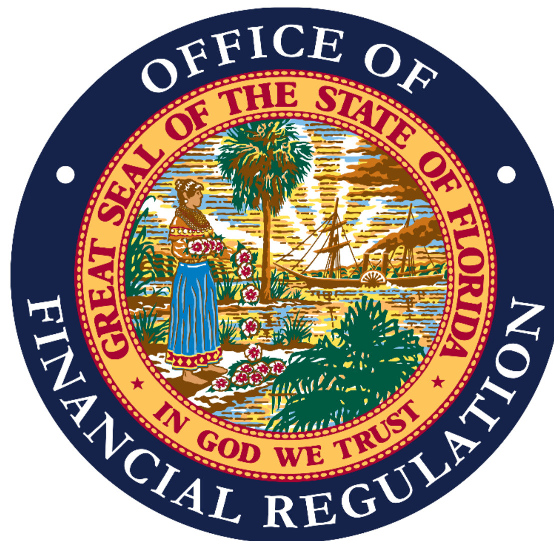
STATE OF FLORIDA
OFFICE OF FINANCIAL REGULATION

Statute Review

Biennial Report December 2022



Promoting a safe marketplace for financial success

Russell C. Weigel, III

Commissioner

Mission Statement: To protect Florida's financial services consumers, promote a safe and sound financial marketplace, and contribute to the growth of Florida's economy through fair, innovative, and excellent regulation of the financial services industry.

Vision Statement: The Office of Financial Regulation envisions Florida's capital market prominence, the strengthening of its financial marketplace, and the continuous availability and dissemination of financial education tools for Floridians to aid in their financial choices while effectively protecting them from predatory practices and wrongdoing.

Commissioner Russell C. Weigel, III

To: The Financial Services Commission

The Office of Financial Regulation (OFR) presents the following statute review report as an initial assessment of all Florida statutes under OFR purview compared to statutory and judicial changes in other states and considers whether Florida's laws should be updated.

The report is styled as "biennial" because the OFR intends to refresh this report every two years. The OFR is not required to prepare a report of this nature.

The OFR welcomes your feedback and hopes this report facilitates discussions and ideas aimed at continuing to modernize Florida's laws and develop any appropriate regulatory frameworks.

Sincerely,

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Statute Review Report

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I. Introduction

As requested by Commissioner Weigel, the Office of General Counsel has undertaken its first biennial comparison of all Office of Financial Regulation ("OFR" or "Office") statutes to comparable statutory and judicial developments in all other states. This review highlights any changes in state and federal codes and judicial opinions and evaluates whether Florida law should be updated to address the issues other states have addressed.

The Divisions of Consumer Finance, Securities, Financial Institutions, and the Bureau of Financial Investigations have compiled their research and present the following findings.

II. Division of Consumer Finance

A. Non-Bank Financial Institutions: A Safety and Soundness Model?

Non-bank financial institutions are primarily regulated in Florida through the application of chapter 560, Florida Statutes, which applies to money transmitters, payment instrument sellers, check cashers, deferred presentment providers, and foreign currency exchangers. Mortgage loan originators, mortgage brokers, and mortgage lenders are regulated by chapter 494, Florida Statutes. The OFR's examination protocol for these licensees is based upon compliance. For these licensees, compliance is determined through the examination of books and records.[1] This is distinct from the safety and soundness compliance model applicable to state chartered financial institutions.

[1] OFR examinations of money services businesses, which include money transmitters, payment instrument sellers, check cashers, foreign currency exchangers, and payday lenders, are focused on reviewing books and records of the licensee to determine compliance with Florida laws and rules. Other state regulators may follow the Money Transmitter Regulatory Association ("MTRA") multi-state examination protocols and manuals which are primarily developed as a safety and soundness examination of money transmitters. These examinations are focused on identifying financial, operational, or compliance weaknesses and/or adverse trends. Additionally, the MTRA examinations utilize composite ratings like depository examinations based on a numerical scale of 1 to 5. The ability

Nevertheless, money transmitters and payment instrument sellers hold customer funds. However, money transmitters have up to ten days to transmit customer funds to the intended recipient, and upon transmission, the money transmitter's liability is extinguished. Payment instrument sellers issue payment instruments where the intended beneficiary is entitled to its value upon negotiation or redemption.

The examination protocol contained in chapter 494, Florida Statutes, is similar to that of money transmitters and payment instrument sellers. This is because mortgage lenders who service mortgage loans may temporarily hold borrower funds that are annually escrowed for the payment of property taxes and property insurance and such escrows also serve as protection of the lender's collateral.

Non-bank financial institutions that hold customer investment and/or trading funds, such as FTX, constitute an inherent risk to consumers. Although there are certain safeguards built into chapter 560, Florida Statutes, to protect consumers' funds, there is currently no per se requirement for the money transmitter or payment instrument seller to carry insurance on funds deposited. The following discussion of the two model acts, the Model Money Transmission Modernization Act and the Uniform Money Services Act, attempts to contrast how safety and soundness requirements could be applied to chapter 560, Florida Statutes.

1. Model Money Transmission Modernization Act

The Model Money Transmission Modernization Act ("Model Law")[2] was approved by the Conference of State Bank Supervisors ("CSBS") in 2021 and is a set of nationwide standards designed to replace state-specific money transmitter laws. The Model Law creates a uniform regulatory regime for money transmission, including stored value, sale of payment instruments,

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of management to identify, measure, monitor, and control the risks of its operations is also considered when assigning a composite rating.

There are pros and cons to both a books and records examination approach and a safety and soundness model. Most safety and soundness exam models are synonymous with examinations of depository institutions, such as banks and credit unions. These examinations focus on the health of the institution and its ability to maintain safe keeping of customers' deposits and utilize responsible lending practices to not put customers' deposits at significant risk for loss. These examinations generally look at capital adequacy, asset quality, management, earnings, liquidity, and sensitivity to market risk. On the other hand, books and records examinations primarily focus on ensuring that money services businesses maintain all necessary records to document transactions, identify instances of suspicious activity, make certain required filings such as SARs and CTRs have been filed, and maintain required capital and proper amounts of collateral such as bonding or pledged deposits. These collateral requirements are directed specifically at the fiduciary duty a money services business has by being temporarily responsible for customer funds during the completion of a transmission or to a point where a payment instrument is negotiated. Money services businesses are not holding deposits nor are they utilizing those deposits to in-turn make loans to their customers. Money services business transactions are short-lived and must be available for the intended beneficiary in a matter of days (e.g., ten days pursuant to Florida law).

[2] The Model Money Transmission Modernization Act, also known as the Money Transmitter Model Law.

and transmission of fiat and virtual currency;[3] however, it does not cover check cashing, currency exchange or payday lending.

One of the Model Law's main objectives is to modernize safety and soundness requirements to ensure that customer funds are protected.[4] In determining whether a licensee is engaging in an unsafe or unsound practice, the Model Law suggests considering the size and condition of the licensee's money transmission, the magnitude of the loss, the gravity of the violation, and the previous conduct of the person involved.[5] Although the Model Law does not define safety and soundness, it aspires to be a nationwide regulatory guide known for its safety and soundness provisions, and as such, the standards and requirements that it recommends are intended to advance this goal.

The Model Law encourages states to participate in a multistate licensing process ("MMLA")[6] [7] to coordinate application processing for money transmission licenses, applications for the acquisition of control of a licensee, control determinations, or notice and information requirements for a change of key individuals. Twenty-three states have committed to participating in the MMLA, including Texas and California.[8]

Additionally, the Model Law encourages and authorizes states to use the Nationwide Multistate Licensing System and Registry ("NMLS") for all aspects of licensing. Further, the Model Law encourages states to adopt standardized definitions and exemptions.

The Model Law requires licensees to meet certain bonding (the greater of $100,000 or an amount equal to 100 percent of a licensee's average daily money transmission liability calculation for the most recent three-month period) and net worth requirements (the greater of $100,000 or 3% of total assets of the first $100 million, 2% of additional assets for $100 million to $1 billion, and .5% of additional assets for over $1 billion) while also evaluating a licensee's permissible investments, holdings, and ratio of tangible assets to total liabilities.

To further consumer protection, the Model Law requires receipts to be provided to a licensee and refunds to be issued if requested by a consumer when certain conditions are met. Also, the Model Law provides for the periodic examination or investigation of licensees and their authorized delegates.[9] The Model Law establishes that certain violations warrant the suspension

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[3] The Model Law does not address check cashing, currency exchange or payday lending.
[4] Model Law, Page 3.
[5] Id at 41.
[6] The purpose of the Multistate Money Services Businesses Licensing Agreement (MMLA) Program is to create a more efficient money service business (MSB) licensing process among state regulators. State regulators recognized the pain points MSB companies were experiencing when seeking licensure in individual states, including different legal requirements, resources and turn times, procedural requirements and interpretations, and satisfying these similar requirements in each state. *See Multistate MSB Licensing Agreement Program*, NMLS Resource Center, https://nationwidelicensingsystem.org/slr/Pages/Multistate-MSB-Licensing-Agreement-Program.aspx
[7] It is worth noting that CSBS obtained direct authority in the Dodd-Frank Act to run the National Multistate Licensing System ("NMLS") for mortgage brokers and loan originators and proposes to make itself the sole filing authority for MMLA, which it advocates that the states adopt.
[8] https://mortgage.nationwidelicensingsystem.org/slr/Pages/Multistate-MSB-Licensing-Agreement-Program.aspx
[9] The term "authorized delegate" means a person a licensee delegates to engage in money transmission on behalf of the licensee.

or revocation of a licensee's license and/or the revocation of an authorized delegate's designation. Some violations may warrant the issuance of a cease-and-desist order while others can subject a licensee or its authorized delegate to criminal or civil penalties. Subject to an enforcement action, an administrative proceeding process is available for licensees or authorized delegates.

Also, the Model Law addresses virtual currency. The Model Law defines virtual currency as a digital representation of value that is used as a medium of exchange, unit of account, or store of value, which is not "money." The Model Law seeks to regulate virtual currency business activity while excluding non-business virtual currency activities. Virtual-currency business activity means exchanging, transferring, or storing virtual currency or engaging in virtual currency administration (issuing virtual currency with the authority to redeem the currency for money, bank credit, or other virtual currency). Non-business virtual currency activity encompasses activities that are inconsequential or peripheral to the virtual currency activity. These provisions seek to regulate the prominent players in the virtual currency arena while excluding those that only have a peripheral connection to the virtual currency arena.

The provisions further this goal by focusing on "control of virtual currency" (defined as the power to execute unilaterally or prevent indefinitely a virtual currency transaction) and a person's involvement in the virtual currency activity. The more substantial the involvement, the more likely that person will be subject to regulation under the Model Law. Those engaging in virtual-currency business activity must maintain certain records, make fee disclosures, file reports, make certain disclosures regarding liability of the licensee and the basis for recovery in the event of loss, and make certain disclosures related to the virtual currency transaction.

In conclusion, the Model Law seeks to eliminate unnecessary regulatory compliance burdens (i.e. licensees having to abide by various state regulations related to licensure and enforcement) by (1) ensuring state coordination in all areas of regulation, licensing, and supervision; (2) protecting the public from financial crimes by standardizing the types of activities that are subject to or exempt from licensing; and (3) modernizing safety and soundness requirements to ensure that customer funds are protected. The success of the Model Law depends on the number of states willing to adopt its provisions.

2. The Uniform Money Services Act

The Uniform Money Services Act[10] ("UMSA") is a safety and soundness law approved by the Uniform Law Commission in 2000 which lays the regulatory framework for the Model Law and creates licensing provisions for various types of MSBs. The UMSA does not define safety and soundness; however, it does define unsafe and unsound. An "unsafe or unsound practice" is a practice or conduct by a person licensed to engage in money transmission or an authorized delegate of such a person which creates the likelihood of material loss, insolvency, or dissipation of the licensee's assets, or otherwise materially prejudices the interests of its customers.[11] Unsafe and unsound practices relate solely to the risk of financial loss posed by the actions of a money

[10] Adopted by 12 states and territories, including Alaska, Arkansas, Hawaii, Iowa, New Mexico, North Carolina, Puerto Rico, South Carolina, Texas, U.S. Virgin Islands, Vermont, and Washington.
[11] Uniform Money Services Act, page 17.

transmitter.[12] In contrast, currency exchangers and check cashers do not engage in an unsafe or unsound practice with respect to their check cashing or currency exchange activity because they provide their customers with funds immediately.[13] The scope of the UMSA pertains solely to safety and soundness as it relates to the prevention of money laundering.[14] Much like the Model Law, the UMSA's regulatory framework was crafted to promote safe and sound practices.

The goal of the UMSA is complete state adoption which creates uniformity regarding the entry of money services businesses.[15] However, only 12 states and territories adopted the UMSA, each with their own interpretation of the law. Texas adopted the UMSA's provisions requiring the licensure of persons engaged in money transmission, currency exchange, and check cashing; however, it did not adopt the UMSA's provisions related to license reciprocity. Instead, Texas chose to adopt a temporary license scheme allowing persons engaged in money transmission to operate without a license during the pendency of the license application. Additionally, Texas chose not to adopt the UMSA interpretation of the terms "money" and "monetary value," instead choosing to insert its own definition of "money" - currency or a claim that can be converted into currency through a financial institution, electronic payments network, or other formal or informal payment system.[16] Alaska chose to adopt the UMSA's provisions requiring the licensure of persons engaged in money transmission and currency exchange; however, it chose not to require the licensure of persons engaged in check cashing activities. Alaska does, however, allow for the license reciprocity of persons licensed as money transmitters and currency exchangers in other jurisdictions.[17] North Carolina chose to adopt the UMSA's definition of monetary value and its provisions requiring the licensure of persons engaged in money transmission (including check cashing); however, it did not adopt the UMSA's provisions requiring the licensure of persons engaged in currency exchange and does not allow for license reciprocity.[18]

The only UMSA provisions that are different from the Model Law are those regarding the types of regulated activities, license reciprocity, and virtual currency.

Like the Model Law, the UMSA seeks to regulate non-bank entities in the financial services industry like those engaged in money transmission (selling or issuing payment instruments[19], selling or issuing stored value,[20] or receiving money[21] or monetary value[22] for transmission). The

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[12] Id at pg. 22.
[13] Id
[14] Id at pg. 8.
[15] Andrew P. Scott, *Telegraphs, Steamships, and Virtual Currency: An Analysis of Money*, Congressional Research Service, Aug. 20, 2020, https://sgp.fas.org/crs/misc/R46486.pdf.
[16] See Texas HB 2218 (2005).
[17] See Alaska SB 116 (2007).
[18] See North Carolina HB 289 (2016).
[19] The term "payment instruments" means a check, draft, money order, traveler's check, or other instrument for the transmission or payment of money or monetary value, whether or not negotiable. The term does not include a credit card voucher, letter of credit, or instrument that is redeemable by the issuer in goods and services.
[20] "The term "stored value" means monetary value that is evidenced by an electronic record.
[21] The term "money" means a medium of exchange that is authorized or adopted by the United States or a foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more governments.
[22] The term "monetary value" means a medium of exchange, whether or not redeemable in money.

UMSA also seeks to regulate entities engaged in check cashing[23] and currency exchange[24] while the Model Law does not.

Unlike the Model Law, but like chapter 560, Florida Statutes, the UMSA provides for two separate licensing regimes. The first is for money services businesses, consisting of money transmitters, payment instrument sellers, and certain types of internet payment services. The second is for check cashers and currency exchangers. The difference in the licensing regimes stems from the fact that check cashers and currency exchangers do not accept funds from consumers for obligations that might remain unpaid. Rather, check cashers and currency exchangers provide funds immediately where there is minimal risk that consumers will lose their money, unlike the risk posed by purchasing a money order that might not be redeemed or transmitting funds. Therefore, check cashers and currency exchangers are subject to different types of reporting and record-keeping requirements and are exempt from bond and net worth requirements. Because money transmitters are subject to a heightened licensing regime, money transmitters may act as check cashers and currency exchangers without the need for a separate license. However, check cashers and currency exchangers may not act as a money transmitter without a license.

Like the Model Law, the UMSA seeks to create uniformity in the licensing process, including license applications, fee processing, background checks, applications for acquisitions of control, surety bonds (for money transmitters), reporting, collection and maintenance of records, and examinations.

The UMSA however differs with the Model Law by permitting a money transmitter to operate in a state based on an already existing license in another state, if the money transmitter is licensed in a state that enacted the UMSA or had licensing requirements like the UMSA.[25]

While the UMSA does not have virtual currency provisions, the drafters of the UMSA recognized the blossoming cyberpayments payment field and that such mechanisms pose the same safety and soundness concerns as their brick-and-mortar counterparts. The drafters expressed particular concern with the risk of loss on the part of the consumer.

The UMSA expands upon the traditional concept of "money."[26] With the advent of the internet and microchip technology, the drafters of the UMSA saw an exchange of value that was not "money" in the traditional sense. Therefore, the UMSA provides a new definition for the term monetary value: a medium of exchange,[27] whether or not redeemable in money. The UMSA takes the same approach with the concept of stored value. It defines "stored value" as monetary value

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[23] The term "check cashing" means receiving compensation for taking payment instruments or stored value, other than traveler's checks, in exchange for money, payment instruments, or stored value delivered to the person delivering the payment instrument or stored value at the time and place of delivery without an agreement specifying when the person taking the payment instrument will present it for collection.
[24] The term "currency exchange" means receipt of revenues from the exchange of money of one government for money of another government.
[25] Uniform Money Services Act, *Comment, pg.32*.
[26] The term "money" is defined as a medium of exchange that is authorized or adopted by the United States or a foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more governments.
[27] Per the UMSA, the term "medium of exchange" connotes that the value being exchanged be accepted by a community, larger than the two parties to the exchange.

that is evidenced by an electronic record. According to the UMSA, this expansion reflects the fact that certain payment service providers employ a form of value that is not directly redeemable in money, but (1) serves as a medium of exchange; and (2) places the customer at risk of the provider's insolvency while the medium is outstanding.[28] To combat this risk, the UMSA encourages mechanisms for leaving an audit trail when value is changed from one holder to another.

As a precursor for the Model Law, the UMSA set the stage for a uniform regulatory regime. However, with the failure of widespread state adoption, the UMSA proved unsuccessful in both scale and implementation.

3. Chapter 560, Florida Statutes

Chapter 560, Florida Statutes ("Chapter 560"), provides for the licensure and regulation of money services businesses and their authorized vendors. The statute originally regulated the activities of money transmitters, payment instrument sellers, and check cashers, but was amended to also regulate the activities of deferred presentment providers and foreign currency exchangers.[29] The statute functions to promote consumer protection, establish a regulatory framework that allows for safe and sound business practices, and deter unlawful activity.

Chapter 560 is like the Model Law and the UMSA in that it sets forth a regulatory regime for non-bank entities operating within the financial services industry. Chapter 560 (1) requires the licensure of persons seeking to engage in money services business[30] activities; (2) requires the renewal of such licenses every two years; (3) allows authorized vendors[31] to operate on behalf of money transmitter licensees; (4) requires the maintenance of specified net worth and bonding; (5) requires the possession of permissible investments;[32] (6) provides an exemption from licensure for certain persons and activities; (7) mandates the filing of certain forms and reports; (8) requires the maintenance/retention of certain records; (9) provides for mandated examinations of licensees every five years, and provide authorization for the investigation of persons, licensees, and authorized vendors acting within the scope of Chapter 560; and (10) authorizes the taking of administrative action for statutory and rule violations including license suspension, license revocation, and the imposition of fines and criminal and civil penalties for certain statutory violations.

Unlike the Model Law, Chapter 560 does not attempt to unify state regulatory regimes, advocate for state participation in the MMLA, or encourage the use of NMLS for license

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[28] Uniform Money Services Act, pp. 19-20.
[29] Chapter 2001-119, Laws of Florida.
[30] § 560.103 (22), Fla. Stat. The term "money services business" means any person located in or doing business in this state, from this state, or into this state from locations outside this state or country who acts as a payment instrument seller, foreign currency exchanger, check casher, or money transmitter.
[31] § 560.103 (3), Fla. Stat. The term "authorized vendor" means a person designated by a money services business licensed under part II of this chapter to act on behalf of the licensee at locations in this state pursuant to a written contract with the licensee.
[32] Required for money transmitters and payment instrument sellers.

processing and regulation. Florida is not a participant in the MMLA and does not utilize NMLS for license processing and regulation. The Office has not pursued adopting NMLS due to various policy implications along with system constraints. Additionally, the MMLA only applies to Chapter 560, Part II activities, but it would be inefficient not to adopt all Chapter 560 license types into NMLS. Lastly, the NMLS charges filing fees to the licensees in addition to our statutory required fees.

Unlike the UMSA, Chapter 560 does not offer license reciprocity. Therefore, a money services business license issued in another jurisdiction does not guarantee the approval of a money services business license under Chapter 560. However, Chapter 560 allows for multi-jurisdictional coordination by allowing the Office to (1) conduct joint or concurrent examinations with state or federal regulatory agencies and (2) accept an examination from an appropriate regulator.

Unlike the Model Law and the UMSA, Chapter 560 regulates deferred presentment providers ("DPP", *commonly known as payday lenders*). Once licensed under Chapter 560 as a money services business, a licensee may file a declaration of intent form with the Office indicating its intent to act as a DPP. DPP's provide currency or a payment instrument in exchange for a customer's check and agree to hold the check for a deferred period. Currently, customers can choose from two types of payday loans. A customer can choose to enter into (1) a deferred presentment agreement for not more than $500 to be re-paid in a lump sum for a term between 7 and 31 days or (2)a deferred presentment installment agreement for not more than $1,000 to be re-paid in installments for a term between 60 and 90 days. Chapter 560, among other things, places limits on the amount of fees charged, does not allow a consumer to enter into more than one deferment agreement at a time, and prevents the rollover of such agreements.

Although Chapter 560 does not expressly use the term safety and soundness, its provisions promote a safe and sound regulatory environment. From the inception of Chapter 560, its purpose in part, was to promote the safe and sound conduct of the business of money transmitters.[33] Although this language has been repealed, the current provisions serve to implement safe and sound business practices, as can be seen in Chapter 560's provisions related to licensure; financial conditions, mandatory disclosure, the conducting of examinations and investigations, the imposition of disciplinary action, prescribing criminal penalties for certain violations, and recordkeeping.

In determining whether a licensee is engaging in an unsafe or unsound practice, the Model Law suggests considering the size and condition of the licensee's money transmission, the magnitude of the loss, the gravity of the violation, and the previous conduct of the person involved. Prior versions of Chapter 560 used the same guidelines to make determinations related to unsafe and unsound conduct.[34] Although the Office no longer makes unsafe and unsound determinations related to Chapter 560, remnants of this analysis can be found in Rule 69V-560.1000, Florida Administrative Code, entitled *Disciplinary Guidelines*. In using its

[33] See § 560.102(2)(a), Fla. Stat. (1994), and § 560.103(10), Fla. Stat. (1994), defining "money transmitters" to mean as any person located in or doing business in this state who acts as a payment instrument seller, foreign currency exchanger, check casher or funds transmitter.
[34] § 560.103(20) Fla. Stat. (1994).

Disciplinary Guidelines to decide the imposition of penalties assessed against a person or entity, the Office conducts a "safety and soundness" analysis by reviewing the licensee's violation rate, the violation's potential harm to customers, whether the licensee was subject to prior administrative action, whether the violation was the result of willful misconduct or recklessness, whether the violation was attributable to one person, and whether the licensee attempted to conceal the violation or mislead the Office. The severity of the penalty is determined by the severity of the violation, with the harshest penalty being license revocation.

Previous versions of Chapter 560 defined "unsound or unsafe practice" similarly to the definition found in the UMSA, meaning a practice or conduct by a person licensed to engage in money transmission or an authorized delegate that creates the likelihood of material loss, insolvency, or dissipation of assets of a money services business or otherwise materially prejudices the interests of its customers.[35] Although Chapter 560 does not currently define "unsound or unsafe practice," it is a violation of section 560.114(1)(z), Florida Statutes, for a person to engage in any practice or conduct that creates the likelihood of material loss, insolvency, or dissipation of assets of a money services business or otherwise materially prejudices the interests of its customers. Such violation subjects a person to the issuance of a cease and desist order; the issuance of a removal order; the denial, suspension, or revocation of a license.

Unlike the Model Law and the UMSA, Chapter 560 does not expressly state that it is a safety and soundness law. However, in looking at the similarities between the regulations, it's clear that Chapter 560 does concern itself with the safety and soundness of money transmitters. If the Office determines that it would like to expressly promote safety and soundness, the Office can look to New York for guidance. The New York Department of Financial Services' examinations focus on compliance with applicable state and federal laws and regulations and areas deemed likely to affect the safety and soundness of the licensee.[36] Its Department of Financial Services assigns licensed money transmitters a FILMS rating based on an assessment of financial condition, internal controls and auditing, legal and regulatory compliance, management, and systems and technology.[37] The ratings range from "1" (Strong) to "5" (Unsatisfactory). Licensees with a FILMS rating of "4" (Marginal) or "5" (Unsatisfactory) or severe violations/deficiencies may be subject to regulatory actions such as monetary fines, and license suspension and revocation.[38]

The Office can also look to its Division of Financial Institutions ("DFI") for guidance. Pursuant to section 655.001(2)(a), Florida Statutes, the Office is expressly tasked with providing for and promoting the safe and sound conduct of the business of financial institutions subject to the financial institutions codes.[39] To accomplish this mandate, DFI conducts periodic examination of regulated financial institutions.[40] To assess safety and soundness, examiners

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[35] § 560.103(20), Fla. Stat. (1994). Repealed in 2009. See Chapter 2008-177, Laws of Florida.
[36] Examination of Money Transmitters, https://www.dfs.ny.gov/apps_and_licensing/money_transmitters/examination_of_mt, (last visited December 7, 2022)
[37] Id
[38] Id
[39] Chapters 655-667, Fla. Stat.
[40] *See* § 655.045, Fla. Stat.

evaluate a bank's performance based on its financial condition, operational controls, risk management practices, and compliance with regulations.

Chapter 655, Florida Statutes, does not define safe or sound conduct, rather it defines what it is not. Section 655.005(1)(y), Florida Statutes, defines an "unsafe or unsound practice" as "any practice or conduct found by the office to be contrary to generally accepted standards applicable to a financial institution, or a violation of any prior agreement in writing or order of a state or federal regulatory agency, which practice, conduct, or violation creates the likelihood of loss, insolvency, or dissipation of assets or otherwise prejudices the interest of the financial institution or its depositors or members." Examiners use CAMELS ratings to describe an institution's soundness. "CAMELS" is an acronym. Examiners rank the banks in each of the following categories on a scale of 1 to 5, 1 being the highest ranking: Capital adequacy, asset quality, management, earnings, liquidity, and sensitivity to market risk. The ratings are an indication of the condition of the institution and are used by Office to identify potential or present problems that create the likelihood of loss, or insolvency, or threaten the availability of consumer deposits.

Should the Office implement a FILMS/CAMELS type rating in Chapter 560, such a system would require extensive examiner training and will likely increase the time it takes to complete a money services business examination. Nevertheless, for non-bank financial institutions holding customer funds for any length of time, a safety and soundness standard of regulation might result in better consumer protection.

B. Uniform Regulation of Virtual Currency Businesses Act

Under traditional money transmission activity, an intermediary receives currency, monetary value, etc. from A for the purpose of transmitting the currency, monetary value, etc. to B. There is rarely a question as to whether the intermediary can move the currency, monetary value, etc. from A to B, but rather did the intermediary move the money as promised? However, with virtual currency transmission, the question is not only whether the virtual currency will be transferred as promised, but whether the intermediary has the proper control over the virtual currency to do so. Particularly, whether the intermediary holds the unique cryptographic keys to transfer the virtual currency, and if so, whether the intermediary has "control" over the keys.

As the Office incorporates more virtual currency provisions in its regulations, the Office should consider whether the subject of control should be addressed in future legislation. If so, the Office may look to the Uniform Law Commission Uniform Regulation of Virtual Currency Businesses Act ("VCBA") for inspiration. The VCBA was designed to create a statutory structure for regulating virtual currency business activity and requires a license "to engage in virtual currency business activity" or to hold oneself out as being able to do so. The VBCA defines the term "control" to mean, in relevant part, the "power to execute unilaterally or prevent indefinitely a virtual-currency transaction." The commentary makes clear, the VCBA is "focused on intermediary providers of virtual-currency products and services – not on the virtual currency itself

or on the 'owner' of virtual currency" that can effect transactions on its own behalf.[41] In addition, the VCBA contains numerous consumer/user protections designed to assure persons of the safety and security of their virtual currency transactions.[42] Such protections include requirements for licensees and registrants to provide disclosures to potential customers about their products and services, such as any fees charged or whether there is insurance coverage, and to establish specific policies and compliance programs to guard against fraud, cyberthreats, and terrorist activity.[43] The VCBA prohibits a licensee or registrant from transferring a client's currency or using it as collateral for a loan to the licensee or registrant without prior consent.[44]

It should be noted that the VCBA not only requires the licensure of persons who engage in transferring virtual currency, but also the exchange and storing of virtual currency. As such, the VCBA should be used as a reference guide and not adopted verbatim within chapter 560, Florida Statutes. Adoption should focus on control and consumer protection provisions under the VCBA. Louisiana and Rhode Island are the only states that have adopted the VCBA.

As the transmission of virtual currency is uniquely different from that of traditional money transmission in terms of whether a person holds the cryptographic keys to transfer virtual currency and whether an intermediary has control over the keys, the Office should consider adding a separate part under chapter 560, Florida Statutes, for virtual currency transmissions. While chapter 560, part I, Florida Statutes, would continue to apply to all money services business activity, including virtual currency transmission, the more specific provisions related to virtual currency transmission would fall under a separate part. This separation would allow the Office to properly accommodate newer virtual currency activities without disturbing provisions related to traditional money transmission.

C. Branch Licensing of Consumer Finance Companies

The Florida Consumer Finance Act, Chapter 516, Florida Statutes, ("Chapter 516") requires licensure of consumer finance companies who make loans of up to $25,000 for which the lender charges, contracts for, collects, or receives interest at a rate greater than 18 percent per annum. The licensing requirements of Chapter 516 are incongruent with other consumer finance regulatory statutes because it requires a full consumer finance company license for each additional location and does not allow for branch office licensure for locations other than the principal place of business. This creates a unique situation in that each license application is processed as a full license where every owner or office required to be listed on the application is vetted as though it is the first time the company is seeking a license. This creates unnecessary and duplicative processing for each additional license of a consumer finance company. Other licensing statutes

[41] McLaughlin and Love, *K&L Gates Discusses the Virtual-Currency Business Act and Coming Cryptocurrency Regulation*, The CLS Blue Sky Blog, Nov. 17, 2017, https://clsbluesky.law.columbia.edu/2017/11/17/kl-gates-discusses-the-virtual-currency-businesses-act-and-coming-cryptocurrency-regulation/.

[42] Kaplinsky and Spagnuolo, *Uniform Act to Regulate Virtual Currency Businesses Ready for State Adoption*, Ballard Spahr, Jan. 9, 2018, https://www.ballardspahr.com/insights/alerts-and-articles/2018/01/uniform-act-to-regulate-virtual-currency-businesses-ready-for-state-adoption.

[43] *Id.*

[44] *Id.*

regulated by the Division of Consumer Finance that require licensure of every licensee's business location also allow for a principal office license and a branch license. Such licensure programs are less burdensome to licensees and usually less costly because the OFR's work effort in reviewing branch license applications is less complex. Future legislative initiatives could address this unusual dynamic and possibly amend the statute to establish a branch office licensing scheme similar to other statutes.

D. Consolidation of Consumer Lending Statutes

Many states have lending licenses encompassing licensing activities found under chapters 516, 537, 520, and chapter 560, part IV, Florida Statutes. Wyoming has instituted one of the most expansive license types. Under Wyoming law, a person holding a consumer lending license may engage in consumer lending, sales finance company activities, title lending, and mortgage lending. While including mortgage lending under one license type would be unwise due to the restrictive nature of chapter 494, Florida Statutes, the Office should consider whether consolidating chapters 516, 537, 520, and chapter 560, part IV, Florida Statutes, would increase regulatory efficiency.

A consolidation of Florida's consumer lending statutes into one general statute applying to all applicable license holders, while maintaining separate parts within the statute to address specific license activities would be a more efficient program for licensees and for oversight. Creating this statutory framework for licensees engaged in lending would decrease regulatory variations between licensees, allow for less complicated examinations as examiners would not need to learn differing regulations for each license type, and would simplify the licensure process as applicants would submit substantially similar forms and examiners would review less materials thereby decreasing the time taken to review applications. (This is being contemplated with the replacement of the Office's REAL licensing system.) Several other states (including, but not limited to, Mississippi, Alabama, and Montana) have a consolidated a "small dollar loan" statute.[45]

E. Cyber Security

Cybercrime is nothing new, but increased levels of connectivity, remote working, reliance on technology, and automation means the risk of attack is rising rapidly.[46] Sensitive consumer data is an alluring target for cyber criminals. In response, many states have enacted laws requiring their licensees to institute cybersecurity policies. New York requires all financial services industry licensees to implement and maintain a written cybersecurity policy. Effective March 1, 2017, the Superintendent of Financial Services promulgated 23 NYCRR Part 500, a regulation establishing cybersecurity requirements for financial services companies (referred to below as "the

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[45] Conference of State Bank Supervisors, *50 State Survey of Consumer Finance Law*, CSBS (Nov. 19, 2020) https://www.csbs.org/50-state-survey-consumer-finance-laws (the Conference of State Bank Supervisors convened a 50-state survey on consumer finance laws. This survey does not include payday or title loan lending. The results of the survey are included in the spreadsheet found on the web page above).
[46] Snaith and Pancholi, *Why Cybercrime is Increasing – and How to Stay Secure*, RSM UK Group, https://www.rsmuk.com/ideas-and-insights/why-cybercrime-is-increasing-and-how-to-stay-secure (last visited Aug. 18, 2022).

Cybersecurity Regulation" or "Part 500").[47] The regulation requires licensees to (1) maintain a cybersecurity program designed to protect the confidentiality, integrity and availability of the licensee's information systems; (2) use defensive infrastructure and the implementation of policies and procedures to protect the licensee's information systems; (3) detect cybersecurity events; (4) respond to identified or detected cybersecurity events to mitigate any negative effects; (5) recover from cybersecurity events and restore normal operations and services; and(6) fulfill applicable regulatory reporting obligations.[48]As the financial services industry expands and reliance on internet technology grows, the Office should consider seeking legislative rulemaking authority to implement a cybersecurity policy requirement.

F. Fair Debt Collection Practices Act Rules

On November 30, 2021, two new rules under the Fair Debt Collection Practices Act ("FDCPA") took effect.[49] In part, the rules attempt to clarify how debt collectors can use new communication technologies, expand the information debt collectors must provide at the outset of their debt collection efforts, and eliminate the practice of passive debt collection through credit reporting.[50]

In comparison to chapter 559, part VI, Florida Statutes, the new rules are more restrictive in nature and contain more expansive consumer protection measures. In keeping with its mission to protect Florida's financial services consumers, it may be wise for the Office to amend chapter 559, part VI, Florida Statutes, to track the FDCPA rule's language and/or prescribe that a violation of the FDCPA may constitute a violation of chapter 559, part VI, Florida Statutes.

G. Chapter 559, Part XII – Financial Technology Sandbox Program

In January 2021, Florida established a financial technology sandbox program ("sandbox") under the provisions of chapter 559, part XII, Florida Statutes, allowing participants to hold licensure for a period of two years with an opportunity to extend its licensure period for an additional 12 months. The sandbox program was designed to specifically allow financial technology innovators to test new products and services in a supervised, flexible regulatory sandbox using exceptions to specified general law and waivers of the corresponding rule requirements under defined conditions.[51]

Over 10 states have established various fintech sandbox regulations, with the state of Arizona enacting the first regulatory sandbox in 2018.[52] Since its inception, Arizona's regulatory

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[47]*Cybersecurity Resource Center*, New York State, Department of Financial Services, https://www.dfs.ny.gov/industry_guidance/cybersecurity (last visited Aug. 19, 2022).
[48] 23 CRR-NY 500.
[49] 12 CFR Part 1006.
[50] Caren D. Enloe, *The Debt Collection Rule: Communications, Disclosures, and the Other Changes You Need to Know*, ABA, Sep. 21, 2021, ://www.americanbar.org/groups/business_law/publications/committee_newsletters/consumer/2021/202109/debt-collection-1/.
[51] § 559.952(2), Fla. Stat.
[52] *Things to Know About Arizona's FinTech Sandbox*, Greater Phoenix Economic Council, Apr. 8, 2021, https://www.gpec.org/blog/things-to-know-about-arizonas-fintech-sandbox/.

sandbox program has licensed thirteen businesses, with three businesses currently holding an active license.[53] However, most U.S. sandbox programs have been unsuccessful in attracting participants.[54] In fact, FinTech and insurance-focused sandboxes in Kentucky, Nevada, and Utah have yet to accept any participants — even though these states established their sandbox programs in 2020 or earlier.[55] Florida has had nine businesses apply for a sandbox license; however, none have completed the application process. Those who have applied have either withdrawn their application and sought a money services business license under Chapter 560, Florida Statutes[56] or simply abandoned the licensure process altogether.

Sandbox applicants who have withdrawn their applications with the OFR have cited a cumbersome and confusing application process. During the application process, applicants must, among other things, prove that they have a physical presence in Florida; prove that they can provide a product or service that is innovative[57] in nature; specify each general law enumerated in section 559.952(4)(a), Florida Statutes, that prevents the innovative financial product or service from being made available to consumers and explain the reasons for the prohibition; maintain a net worth of at least $25,000, and maintain a surety bond of at least $75,000.[58] Sandbox programs in other jurisdictions are not quite as restrictive as the Office's sandbox program. In fact, programs in other jurisdictions allow for the provision of products and services related to mortgage lending, motor vehicle retail installment contracts,[59] check cashing,[60] and even vehicle title loans.[61] Other sandbox programs do not require net worth or bonding amounts. [62] Such programs simply require licensees to demonstrate that consumers will be financially protected for the duration of the test. Some sandbox programs do not require a business to establish state domicile but simply require the licensee to subject itself to the state's jurisdiction.[63]

Businesses applying for a license that is designed to be temporary in nature, may indeed find it burdensome (1) to comply with regulations requiring a licensee/applicant to specify each general law enumerated in section 559.952(4)(a), Florida Statutes, that prevents the innovative financial product or service from being made available to consumers and explain the reasons for

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[53] *Welcome to Arizona's FinTech Sandbox,* State of Arizona, Attorney General, https://www.azag.gov/fintech/participants (last visited Aug. 19, 2022).

[54]https://www.realclearpolicy.com/articles/2022/02/03/state_lawmakers_need_a_better_strategy_to_make_regulator y_sandbox_programs_a_success_814996.htm

[55] https://www.realclearpolicy.com/articles/2022/02/03/state_lawmakers_need_a_better_strategy_to_make_regulatory _sandbox_programs_a_success_814996.html

[56] Two such applicants currently hold a money services business license.

[57] Pursuant to section 559.952(3)(h), Fla. Stat., the term "innovative" means new or emerging technology, or new uses of existing technology, which provide a product, service, business model, or delivery mechanism to the public and which are not known to have a comparable offering in this state outside the Financial Technology Sandbox.

[58] For a licensee offering the product to no more than 7,500 consumers. The required amount increases as the number of consumers increase.

[59] *See supra* note 33.

[60] *See* West Virginia's regulatory sandbox provisions found at West Virginia Code §31A-8G-1, et. seq.

[61] *See supra* note 33.

[62] *See* Utah's regulatory sandbox provisions found at Utah Code 63N-16-101, et. seq. and *See* Arizona Revised Statutes §§ 41-5601, et seq.

[63] *See* Arizona Revised Statutes §§ 41-5601, et seq.

the prohibition; (2) to meet current net worth and bonding requirements; and (3) to limit the provision of products/services offered to chapter 516 and chapter 560, Florida Statutes, activities. Initial versions of the legislation implementing Florida's sandbox program sought to create a more expansive program. In particular, the legislation allowed for the provision of products and services offered under banking, securities, consumer credit, and money transmission laws. If it is the Office's intention to attract more sandbox participants, then it may be worth revisiting the current sandbox program with an eye towards easing existing regulatory requirements and expanding permissible activities.

H. Smart Contracts

A smart contract is a digitally facilitated agreement between two parties that is written in code into blockchain technology.[64] The code automatically executes the terms of the contract when agreed upon conditions occur.[65]

Some states have enacted laws related to "smart contracts and blockchain technology."[66] Tennessee is one of the first states to approve the use of smart contracts.[67] Tennessee defines the terms "smart contracts" and "blockchain technology" and makes signatures, records, and contracts secured through blockchain technology legally valid.[68] [69] Smart contracts have been hailed as the future of contracts based on the contract's ability to reduce fraud, improve efficiency, and increase transaction speed.[70] However, smart contracts are not without flaws. "Despite the bright side of smart contracts, several concerns continue to undermine their adoption, such as security threats, vulnerabilities, and legal issues."[71] As technology improves and vulnerabilities are addressed, there could soon be wide use of smart contracts and blockchain technology in industries regulated by the Office. The Office should keep an eye out for advancements in this area to ensure the implementation of effective and responsive regulations.

I. Licensee Remote Work Locations

There continues to be a trend towards codifying through regulation or statute, emergency COVID-19 guidance enabling remote work locations.[72] Several states, including Ohio, Rhode

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[64] Matthew Zeitlin, *What Are Smart Contracts? A Beginner's Guide*, SoFi Learn (Dec. 6, 2021), https://www.sofi.com/learn/content/smart-contracts/.
[65] *Id.*
[66] Waller Law, *Tennessee Becomes One of First States to Approve Blockchain 'Smart' Contracts* (Mar. 29, 2018), https://www.wallerlaw.com/news-insights/3189/Tennessee-becomes-one-of-first-states-to-approve-blockchain-smart-contractstennessee-becomes-one-of-first-states-to-approve-blockchain-smart-contracts/.
[67] *See* Tennessee Code Annotated 47-10-201, et. seq.
[68] A.J. Bosco, *Blockchain and the Uniform Electronic Transactions Act*, American Bar Association (Last visited Aug. 16, 2022), https://www.americanbar.org/content/dam/aba/publications/business_lawyer/2019/74_1/survey-cyberspace-blockchain-201902.pdf.
[69] The code may be written only in computer language making its enforcement as a contract difficult in Florida courts at this time.
[70] *10 Advantages of Using Smart Contracts*, ChainTrade, Dec. 27, 2017, https://medium.com/@ChainTrade/10-advantages-of-using-smart-contracts-bc29c508691a.
[71] Shafaq Khan Et Al., *Blockchain Smart Contracts: Applications, Challenges, and Future Trends*, National Library of Medicine, Apr. 18, 2021, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8053233/.
[72] Ballard Spahr LLP, *State Developments Regarding Work From Home (Non-Depository)* (July 14, 2022), https://www.jdsupra.com/legalnews/state-developments-regarding-work-from-1704720/.

Island, Kansas, South Dakota, and Kentucky have amended their laws to regulate remote work within the consumer lending and/or mortgage lending industries.[73] In particular, the regulations sought to (1) define the term "remote location," with most regulations specifically excluding branch locations from the definition; (2) establish prohibitions against in-person customer contact at remote locations; and (3) provide for the protection of consumer data (e.g., bank account information, social security numbers, driver license information, etc.) at remote locations.[74] As remote work continues to grow in popularity among various industries regulated by the Office, the Office may soon need to consider whether it would be in the best interest of the OFR's licensees and Florida consumers to adopt regulations related to remote work locations.

III. Division of Securities

A. Registration of Finders

In October 2020, the SEC voted to propose a new limited, conditional exemption from broker registration requirements for "finders" who are natural persons who assist issuers with raising capital in private markets from accredited investors. The proposal would create two classes of finders, Tier I Finders and Tier II Finders, that would be subject to conditions tailored to the scope of their respective activities. A Tier I Finder would be limited to providing contact information of potential investors in connection with only a single capital raising transaction by a single issuer in a 12-month period. A Tier II Finder could solicit investors on behalf of an issuer, but the solicitation-related activities would be limited to: (i) identifying, screening, and contacting potential investors; (ii) distributing issuer offering materials to investors; (iii) discussing issuer information included in any offering materials, provided that the Tier II Finder does not provide advice as to the valuation or advisability of the investment; and (iv) arranging or participating in meetings with the issuer and investor.[75]

NASAA has voiced its opposition to the SEC's proposal stating that fraud and other harms are more likely to occur where either a security being offered, an intermediary involved in the sale of securities, or both are unregistered.[76]

As of July 2022, the SEC has not taken any further action on its proposal. Currently California, Texas, and Michigan explicitly identify and regulate finders. The Office should evaluate finder activity in Florida and consider whether explicit regulation of finders in Florida is warranted.

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[73] *Id.*
[74] *Id.*
[75] Press Release, SEC, *SEC Proposes Conditional Exemption for Finders Assisting Small Businesses with Capital Raising* (Oct. 7, 2020), https://www.sec.gov/news/press-release/2020-248.
[76] Comment Letter, NASAA, *NASAA Outlines Opposition to SEC's Proposed Federal Broker-Dealer Exemption for Private Placement Finders* (Nov. 13, 2020), https://www.nasaa.org/56150/nasaa-outlines-opposition-to-secs-proposed-federal-broker-dealer-exemption-for-private-placement-finders/.

The Office is continuing to monitor how other states and the SEC address finders and in its forthcoming proposal to amend chapter 517, Florida Statutes, the Office has provided for an alternative to traditional dealer registration for Tier II dealers, i.e., "finders" or "capital connectors."

B. NASAA Model Investment Adviser Information Security and Privacy Rule

On May 19, 2019, NASAA adopted its "Investment Adviser Information Security and Privacy Rule." The rule requires state registered investment advisers to establish, implement, update, and enforce written physical security and cybersecurity policies and procedures reasonably designed to ensure the confidentiality, integrity, and availability of physical and electronic records and information. The policies and procedures must be tailored to the investment adviser's business model and reviewed at least annually. The rule further requires that an investment adviser deliver to its clients a privacy policy. The model rule has been adopted or proposed for adoption by at least seven NASAA jurisdictions.

On November 24, 2020, NASAA adopted its Model Rule for Investment Adviser Written Policies and Procedures Under the Uniform Securities Acts of 1956 and 2002.[77] The model rule would require investment advisers to establish, maintain, and enforce written policies and procedures that address: regulatory compliance, supervision, proxy voting, *physical security and cybersecurity*, business continuity and succession, code of ethics compliance, and the handling of material non-public information.

In Florida, dealers, intermediaries, and federal covered advisers are required to comply with section 248.30 of Regulation S-P (17 C.F.R. §248.30).[78] Regulation S-P requires dealers and federal covered advisers to "adopt written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information."[79] Additionally, section 517.0611(13)(m), Florida Statutes, requires that intermediaries comply with the privacy requirements of Regulation S-P.

Florida investment advisers are not required to comply with section 248.30 of Regulation S-P. However, section 501.171, Florida Statutes, requires a sole proprietorship, partnership, corporation, trust, estate, cooperative, association, or other commercial entity that acquires, maintains, stores, or uses personal information to take reasonable measures to protect and secure data in electronic form containing personal information. Such entities must provide notice to the Department of Legal Affairs (OAG) of any breach of security affecting 500 or more individuals in the state. This section also requires entities to take all reasonable measures to dispose of such records. Such disposal shall involve shredding, erasing, or otherwise modifying the personal

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[77] NASAA Model Rule for Investment Adviser Written Policies and Procedures Under the Uniform Securities Acts of 1956 and 2002 (adopted 11/24/2020), https://www.nasaa.org/wp-content/uploads/2020/07/NASAA-IA-PandP-Model-Rule-and-Sample-Compliance-Grid.pdf.

[78] § 517.1217, Fla. Stat. and Rule 69W-600.013, Fla. Admin. Code.

[79] *See* Release 34-42974, Privacy of Consumer Financial Information (Regulation S-P), Section III, Subpart E - Safeguard Procedures, (June 22, 2000).

information in the records to make it unreadable or undecipherable through any means. A violation of this section is treated as an unfair or deceptive trade practice in any action brought under section 501.207, Florida Statutes, against an entity. Additionally, violators may be subject to a civil penalty.

The Office should evaluate its investment advisers' current cybersecurity practices and decide whether it is necessary to adopt regulations like the NASAA model rule. In addition to the protections of section 501.171, Florida Statutes, discussed above, investment advisers are fiduciaries and are required to maintain policies and procedures to ensure compliance with chapter 517, Florida Statutes. Further, many investment advisers do not have custody of investor funds; accordingly, the risk of directly losing investor funds in a cyberattack is low. The risk of losing customer identifying information in a cyberattack that could be exploited elsewhere remains. These facts should then be balanced against the cost associated with implementing policies and procedures as contemplated by the NASAA model rule.

C. NASAA Model Rule on Investment Adviser Representative Continuing Education

On November 24, 2020, NASAA adopted its Model Rule on Investment Adviser Representative Continuing Education (the "Rule"). If implemented, the Rule would require associated persons of investment advisers and federal covered advisers seeking registration or renewal of registration with the Office to complete 12 continuing education ("CE") credits each year. Associated persons must complete six credits of regulatory and ethics content and six credits of compliance and practice content. Associated persons may select courses that appeal to their interests and suit their business models, so long as such courses meet the credit requirements and are approved content for the CE program.

Currently, ten NASAA member jurisdictions have adopted CE requirements like those proposed in the Rule and at least three more jurisdictions are planning to finalize their adoption of such a requirement in 2022. Under the Rule, an associated person registered in Florida who is also registered as an associated person of an investment adviser or federal covered adviser in his or her home state is in compliance with the Rule if: 1) the home state has CE requirements pertaining to associated persons of investment advisers or federal covered advisers that are at least as stringent as the Rule, and 2) the associated person is in compliance with the home state's CE requirements.

Associated persons are responsible for the cost of completing their continuing education. Costs incurred by associated persons of investment advisers and federal covered advisers who are required to comply with the Rule will vary. NASAA has implemented a course reporting fee of $3 per credit hour. Therefore, an associated person will be required to pay a minimum of $36 per year in addition to any training costs to meet the CE requirement of the Rule. Training costs are indeterminable at this time, and will vary depending on the continuing education course and provider selected, whether the associated person is in compliance with FINRA CE requirements, and whether the associated person holds and maintains certain professional designations. Associated persons who are also registered as associated persons of a dealer ("dually registered") and comply with FINRA's CE requirements are considered to be in compliance with the

requirement to report six credits of Products and Practices content, so long as the FINRA CE content continues to meet certain baseline criteria as determined by NASAA. Further, CE courses required to maintain certain professional designations held by associated persons may meet some or all of the CE requirements of the Rule.

Legislation is necessary to implement the CE requirements discussed above. The Office is continuing to monitor the adoption of this rule by other states and has incorporated the model rule in its forthcoming proposal to amend chapter 517, Florida Statutes.

D. NASAA Model Act to Create Restitution Assistance Funds for Victims of Securities Violations

On May 17, 2021, NASAA adopted model legislation which creates a restitution assistance fund for victims of securities violations. The model act provides states a way to provide financial assistance to victims of securities law violations who are awarded restitution but do not receive full payment. The model act establishes a state securities restitution assistance fund, outlines eligibility requirements for victims seeking restitution assistance, sets payment caps on the amount of restitution assistance awards, prohibits and forfeits awards in certain circumstances, and provides for recovery mechanisms. The model act also calls for restitution assistance awards to be doubled for victims of securities violations who meet certain criteria to be considered vulnerable persons, whether by age or other factors.[80] Restitution assistance awards are capped at the lesser of $25,000 or 25% of the amount of unpaid restitution awarded in the final order. These limits are doubled when the victim is a vulnerable person.

According to NASAA, "the model act draws upon similar legislation in Indiana, Montana, Vermont, Kansas and Maine." In a press release, NASAA President Lisa A. Hopkins said, "Indiana and Montana enacted this type of legislation nearly a decade ago and have reported that their restitution assistance programs are successful. For example, since the inception, Indiana has issued approximately $1 million in restitution assistance awards to 102 claimants, and Montana has awarded approximately $1.8 million to 134 claimants. The average age of a restitution recipient was 64 years old in Indiana, and 82% of restitution recipients were over 60 years old in Montana."[81]

Section 517.131, Florida Statutes, establishes Florida's Securities Guaranty Fund. This fund provides financial assistance to persons who are adjudged by a court to have suffered monetary damages as a result of a violation of sections 517.07 or 517.301, Florida Statutes, committed by a dealer, investment adviser, or associated person who was licensed by the Office

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[80] NASAA Model Legislation to Create Restitution Assistance Funds for Victims of Securities Violations (May 17, 2021), https://www.nasaa.org/wp-content/uploads/2021/05/NASAA-Restitution-Assistance-Fund-Model-Act-Approved-May-17-2021.pdf.

[81] Press Release, NASAA, *NASAA Members Approve Model Act to Create Restitution Assistance Funds for Victims of Securities Violations* (May 18, 2021), https://www.nasaa.org/57582/nasaa-members-approve-model-act-to-create-restitution-assistance-funds-for-victims-of-securities-violations/.

at the time the act was committed. To be eligible for disbursement from the fund, the act for which recovery is sought must have occurred on or after January 1, 1979 and a person must have: (1) received a final judgment in any action wherein the cause of action was based on a violation of sections 517.07 or 517.301, Florida Statutes; (2) make all reasonable searches and inquiries to ascertain whether the judgment debtor possesses real or personal property or other assets subject to being sold or applied in satisfaction of the judgment; and (3) applied any amounts recovered from the judgment debtor, or from any other source, to the damages awarded by the court. Payments from the fund are capped at $10,000/person and $100,000 in the aggregate.

The Office may want to assess the success of the fund and may want to consider updating the payment cap as existing caps have not been updated in at least 30 years.

E. NASAA Model Rule for Unpaid Arbitration Awards

On May 16, 2022, NASAA adopted its Model Rule for Unpaid Arbitration Awards. The rule addresses the failure of regulated firms and persons to pay final awards and judgments to customers as well as the failure to pay fines and other monetary penalties imposed by regulators. The model rule would make it a dishonest or unethical practice for registrants to fail to pay any investment-related, customer-initiated arbitration award or judgment, fine, civil penalty, order of restitution, order of disgorgement, or similar monetary payment obligation imposed by any state securities regulator, the SEC, or FINRA. Registrants may also avoid licensing actions under the model rule by entering into and staying current with alternative payment arrangements related to obligations covered by the model rule.

The Office has incorporated the model rule in its forthcoming proposal to amend chapter 517, Florida Statutes, including the rule in section 517.161, Florida Statutes, concerning grounds for denying, revoking, restricting, or suspending a registration under section 517.12, Florida Statutes.

F. NASAA Model Whistleblower Award and Protection Act

On August 31, 2020, NASAA adopted its Model Whistleblower and Protection Act. The Act authorizes Securities Administrators to make a monetary award to whistleblowers who voluntarily provide original information. The aggregate number of awards that may be awarded in connection with an administrative or judicial action may not be less than ten percent (10%) nor more than thirty percent (30%) of the monetary sanctions imposed and collected in the related administrative or judicial action. The exact amount of the award is at the discretion of the agency and based on certain factors. The model act also would protect whistleblower confidentiality, prohibit retaliation by an employer against a whistleblower, and create a cause of action and provide relief for whistleblowers retaliated against by their employer.

There is currently no similar provision found in the Florida Statutes. In a press release, NASAA stated that "[t]he model act draws upon the whistleblower award provisions contained in

section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, as well as from current state law in Indiana and Utah."[82]

The Office is vetting whether a similar whistleblower provision would be helpful to assist its examinations and investigations by creating a safe environment for individuals to come forward to report suspected wrongful practices not only in the securities area, but also the other program areas of the Office.

G. The Uniform Securities Act

The Uniform Law Commission has developed model acts for states to use as the basis of their own statutes to bring about uniformity throughout the United States. The Uniform Securities Act of 2002 (the "2002 Act") is the current model and supersedes the two prior models, known as the Uniform Securities Act of 1956 (the "1956 Act") and the Revised Uniform Securities Act of 1985, as amended in 1988 (the "1985 Act").

The majority of states have adopted some version of the act. However, a few, including Florida, have not. Chapter 517, Florida Statutes, is loosely based on the 1956 Act and contains many of the same provisions.

Some of the differences between the 2002 Act and chapter 517, Florida Statutes, include:

- Registration by Coordination: The 2002 Act provides for registration by coordination. Coordinated review programs for state registration of securities or franchise offerings allow an issuer to file one application for review and approval by multiple states. The states, under the auspices of NASAA, have created coordinated review protocols for equity, small company, franchise offerings, direct participation program securities, and certain Regulation A securities.
- Issuer registration: Florida law defines issuers as dealers and requires that they register before they can issue securities.

Further, it is important to note that some of the topics covered by the 2002 Act are addressed in other chapters of the Florida Statutes. For example, public records and confidentiality of records is addressed in the 2002 Act. This topic is addressed in chapter 517, Florida Statutes, but also chapter 119, Florida Statutes. Additionally, the 2002 Act grants the securities administrators significant rule making authority and leaves many items up to the securities administrator's discretion which may not be permissible or feasible under chapter 120, Florida Statutes, and other Florida law.

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[82] Press Release, NASAA, *NASAA Members Adopt Model Act to Award and Protect Whistleblowers* (Aug. 31, 2020), https://www.nasaa.org/55628/nasaa-members-adopt-model-act-to-award-and-protect-whistleblowers/#:~:text=Among%20other%20provisions%2C%20the%20NASAA%20Model%20Whistleblower%20Award,up%20to%2030%20percent%20of%20the%20amount%20recovered.

H. Regulation of Digital Assets and Market Participants

There are strong parallels to various aspects of the regulated securities industry and the burgeoning cryptocurrency industry such as how cryptocurrencies are issued, how cryptocurrencies are traded and sold on the secondary market, and the intermediaries facilitating the buying and selling of cryptocurrencies.[83]

For example, a technology business creating and issuing a digital asset offered for investment purposes or having the characteristics of a traditional security, such as common stock, a bond, or an investment contract, is likely acting as an "issuer" and creating a "security" within the meaning of Florida's securities laws. Such activities are often referred to as initial coin offerings (ICOs) and are akin to initial public offerings (IPOs) of securities. Digital assets meeting the definition of a "security" under Florida law ("digital asset securities") are regulated pursuant to the Florida Securities and Investor Protection Act, and the rules promulgated thereunder. Such digital assets are subject to the registration requirements under section 517.07, Florida Statutes, and must be registered with the Office or exempt from registration. The offer and sale of digital assets found to be securities are also subject to the anti-fraud provisions of section 517.301, Florida Statutes.

Once such securities are issued and subsequently traded by their owners for economic gain, the transactions look like ordinary securities market transactions. Intermediaries who open accounts for digital asset securities traders or investors, facilitate transactions in digital asset securities, create a market for digital asset securities, or give advice as to those seeking to purchase digital asset securities are akin to traditional securities intermediaries such as securities broker-dealers, and investment advisers. Participants in the digital asset securities ecosystem who offer, sell, or recommend digital asset securities to Florida residents must register as a dealer or investment adviser under section 517.12, Florida Statutes, unless exempt or excluded from the requirements.

The Office, like other securities regulators, will need to continue to monitor the digital asset ecosystem as it evolves and matures and identify and analyze new digital assets and transactions involving digital assets or distributed ledger technologies (DLTs) on a case-by-case basis to determine whether they are securities under Florida's securities laws and how to best regulate new products such as stable coins. Policy makers should consider whether additional disclosures should be required for digital asset securities to address: the high degree of fraud associated with such securities offerings; cybersecurity risks, including theft of digital assets by hackers; and the lack of liquidity, volatility and pricing speculation in the digital asset securities market. Further, policymakers should evaluate whether Florida's securities laws adequately regulate all the appropriate participants in the digital asset securities markets and, if not, whether Florida should modify its securities laws or create a separate regulatory scheme in this area. For instance, the Office is considering whether it is appropriate to regulate cryptocurrency exchanges as "dealers."

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[83] In December 2022 the Office completed its white paper titled "Assessment of Commerce and Regulatory Issues Presented by Blockchain Technology and Virtual Currency," which comprehensively treats this topic.

I. Regulation of Investment Adviser Solicitors

A solicitor is anyone who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser. Solicitors are generally viewed as persons associated with an investment adviser and thus must register as such unless exempt from registration.

At the federal level, payment of a cash fee, directly or indirectly, to a solicitor is prohibited unless it meets the requirements of SEC Rule 206(4)-1.[84] The rule requires that an investment adviser be registered with the SEC and not disqualified. Fees must be paid pursuant to a written agreement and certain disclosures must be provided to prospective clients.

States, on the other hand, have various regulations depending on the activity of the solicitor and the solicitor's relationship with the investment adviser. Most states view solicitation activity as activity requiring registration. The Uniform Securities Act, which is adopted by many states, defines "investment adviser representative" as "an individual employed by or associated with an investment adviser or federal covered investment adviser and who . . . receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice." Other states do not require solicitors to register under their securities acts, require registration but with fewer requirements, provide exclusions for certain solicitors, or have de minimis exemptions for solicitation activity.[85]

In 2009, NASAA proposed a model rule pertaining to investment adviser solicitors. The proposed rule clarified the conditions under which investment advisers, investment adviser representatives, and solicitors must operate. Additionally, the proposed rule provided an optional template for administrators wishing to exempt solicitors performing limited activities from registration under specified conditions. This rule was never adopted by NASAA.

Florida incorporates SEC Rule 206(4)-3 into Rule 69W-200.001, Florida Administrative Code, and is proposing to amend its rule to incorporate amended SEC Rule 206(4)-1 but otherwise requires the registration of solicitors. Florida should consider whether to amend its existing statutes to more clearly define whether solicitors are required to register and under what circumstances.

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[84] 17 U.S.C. §275.206(4)-1 (effective May 4, 2021) formerly 17 U.S.C. §275.206(4)-3. The amended rule replaces and updates the SEC's former advertising rules and cash solicitation rules.

[85] *See* Missouri Secretary of State, Registration of Brokers & Advisers FAQs, FAQ#7, https://www.sos.mo.gov/securities/licensing_faq#faq8 (Missouri does not require solicitors to register as investment adviser representatives); 10 CCR §260.236(c)(2), California Code of Regulations (California requires solicitors to register as an investment adviser representative but does not require the solicitor to take qualifying examinations); Rule 590-4-4-.12(2), Georgia Administrative Code (excludes CPAs and attorneys licensed in Georgia that solicit their own pre-existing accounting or legal clients on behalf of an RIA from the definition of investment adviser representative, and also has what amounts to a "de minimis" threshold that permits any other Georgia resident to solicit on behalf of an investment adviser so long as the annual clients solicited is capped at ten); Texas State Securities Board, FAQs for Investment Advisers and their Representatives, FAQ 1.B.3 and 1.B.4, https://www.kitces.com/blog/solicitor-rule-206-4-3-sec-state-ria-pay-cash-for-client-referral-attorney-accountant/ (distinguishing between solicitors for SEC registered investment advisers and state registered investment advisers).

J. Business Continuity

On April 13, 2015, NASAA adopted its Model Rule on Business Continuity and Succession Planning. The rule requires investment advisers to establish, implement, and maintain written procedures relating to a business continuity and succession plan. The rule contemplates the plan being tailored to the investment adviser's business model and specifies elements that must be included.

In Florida, dealers are required to create and maintain a written business continuity plan. Investment advisers, however, are not explicitly required to have such a plan. Investment advisers are fiduciaries and are required to have written policies and procedures to ensure compliance with the securities laws.

The Office should determine whether a specific requirement is necessary or whether an investment adviser's obligation to look out for the interests of their clients, which would include a client's ability to continue to obtain advisory services, and guidance from the Office recommending that a business continuity plan be included in an investment adviser's written policies and procedures will suffice. Legislation is necessary to require a business continuity plan as discussed above.

K. Choice-of-Law Provisions

FINRA Rule 2268[86][87] establishes minimum disclosure requirements and requires that any predispute arbitration clause must be highlighted in the customer agreement and immediately preceded by specified disclosures that describe the consequences of agreeing to arbitration.

In addition, FINRA Rule 2268 prohibits any pre-dispute arbitration agreement from including any condition that: (1) limits or contradicts the rules of any self-regulatory organization; (2) limits the ability of a party to file any claim in arbitration; (3) limits the ability of a party to file any claim in court permitted to be filed in court under the rules of the forums in which a claim may be filed under the agreement; or (4) limits the ability of arbitrators to make any award. FINRA interprets this provision to require that, "if a choice-of-law provision is used, there must be an adequate nexus between the law chosen and the transaction or parties at issue."[88]

Choice-of-law provisions can be harmful to customers when the customer does not understand the provision and a particular state's laws are selected by a firm to limit the scope of their liability or damages. FINRA Rule 2268 is incorporated into the Office's rules by reference, and a violation of

[86] FINRA arbitration hearings are generally conducted near where the customer resided at the time of the complaint or in employment disputes near where the employee resided at the time of the complaint. FINRA Customer Code Rule 12213; FINRA Industry Code Rule 13213.

[87] FINRA member firms are required to arbitrate all customer and employment claims. *See, e.g.,* FINRA Industry Code Rule 2263. Investment adviser firms do not have a self-regulatory association like FINRA that imposes arbitration requirements on advisory firms. Thus, all disputes between investment advisory firms and their customers or employees are based on the terms of their respective contractual agreements.

[88] *NASD Notices to Members* 05-09, https://www.finra.org/rules-guidance/notices/05-09.

the rule is considered a prohibited business practice and deemed a demonstration of unworthiness by a dealer. Yet, this requirement does not apply to investment advisers, nor are investment advisers prohibited from imposing choice of venue provisions that favor the advisory firm and may require a venue in a different state than that of the claimant. However, Rule 69W-600.0131(1)(s), Florida Administrative Code, applies to investment advisers and states that "[i]ncluding, in an advisory contract, any condition, stipulation, or provisions binding any person to waive compliance with any provision of Chapter 517, F.S., or with any provision of, or with any rule, regulation, or order issued under, the Investment Advisers Act of 1940" is a prohibited business practice and deemed a demonstration of unworthiness.

Recently, the Office has received questions from industry on whether a particular choice-of-law provision in their customer contracts would violate Florida's securities laws. Accordingly, the Office is considering whether it is necessary to explicitly prohibit the use of certain choice-of-law provisions by statute.

IV. Division of Financial Institutions

A. Field of Membership

Field of Membership ("FOM") laws and regulations allow for the mixing and matching of communities and Select Employee Groups for state-chartered credit unions. Pursuant to Florida law, the group of persons eligible for membership in the credit union may be designated based upon several characteristics, including sharing a similar profession, occupation, or formal association with an identifiable purpose; living or working within an identifiable neighborhood, community, rural district, or county; employment by a common employer; or employment by the credit union; along with members of the immediate family of persons within such a group."[89] As such, Florida state-chartered credit unions enjoy flexible FOM regulations that adhere to Florida's individual geography and communities so that credit unions can best serve their members' financial service needs. On the other hand, the Federal Credit Union Act recognizes three types of federal credit union charters: single common bond, which consists of one group having a common bond of occupation or association, multiple common bond, which consists of more than one group, each of which has a common bond of occupation or association, and community, which consists of persons or organizations within a well-defined local community, neighborhood, or rural district.[90] Florida law usually permits more rapid field of membership expansion than a federally chartered credit union. A credit union can continue to grow, assuming of course that the credit union has the capitalization, administrative ability, and infrastructure to support the increased customer base.

While these definitions may be similar on their face, recent application of these rules garner concerns of competitive equality for state-chartered credit unions. There are three federal credit unions with so-called "open" charters, which allow anyone in the nation to join.[91] Likewise, the

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[89] § 657.002(9), Fla. Stat.

[90] 12 C.F.R. Part 701 Appendix B: NCUA Chartering and Field of Membership Manual

[91] *With open charter, Teachers FCU sets sights on Florida and Beyond*, Ken McCarthy, American Banker, Oct. 6, 2022.

American Bankers Association has voiced concerns that these open charters fly in the face of the notion that credit unions are meant to provide service to people within well-defined communities.[92]

The current statute allows the Office to authorize "foreign credit unions," i.e., those credit unions organized and operating under the laws of other states,[93] to open branches in Florida if the foreign credit union meets certain criteria.[94] However, there is no Florida or federal law or regulation limiting an out-of-state credit union's expansion of a geographic FOM within the state of Florida. As a result, at least one out-of-state credit union from Michigan has a FOM encompassing the full state of Florida. However, no Florida state charter has a full state FOM. The League of Southeastern Credit Unions has expressed interest in legislation to block or curtail out-of-state credit unions from expanding geographic FOM in the state of Florida to this extent. As Florida is one of the largest states in the union, it is further questionable whether reciprocity in fact amounts to reciprocity in function.

Any amendment regarding reciprocity aimed at a more equitable reciprocal relationship may affect OFR's current relationship with other regulators. Currently, the Office is a party to the Southeastern Regional Cooperative Interstate Agreement for the Supervision of State Chartered-Credit Unions which was organized by NASCUS and signed in 2009. This Agreement recognizes that the other parties, regulators from Georgia, Mississippi, Missouri, North Carolina, and Tennessee, are afforded the same application and approval process as Florida state-chartered credit unions if their state will reciprocate and vice versa. Section VII of this Agreement provides:

> *Where not otherwise inconsistent with applicable State law, credit unions may request to serve additional limited fields of membership from previously approved interstate branches, subject to the same statutory, regulatory and policy requirements that state-chartered credit unions domiciled in that state would be subject to, and the requirements of the Home State Supervisor. In addition, credit unions in that Host state must have similar reciprocal authority to apply for additional limited fields of membership in the Home state of the credit union making application.*

Currently, the states of Alabama and Georgia have allowed several Florida credit unions to expand their geographic FOM within their states.

B. Puerto Rican Financial Entities

Recently, the Office received an inquiry regarding the establishment of a representative office of a Puerto Rican International Financial Entity ("IFE") in the State of Florida. The Commonwealth of Puerto Rico is an unincorporated territory of the United States. While Puerto Rican citizens born on or after April 11, 1899 have been considered U.S. Citizens since 1941,[95] the island still lacks statehood.

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[92] *Ibid.*
[93] § 657.002(7), Fla. Stat.
[94] § 657.008(5)(a), Fla. Stat.
[95] 8 U.S.C. § 1402.

In 2012, the International Financial Center Regulatory Act, Act No. 273 of September 25, 2012, as amended ("IFE Act"), was passed to regulate the organization and operation of international financial institutions to be regulated by the Office of the Commissioner of Financial Institutions in Puerto Rico with an eye toward developing Puerto Rico into an international banking center. Even though the IFE Act defines those persons to which a license has been granted pursuant to the act as an "international financial institution," the common industry parlance has been "international financial entity" or "IFE."

IFE's are slightly different than traditional banks. They are issued tax incentives for doing business off the island,[96] and are only authorized to take deposits from, and make loans to, non-residents of Puerto Rico.[97] These differences make IFEs hard to categorize under Florida law. Section 658.12(2), Florida Statutes, defines a bank, in part, as "any person having a subsisting charter or other lawful authorization, under the laws of this or any other jurisdiction, authorizing such person to conduct a general commercial banking business." While the term "international banking corporation" is significantly broader,[98] the limitation of activities of an IFE still brings into question whether an IFE fits the definition.

To add another wrinkle, section 658.12(16), Florida Statutes, defines the term "state" as "any or every other state of the United States, the District of Columbia, any and every territory of the United States, *Puerto Rico*, Guam, American Samoa, and the Virgin Islands." (Emphasis added.) Likewise, the express purpose of the Florida Interstate Branching Act[99] is to provide for the regulation of interstate branching, consistent with the Federal Deposit Insurance Act,[100] which defines the term "state" to mean "any state of the United States, *Puerto Rico*, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Northern Mariana Islands."[101] Pursuant to the Florida Interstate Branching Act, an out-of-state bank may establish and maintain a de novo branch or acquire a branch in this state upon meeting certain minimal requirements.[102]

However, pursuant to section 663.01(3), Florida Statutes, the term "foreign country" means "a country other than the United States and includes any colony, dependency, or possession of such country notwithstanding any definitions in chapter 658, and any territory of the United States, including Guam, American Samoa, the Virgin Islands, and the *Commonwealth of Puerto Rico*."

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[96] 7 L.P.R.A. § 3085.
[97] 7 L.P.R.A. § 3091.
[98] § 663.01(6), Fla. Stat. "International banking corporation" means a banking corporation organized and licensed under the laws of a foreign country. The term includes, without limitation, a foreign commercial bank, foreign merchant bank, or other foreign institution that engages in banking activities usual in connection with the business of banking in the country where such foreign institution is organized or operating, including a corporation: the sole shareholders of which are one or more international banking corporations or holding companies which own or control one or more international banking corporations which are authorized to carry on a banking business, or a central bank or government agency of a foreign country and any affiliate or division thereof; which has the power to receive deposits from the general public in the country where it is chartered and organized; and which is under the supervision of the central bank or other bank regulatory authority of such country. The term also includes foreign banks with fiduciary powers which conduct trust business as defined in the financial institutions codes.
[99] § 658.2953, Fla. Stat.
[100] § 658.2953(2), Fla. Stat.
[101] 12 U.S.C. § 1813(a)(3) (*emphasis added*).
[102] § 658.2953(11)(c), Fla. Stat.

(Emphasis added.) Chapter 663, Florida Statutes, governs the activities of international financial institutions in Florida and defines the term "international banking corporation" as:

> A banking corporation organized under the laws of a foreign country. The term includes, without limitation, a foreign commercial bank, foreign merchant bank, or other foreign institution that engages in banking activities usual in connection with the business of banking in the country where such foreign institution is organized or operating, including a corporation: the sole shareholders of which are one or more international banking corporations or holding companies which own or control one or more international banking corporations which are authorized to carry on a banking business, or a central bank or government agency of a foreign country and any affiliate or division thereof; *which has the power to receive deposits from the general public in the country where it is chartered* and organized; and which is under the supervision of the central bank or other bank regulatory authority of such country. The term also includes foreign banks with fiduciary powers which conduct trust business as defined in the financial institutions codes.[103] *Emphasis added.*

As described above, IFEs are only authorized to take deposits from, and make loans to, non-residents of Puerto Rico.[104] Between the apparent overlap of the definitions of "state," "foreign country," and "international banking corporation," and an IFE's inability to take deposits from the general public in Puerto Rico, clarification may be required in order to appropriately regulate IFEs.

When it comes to representative offices, these definitions may lead to an absurd result, wherein a Puerto Rican bank may branch into Florida under the Florida Interstate Branching Act but be required to seek licensure to operate a representative office pursuant to chapter 663, Florida Statutes. When you add into the mix the possibility that an IFE may not be a bank at all, legislation tailored specifically to IFEs that would enable the Office to gather information about the entities and their activities in Florida should be sought.

C. Land Trusts

A "Land Trust" is an unusual legal mechanism primarily designed to facilitate land development.[105] Essentially modified conventional trusts, land trusts were originally developed out of case law in Illinois and are still sometimes referred to as "Illinois land trusts."[106] The defining characteristics of a land trust are: (1) the trustee holds both the legal and equitable title to the real property, but has no duties or powers other than to convey, mortgage, lease, sell, or otherwise deal with the property at the beneficiary's direction; and (2) the beneficiary's interest is considered personal property, even though the "rights, interests, powers and conveniences of fee ownership are retained and exercised by the beneficiary."[107] Further distinguishing land trusts from

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[103] § 663.01(6), Fla. Stat.
[104] 7 L.P.R.A. § 3091.
[105] Mitchell A. Sherman, *The Florida Land Trust: An Overview*, 6 Nova L. J. 489, 490 (1982).
[106] *Grammar v. Roman*, 174 So. 2d 443 (Fla. 2d DCA 1965).
[107] Mitchell A. Sherman, *The Florida Land Trust: An Overview*, 6 Nova L. J. 489, 491 (1982).

conventional trusts in Florida, a land trust trustee may also be a beneficiary of the land trust for which it serves as trustee,[108] the doctrine of merger is inapplicable.[109]

Section 689.071(2)(c), Florida Statutes, defines a "land trust" as follows:

> "Land Trust" means any express written agreement or arrangement by which a use, confidence, or trust is declared of any land, or of any charge upon land, under which the title to real property, including, but not limited to, a leasehold or mortgagee interest, is vested in a trustee by a recorded instrument that confers on the trustee the power and authority prescribed in s. 689.073(1) and under which the trustee has no duties other than the following:
>
> 1. The duty to convey, sell, lease, mortgage, or deal with the trust property, or to exercise such other powers concerning the trust property as may be provided in the recorded instrument, in each case as directed by the beneficiaries or by the holder of the power of direction;
>
> 2. The duty to sell or dispose of the trust property at the termination of the trust;
>
> 3. The duty to perform ministerial and administrative functions delegated to the trustee in the trust agreement or by the beneficiaries or the holder of the power of direction; or
>
> 4. The duties required of a trustee under chapter 721, if the trust is a timeshare estate trust complying with s. 721.08(2)(c)4. or a vacation club trust complying with s. 721.53(1)(e).
>
> However, the duties of the trustee of a land trust created before June 28, 2013, may exceed the limited duties listed in this paragraph to the extent authorized in subsection (12).

The Florida Land Trust Act[110] (the "Act"), which was originally enacted in 1963, was amended a few times in the early 2000s regarding who may serve as trustee. Prior to 2006, the Act contemplated "any person, corporation, bank, trust company, or other entity qualified to act as a fiduciary in this state" acting as trustee of a land trust.[111] Then, in 2006, the Act was amended to expand the pool of possible trustees, notably eliminating the requirement that the trustee of a land trust must be "qualified to act as a fiduciary in this state." According to the Real Property, Probate, and Trust Law Section of the Florida Bar (RPPTL), the legislation was designed to allow creditors to act as trustees, reasoning that a commercial bank may want to serve as trustee of a land trust

[108] § 689.071(2)(b), Fla. Stat. (2021).
[109] § 689.071(5), Fla. Stat. (2021).
[110] § 689.071, Fla. Stat. (2021).
[111] § 689.071(1), Fla. Stat. (2005).

and lend funds to the trust.[112] In 2013, the Act was again amended, this time to define a land trust in part as having a trustee with limited duties. This legislation created the current definition of "land trust" found above. Conspicuously missing from this list of enumerated duties is fiduciary duty. This legislation also notably eliminated any reference to banks or trust companies.

The impact of the early 2000s amendments, particularly the 2006 amendment, was essentially permission by omission. As a result of these acts, several "land trust companies" sprang onto the market offering professional services as land trust trustees. These companies are rarely, if ever, chartered as trust companies pursuant to the financial institutions codes.[113] Due to the similarities of a land trust and a conventional trust, the Office has received several questions over the years regarding the applicability of trust company regulation to land trust activity. Most recently, the Office received a petition for declaratory statement seeking a declaration that a land trust company does not need to be chartered as a trust company in order to engage exclusively in the activity of serving as a trustee for land trusts. Despite the readily apparent differences between land trusts and the activities that the Office regulates, Florida law does not contain an express exemption for these activities. While the definitions of "trust business" and "trust powers" within the financial institutions codes both hinge on acting as a fiduciary and land trusts are, in part, defined as having a trustee with limited powers which do not include the power to act as a fiduciary, the definition of "fiduciary" within the financial institutions codes is broad enough to allow a plain reading interpretation including land trust trustees. Section 658.12(8), Florida Statutes, states:

> "Fiduciary" means *a trustee;* committee, guardian, custodian, conservator, or other personal representative of a person, property, or an estate; registrar or transfer agent of, or in connection with, evidences of indebtedness of every kind and of stocks and bonds and other securities; fiscal or financial agent; investment adviser; receiver; trustee in bankruptcy; assignee for creditors; or holder of any similar representative position or any other position of trust, including a person acting in any or all the capacities and performing any or all the functions enumerated in s. 660.34. (emphasis added)

As such, it is no surprise that the Office occasionally receives questions regarding the applicability of the financial institutions codes to land trust activity, even though the Office does not have clear regulatory oversight of this activity, nor is it set up to examine such activity. This apparent conflict could be resolved easily with an express exemption. Such an exemption would provide clarity for the industry.

Presently, there are only a handful of other states aside from Florida which have adopted legislation to authorize ownership of real property through such a land trust: Illinois,[114] Hawaii,[115]

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[112] Senate Banking and Insurance Committee*, Senate Staff Analysis and Economic Impact Statement for CS/SB 1956 Land Trusts*, April 20, 2006.
[113] § 655.005(1)(k), Fla. Stat. (2021). The financial institutions codes are comprised of Chapters 655, 657, 658, 660, 662, 663, 665, and 667, Florida Statutes.
[114] 765 Illinois Statutes, Acts 405-435.
[115] Ch. 588, Hawaii Statutes.

Indiana,[116] and Virginia.[117] However, the differences in the banking codes of these states combined with the differences in the land trust codes means that the laws of other states are not particularly useful for comparison or instructive for the purposes of carving out an exemption.

D. Domestic Trust Representative Offices

Generally, a trust representative office ("TRO") is an office of a trust company that does not engage in fiduciary activity, but performs services ancillary to trust business, such as marketing and acting as a liaison with existing customers. TROs may also transfer documents from customers to the home office or provide information to customers about their accounts and answer questions.

Federal law defines a TRO as "an office of a national bank, other than a main office, branch or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not engage in any of the activities specified in 12 CFR 9.7(d)."[118] Examples of acceptable activities pursuant to federal law, which are ancillary to the fiduciary business, are discussed in 12 CFR 9.2(k) and include advertising, marketing, and soliciting for fiduciary business; contacting existing or potential customers, answering questions, and providing information about matters related to their accounts; acting as a liaison between the trust office and the customer (e.g., forwarding requests for distribution or changes in investment objectives, or forwarding forms and funds received from the customer); or simply inspecting or maintaining custody of fiduciary assets. The establishment of trust representative offices requires no filing to the OCC.[119]

There are a couple of limitations insofar as what type of regulation the Office may impose upon TROs. First, it should be noted that while Florida may act by legislation to control or prevent undue concentrations of economic power in the banking, investment, and trust businesses, in order to not run afoul of the commerce clause of the United States Constitution, such legislation must impact evenhandedly on in-state and out-of-state firms alike.[120] Second, 12 U.S.C. § 92a does not geographically limit the places where a national bank may market its fiduciary services or the location of the bank's fiduciary customers, nor does it condition the exercise of fiduciary powers on compliance with state laws that purport to impose licensing or operating requirements on national banks. Thus, state laws are preempted to the extent they impermissibly conflict with a national bank's authority to have trust representative offices in those states.[121]

Currently, Florida law only governs the trust representative office activity of international financial institutions.[122] In order to establish an international trust company representative office, an international trust office must apply and be approved for a license from the Office.[123]

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[116] Ind. Code Ann. § 30-4-2-13.
[117] Va. Code Ann. § 55-17.1.
[118] 12 C.F.R. § 9.2.
[119] Office of the Comptroller of the Currency, OCC Interpretive Letter #866, October 8, 1999.
[120] *BT Inv. Managers, Inc. v. Lewis*, 461 F. Supp. 1187 (N.D. Fla. 1978).
[121] Office of the Comptroller of the Currency, OCC Interpretive Letter #866, October 8, 1999.
[122] Ch. 663, Part III, Fla. Stat.
[123] § 663.404, Fla. Stat.

Several other states do impose regulation on trust representative offices. Some states, like Kentucky, employ a notification program for out-of-state trust companies based on reciprocity.[124] Texas has a more robust program that requires notification and maintains the power to examine trust representative offices established and maintained by out-of-state trust companies.[125] Illinois requires licensure.[126]

E. Investment Caps for Credit Unions

Section 657.042, Florida Statutes, governs the investment powers and limitations of state-chartered credit unions. Industry frequently approaches the Office for guidance regarding this section, no doubt due in part to the language of the section.

First, several of the investment limitations are based upon percentages of credit union capital. For the purposes of chapter 657, "capital" is defined as "shares, deposits, and equity."[127] In turn, "shares" are "the money placed into the credit union by members on which dividends may be paid.[128] "Deposits" are "the portion of the money placed into the credit union by members on which interest may be paid."[129] Finally, "equity" is "undivided earnings, regular reserves, and other reserves."[130] In contrast, of those investments limited by percentage, the National Credit Union Administration (NCUA) limitations are based upon percentages of "paid in and unimpaired capital and surplus."[131] "Paid in and unimpaired capital and surplus" or "unimpaired capital and surplus" means "shares plus post-closing, undivided earnings." It does not include "regular reserves, or special reserves required by law, regulation, or special agreement between the credit union and its regulator or share insurer."[132] The term "share" is defined within 12 C.F.R. § 702.2 as "deposits, shares, share certificates, share drafts, or any other depository account authorized by state or federal law." As all state-chartered credit unions must be insured by the NCUA, the differing language between state and federal law often results in industry questions. Further, it complicates matters when drafting Orders of General Application regarding credit union investment limitations.[133]

Next, the Office has received at least one recent request asking for clarification regarding investment in credit union service organizations (CUSOs). While the question was resolved on different merits, it was obvious that the language of section 657.042, Florida Statutes, was confusing insofar as it utilizes terms which are undefined and not used anywhere else in the financial institutions codes. For example, section 657.042(3)(a), Florida Statutes, authorizes

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[124] KY ST § 286.3-146.
[125] TX FIN § 187.202 and 187.302.
[126] 205 ILCS 620/4A-15.
[127] § 657.002(1), Fla. Stat.
[128] § 657.002(10), Fla. Stat.
[129] § 657.002(5), Fla. Stat.
[130] § 657.002(6), Fla. Stat.
[131] 12 U.S.C. § 1757(7).
[132] 12 C.F.R. § 700.2.
[133] *See* § 655.061, Florida Statutes. Via an Order of General Application, the Office may authorize state-chartered credit unions to make any investment which they could make or exercise if incorporated or operating in this state as a federally chartered or regulated credit union.

investment in the capital shares, obligations, or preferred stock issues of any "agency or association, or membership association." The term "agency" is undefined and does not appear anywhere else in chapter 657 or in any implementing rules. Without a definition or context, the term is ripe for questioning. Likewise, the term "association" is without definition or context.

Clarifying the language of this section would be a win-win between regulators and the industry however, it should be noted that explaining the issue to the legislature may be difficult due to the complexity of the subject matter. In the past, the Division of Financial Institutions has attempted to amend section 657.042(5), Florida Statutes, which governs credit union investment in real estate and equipment. The suggested amendment altered the percentage limitation from 5 percent of capital to 60 percent of equity. Although equity is, by definition, a component of capital, the amendment was discarded for another session due to the time and resources needed to support its inclusion in the bill.

V. Bureau of Financial Investigations

A. Aiding and Abetting Liability

Currently, there appears to be no tool found in chapter 517, Florida Statutes, which would specifically allow the Office to pursue an administrative enforcement action against individuals who aid or abet other securities violators. The only explicit mention of "aiding" is found in the private civil remedies provision, section 517.211(2), Florida Statutes. This provides for joint and several liability in rescission actions involving securities fraud or misstatement violations to be distributed between the violator and certain persons (e.g., officers, partners, agents of a violating securities purchaser or seller) who "aided" in the violation.

Meanwhile, section 517.191(1), Florida Statutes, allows the Office to pursue injunctive relief (and, potentially, civil penalties and restitution) in a circuit court against securities violators "and any other person concerned in or in any way participating in or about to participate in such practices or engaging therein or doing any act or acts in furtherance thereof or in violation of this chapter." Although this is useful in civil actions, there is still no enforcement tool available in chapter 517 which would enable the Office to bring an administrative action seeking to discipline an aider or abettor of a securities violation through, e.g., imposition of a cease-and-desist, administrative fine, or registration denial, suspension or revocation.

Examples of other chapters of Florida law regulated by the Office which currently include aiding and abetting provisions for administrative enforcement purposes include chapters 560, 494, and 559, Florida Statutes. Section 560.114(1)(s), Florida Statutes, extends aiding and abetting liability for *any violation* of the chapter. However, sections 494.00255(1)(i) and 559.730(1)(c), Florida Statutes, extend such liability only to aiding, abetting, or conspiring in violations involving "fraud, misrepresentation, concealment, or dishonest dealing by trick, scheme, or device; culpable negligence; breach of trust in any business transaction in any state, nation, or territory." In the context of securities violations under chapter 517, the Office may not want to limit liability purely to cases of fraud, misrepresentation, concealment, or deceit (i.e., violations of section 517.301,

Florida Statutes). For instance, in clear cases of unregistered activity where suspected fraud is not chargeable due to evidentiary weaknesses, it might be useful to be able to proceed nonetheless against all involved parties. Thus, chapter 560's open-ended provision appears to be preferable in providing the Office with the most flexibility.

Additionally, 15 U.S. Code § 78t(e), included in section 20(e) of the Securities Exchange Act of 1934 (as amended by the 1995 Private Securities Litigation Reform Act), provides a mechanism, in S.E.C. civil enforcement actions seeking injunctive relief and disgorgement, for creating liability of controlling persons and persons who aid and abet certain federal securities violations (i.e., "any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter"). Note the express scienter requirement in this provision – the assistance must be provided "knowingly or recklessly." However, this section is not currently incorporated into Rules 69W-600.013 or 69W-600.0131, Florida Administrative Code (covering prohibited business practices for dealers, investment advisers, and associated persons of each). Although incorporation of this provision into the Florida Administrative Code may not be feasible due to its limited applicability (i.e., for purposes of certain federal civil enforcement actions), the language may be useful to consider.

Also consider section 604(a) of the Uniform Securities Act of 2002, which provides for administrative enforcement actions by state regulators seeking a cease-and-desist order (or an order limiting or denying an exemption) against a securities violator or a "person [who] has, is, or is about to *materially aid* an act, practice, or course of business constituting a violation of this [Act] or a rule adopted or order issued under this [Act]." The use of "materially" here would seem to raise a regulator's burden of proof and could create more of a barrier to such enforcement actions.

In the criminal context, section 777.011, Florida Statutes, states that a person who "aids, abets, counsels, hires, or otherwise procures [a criminal offense] … [where] such offense is committed or is attempted to be committed [is a] principal in the first degree [who, just like the principal offender,] may be charged, convicted, and punished as such, *whether he or she is or is not actually or constructively present at the commission of such offense*." The utility of this language may seem limited to the criminal context, where guilt must be proven beyond a reasonable doubt, thus making presence during commission of an offense an otherwise critical element unless removed by statute, as here. However, considering the nature of many securities fraud cases brought under chapter 517 (e.g., where a sales agent may be actively offering or selling the securities to an investor by way of fraud or misrepresentation, at the direction of his employers who are typically located at a safe distance, far away from the violation), it could make sense to expressly remove the "presence" obstacle from the Office's burden of proof in an aiding or abetting provision under this chapter.

Therefore, the Office may consider seeking to close this apparent gap in chapter 517 by adding a provision creating aiding and abetting liability that contains open-ended language similar to that found in section 560.114(1)(s), Florida Statutes, which provides for a range of disciplinary actions and penalties for violations involving "[a]iding, assisting, procuring, advising, or abetting

any person in violating a provision of this chapter or any order or rule of the office or commission." Proposed language might also include the "knowingly or recklessly" verbiage found in 15 U.S. Code § 78t(e), since the express inclusion of recklessness would likely make it slightly easier for the Office to prove the generally-required scienter element in administrative actions against aiders or abettors of securities violations. Finally, it is worth thinking about whether, given the unique modus operandi found in securities fraud cases discussed above (i.e., sales agents and their distant, yet culpable, employers), it may be prudent to *expressly exclude* a "presence" requirement from the provision, similar to section 777.011, Florida Statutes ("whether he or she is or is not actually or constructively present at the commission of such offense").

By seeking to amend chapter 517 with an aiding or abetting provision using some or all of the language above, the Office may be able to close this apparent gap in Florida securities law and gain a useful enforcement tool which holds liable additional individuals or entities who are indirectly responsible for securities violations against Florida investors. The Office has incorporated aiding and abetting liability in its forthcoming proposal to amend chapter 517, Florida Statutes.

B. <u>Control Person Liability</u>

The Office should consider amending chapter 517, Florida Statutes, to add a provision that provides greater liability for control persons who engage in securities fraud violations. Currently, under chapter 517, there appears to be no direct liability for control persons, even though parts of the statute clearly refer to the actions of control persons.

For example, section 517.111(1), Florida Statutes, provides that the Office may revoke or suspend the registration of any security, or may deny any application to register securities, if a control person of the issuer has committed any of the violations in subsections (b) through (g). However, this subsection only applies to registration and does not apply uniformly throughout chapter 517.

The Uniform Law Commission's "2002 Act" has a specific provision for control person liability. The applicable provision is as follows:

> (h) [Control person liability.] A person that controls, directly or indirectly, a person not in compliance with this section may be disciplined by order of the administrator under subsections (a) through (c) to the same extent as the noncomplying person, unless the controlling person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct that is a ground for discipline under this section.

Even if the 2002 Act is not adopted, the Office should strongly consider renumbering subsection 22(a) of section 517.12, as subsection (6) of the "Definitions" section of chapter 517.[134] The new subsection (6) should read as follows:

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[134] § 517.021, Fla. Stat.

> "Control person" means an individual or entity that possesses the power, directly or indirectly, to direct the management or policies of a company through ownership of securities, by contract, or otherwise. A person is presumed to be a control person of a company if, with respect to a particular company, the person:
>
> a. Is a director, a general partner, a member, or a manager of a limited liability company, or is an officer who exercises executive responsibility or has a similar status or function;
>
> b. Has the power to vote 20 percent or more of a class of voting securities or has the power to sell or direct the sale of 20 percent or more of a class of voting securities; or
>
> c. In the case of a partnership or limited liability company, may receive upon dissolution, or has contributed, 20 percent or more of the capital.

This proposed amendment would bring greater clarity to the definition of control person. Currently, the definition only applies to 517.12(22)(a), Florida Statutes, even though the term control person appears in other sections of chapter 517.[135] The Office could also consider whether control person liability needs to be added as a new subsection within 517.111, Florida Statues, or to other sections as well.

Thus, the Office should consider amending chapter 517, to add a provision identifying the liability of control persons who commit violations of chapter 517. The Office has incorporated control person liability in its forthcoming proposal to amend chapter 517.

C. <u>Attorney's Fees Limitation</u>

The Office should consider amending chapter 517, Florida Statutes, to add a provision that limits the ability of parties who prevail in litigation against the Office from seeking attorney's fees. The problem is that currently, under chapter 517, there appears to be no limit to the scenarios in which prevailing parties can seek attorney's fees from the Office. This absence of a limit may lead to prevailing parties seeking attorney's fees anytime they prevail in a lawsuit against the Office, even though attorney's fees are limited to specified scenarios in other Florida law provisions.[136] The Office may be able to avoid the cost of defending attorney's fees requests from many prevailing parties by amending chapter 517 to include a provision limiting the ability of such parties to seek attorney's fees.

If the Office were to add an attorney's fees provision to chapter 517, the new provision should be like the attorney's fees provision in section 501.2105(5), Florida Statutes. Chapter 501's provision applies to any civil litigation initiated by the Office and awards the prevailing party reasonable attorney's fees if the losing party (1) failed to raise a justiciable issue of law or fact, or (2) acted in bad faith.[137]

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135 §§ 517.0611, 517.111, Fla. Stat.

[136] *E.g.*, § 517.141(1), Fla. Stat. (limiting the number of persons who can apply for attorney's fees to those who meet the conditions prescribed in § 517.131).

[137] § 501.2105(5), Fla. Stat. ("In any civil litigation initiated by the enforcing authority, the court may award to the prevailing party reasonable attorney's fees and costs if the court finds that there was a

Currently, chapter 517 provides for attorney's fees in five provisions.[138] However, none of these provisions generally addresses chapter 517 and none of them are as limited in scope as section 501.2105(5), Florida Statutes. Accordingly, the Office should consider amending chapter 517 to add an attorney's fees provision that (1) applies to any civil litigation initiated by the Office under chapter 517; and (2) limits the award of attorney's fees to the prevailing party of such litigation only if the losing party fails to (a) raise a justiciable issue of law or fact; or (b) acts in bad faith.

Such a provision could be added as subsection (5) to the "Remedies" section of chapter 517[139] and could read as follows:

> In any civil litigation initiated by the Office under this chapter, the court may award attorney's fees to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

This proposed amendment would likely limit the ability of prevailing parties against the Office from seeking attorney's fees by permitting attorney's fees only when the Office fails to bring a justiciable issue of law or fact or when the Office acts in bad faith. Additionally, the proposed amendment allows the Office to potentially be awarded attorney's fees from the defendant if the Office wins and can show that the defendant failed to raise a justiciable issue or acted in bad faith.

In sum, the Office should consider amending chapter 517 to add a provision that limits the ability of prevailing parties to seek attorney's fees when they prevail in a civil litigation against the Office. The Office has incorporated a fee limitation in its forthcoming proposal to amend chapter 517, Florida Statutes.

D. Increase in Statutory Limitations for Crypto Investigations

Currently, chapter 517, Florida Statutes, appears to lack a clear mechanism which adequately extends the generalized 5-year statute of limitations ("SOL") period for criminal prosecution of any securities violation involving virtual currency. However, the significant risks posed to investors in the exploding cryptocurrency sphere are evidenced by a spate of recent litigation filed around the country against various cryptocurrency companies by regulators and complaining investors alike. Additionally, thorough investigation of virtual currency-related chapter 517 violations involves special evidentiary challenges and complexities due to the

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complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.").

[138] *See* § 517.075(7), Fla. Stat. (providing attorney's fees to brokers, dealers, or agents who sell securities offered by an issuer who violates the Florida laws regarding disclosing business dealing with Cuban affiliates); § 517.141(1), Fla. Stat. (any person who meets the conditions of section 517.131 may apply to the Office for attorney's fees, from the Securities Guaranty Fund); § 517.141(7) (the Office may institute legal proceedings to recover moneys owed to the fund and may recover attorney's fees when the Office prevails); § 517.191(5), Fla. Stat. (the Attorney General may recover attorney's fees for an investigation or enforcement of 517.275, 517.301, 517.31, or 517.321); § 517.211(6), Fla. Stat. (for any action related to the unlawful sale of securities, the court shall award reasonably attorney's fees to the prevailing party unless such an award would be unjust).
[139] § 517.241, Fla. Stat.

decentralized aspects of many types of crypto transactions. Thus, an amendment which sufficiently extends the current 5-year SOL in all such cases may provide significant benefits to Florida's prosecutors, law enforcement, and the investing public.

Accordingly, the Office might consider proposing an amendment to chapter 517's SOL provision which (1) incorporates the new "virtual currency" definition included in the recently-amended chapter 560, Florida Statutes and (2) extends both the date when an SOL first runs as well as the overall SOL period in these unique cases. Such an amendment may serve to provide a much-needed time extension for prosecutors and investigators handling difficult chapter 517 cases involving cryptocurrency.

Background

Although "virtual currency" is not currently classified as a "security" in chapter 517, in recent years, both federal and state agencies, along with courts that have considered the issue, have determined that virtual currencies qualify as commodities, or securities, under the law. [140] Note that chapter 517 contains a prohibition against federal commodities violations (e.g., commodities fraud), and that chapter 517's definition of "security" includes an investment contract, which a crypto-related investment could arguably be in Florida under a fact-specific *Howey* analysis.[141] Still, there is currently no definition for, or specific reference to, "virtual currency" found in chapter 517.

It is worth noting that both state and federal law enforcement agencies have taken note of the gravity of the risks posed by those operating on the fringes of the commodities and securities markets. A recent U.S. Department of Justice report concluded that segments of the virtual currency industry are not only enabling old-fashioned versions of international crime (e.g. financing terrorism, money laundering) but are also directly defrauding investors.[142] A 2018 report issued by the Office of the New York Attorney General also found that virtual currency platforms are "highly susceptible to abuse" and that protections for customers are often "illusory."[143]

Taking effect on January 1, 2023, Florida's HB 273 will modernize chapter 560, Florida Statutes, through which the Office regulates the state's vast money transmission industry, to include virtual currency. Section 560.103(36), Florida Statutes, will define "virtual currency" as "a medium of exchange in electronic or digital format that is not currency." As defined, virtual currency will also be included in a number of provisions throughout chapter 560 to overhaul and

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[140] See *CFTC v. McDonnell*, 287 F.Supp.3d 213 (E.D.N.Y. 2018) (Bitcoin and other virtual currencies are a "commodity" under the federal Commodity Exchange Act); *Hodges v. Harrison*, 372 F. Supp. 3d 1342 (S.D. Fla. 2019) (unregistered "initial coin offering" or "ICO" of virtual currency ID Token was an "investment contract" under *Howey* test and thus a "security" which violated both federal and Florida securities laws); see also *SEC v. Kik Interactive, Inc*., 19 Civ. 5244 (S.D.N.Y. Sep. 30, 2020) (unregistered ICO of virtual currency "Kin" was a *Howey*-analyzed "security" that violated Section 5 of the Securities Act); *SEC v. NAC Foundation, LLC*, 512 F.Supp.3d 988 (N.D. Cal. Jan. 8, 2021) (unregistered ICO of virtual currency "AML BitCoin" was a *Howey*-analyzed "security" to survive a motion to dismiss SEC claims of securities fraud and sale of unregistered securities).

[141] See *Hodges v. Harrison*, 372 F. Supp. 3d 1342, fn. 1 (S.D. Fla. 2019).

[142] The DOJ report observed that, "despite its relatively brief existence, this technology already plays a role in many of the most significant criminal and national security threats our nation faces." U.S. Department of Justice, Cryptocurrency: Enforcement Framework, at viii, 15-16 (Oct. 2020).

[143] Office of the New York Attorney General, Virtual Markets Integrity Initiative report, at 5 (2018).

broaden the scope of money transmission regulation, such as the anti-money laundering ("AML") provisions found in section 560.123(2), Florida Statutes.

Chapter 517's SOL Provision

Section 517.302(5), Florida Statutes, by way of reference to section 775.15, Florida Statutes, provides for a generalized 5-year statute of limitations ("SOL") for criminal prosecutions of chapter 517 violations, which are typically third-degree felonies under subsection (1).

Specifically, section 775.15(8), Florida Statutes, states that chapter 517 prosecutions "must be commenced within 5 years after the violation is committed." Subsection (3) of this section provides that the SOL "starts to run on the day after the offense is committed" and defines "committed" to mean either (i) "when every element has occurred" or (ii) "*if a legislative purpose to prohibit a continuing course of conduct plainly appears*, at the time when the course of conduct or the defendant's complicity therein is terminated" (Emphasis added). Note that this latter definition of "committed," where applicable, seems to provide additional time to prosecutors before the SOL starts to run.

Finally, subsection (12)(a) allows for a 1-year "discovery" extension of the 5-year SOL in securities fraud cases, "but in no case shall this provision extend the period of limitation otherwise applicable by more than 3 years." This current extender provision may be helpful in crypto fraud cases, but its language could be too limited to adequately address the broad range of SOL-related problems faced by prosecutors and investigators (e.g., locating and identifying individuals, obtaining evidence) in many types of securities cases involving virtual currency. For instance, this SOL extender may not reach a clear chapter 517 case of unregistered activity, which may be the only avenue available to prosecutors where fraud is suspected but not chargeable due to evidentiary issues.

Two Alternative Proposals for Chapter 517 SOL Reform

Given the current landscape described above, one proposal that the Office might consider to help resolve this issue could add a new subsection under section 517.302(5), Florida Statutes, which, relying on section 775.15(3), Florida Statutes, will define a specific "legislative purpose to prohibit a continuing course of conduct" (i.e., chapter 517 violations involving virtual currency). An offense of this type can then be deemed to have been "committed … at the time when the course of conduct or the defendant's complicity therein is terminated." This would provide one useful form of extension to prosecutors, since the SOL will run from a later date than the usual default point absent a clear legislative purpose (i.e., "when every element has occurred"). Next, the reference to "virtual currency" in this amended provision would incorporate by reference the definition created by the new section 560.103(36), Florida Statutes. Finally, this approach might also consider a minor corollary amendment to section 775.15(12)(a), Florida Statutes, which would broaden the sweep of the current SOL extender period beyond securities fraud to cover *any* chapter 517 violations involving virtual currency, as defined by section 560.103(36), Florida Statutes.

An alternative proposal might simply involve amending section 517.302(5), Florida Statutes, first, as described above (i.e., (i) defining a "legislative purpose to prohibit a continuing course of conduct" and (ii) referencing the new virtual currency definition in chapter 560). However, this approach would specifically provide for an unfettered 3-year extension of the 5-year SOL found in section 775.15, Florida Statutes, for chapter 517 violations involving virtual

currency. This 3-year extension, by hard-wiring it directly in chapter 517 instead of chapter 775, might be a simpler, more streamlined approach than the first proposal above: Any "time limitations in s. 775.15" will, per the "legislative purpose to prohibit" virtual currency-related violations of chapter 517, be extended by 3 years.

Pursuing one of these two potential approaches would (1) extend the point in time when a crypto-related offense is deemed "committed" and thus start the SOL clock at a later date; and, (2) provide a full 8 years from that later date in which prosecutors can bring a chapter 517 case against crypto violators whose activities are notoriously difficult to track due to the decentralized nature of the expansive cryptocurrency space.

E. Sworn Statements and Subpoena Language Under 517.201(1)(B), Florida Statutes

The Office should consider amending section 517.201, Florida Statutes, which authorizes the Office to make investigations and examinations, to require or permit a person to make a sworn statement, and to issue and serve subpoenas. There are two problems with section 517.201: (1) there are no enforcement mechanisms nor penalties for failure to make a sworn statement; and (2) the subpoena language does not give the Office enough flexibility to assist other states in investigations.

First, the provision regarding sworn statements[144] seems to be substantially similar to the provisions in other statutes.[145] However, none of these comparable statutes have specific enforcement mechanisms. Sworn statements are useful when litigating cases, such as to refresh a witness's recollection,[146] and when the refusal to make a sworn statement could result in negative inferences.

At a minimum, the Office should consider adding language that failure to make a sworn statement as required within 30 days creates a rebuttable presumption that the person has failed to comply with the Office's investigation. Additionally, the Office should consider amending the statute to enable the Office to compel an individual to respond the Officer's sworn demand for a sworn written statement, to the same degree the statute enables the Office to seek to compel compliance with a subpoena.

Second, the Office should consider adding language that gives the Office the power to assist other States in securities investigations. For example, Arizona law grants the Arizona Corporation Commission the authority to (1) issue and enforce subpoenas in Arizona at the request of an agency or administrator of another state; and, (2) order financial institutions to not disclose the content or existence of a subpoena to individuals not affiliated with the financial institution.[147]

As another example, New Mexico authorizes its Director of the Securities Division of the Regulation and Licensing Department to aid a securities regulator of another state to determine if a person has, is, or is about to violate a law or rule of the other state.[148]

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[144] § 517.201(1)(b), Fla. Stat.
[145] See §§ 17.05, 559.726, & 718.501, Fla. Stat.
[146] § 90.803, Fla. Stat.
[147] § 44-1823(B) & (C), A.R.S. (2021).
[148] § 58-13C-602, N.M. Stat. (2017).

Accordingly, the Office should consider adding language to section 517.201, Florida Statutes, that gives the Office the flexibility to assist other states in investigations. Specifically, such language should combine the Arizona and New Mexico provisions, in a way that gives the Office the option to (1) enforce an out-of-state subpoena; (2) issue its own subpoena to assist an out-of-state regulator's investigation; and (3) issue a non-disclosure order to banks in connection with such subpoenas. Such language could read as follows:

> The Office may, at the request of a securities agency or administration of another state:
>
> (1) Issue and enforce a subpoena from another state in Florida if the activities constituting an alleged violation for which the information is sought would be a violation of this chapter if the activities had occurred in Florida; and,
>
> (2) Provide other assistance if the requesting regulator demonstrates that it is conducting an investigation to determine whether a person has violated, is violating, or is about to violate a law or rule of the other state relating to securities matters administered or enforced by the requesting securities agency or administration. The office may provide such assistance by using the authority to investigate and the powers conferred by this section as it determines is necessary or appropriate. The assistance may be provided without regard to whether the conduct described in the request would also constitute a violation of the Florida Securities and Investor Protection Act or other law of Florida if occurring in Florida. In deciding whether to provide the assistance, the office may consider whether the requesting regulator is permitted and has agreed to provide assistance reciprocally within its state or foreign jurisdiction to the office on securities matters when requested; whether compliance with the request would violate or prejudice the public policy of Florida; and the availability of resources and employees of the director to carry out the request for assistance.
>
> (3) Issue a non-disclosure order to a bank in connection with a subpoena issued by the Office seeking the bank customer's records in an investigation by the Office or in connection with related subpoena efforts.

F. Misrepresentations Under 517.311, Florida Statutes

Currently, section 517.311(1), Florida Statutes, prohibits a person from misrepresenting that the security being sold has been guaranteed, sponsored, recommended, or approved by the state. Likewise, section 517.311(2) prohibits a person from misrepresenting that the person has been sponsored, recommended, or approved by the state. Section 517.311(4) allows a person to state that they are registered with the Office, or that the security itself is registered, if: (1) the statement is true; (2) the effect of being registered is not misstated, and (3) the statement is accompanied by a statutory disclaimer.

However, in the recent past, certain entities have utilized the OFR logo so as to mislead the investing public into believing that the investment is sound. Under the current statutory framework, it is not clear if the mere use of the logo in connection with the sale of a security is a violation.

The Office should consider adding a new subsection which prohibits persons from utilizing the OFR logo, or which limits the use of the OFR logo to solely accompany the required statutory disclaimer.

G. Enhancing Penalties When Older Victims and Other Specified Groups Are Targeted

The Office recognizes that the victimization of the elderly and other uniquely situated investor groups through fraudulent and deceptive practices in the securities industry is a serious and ongoing issue in Florida. However, there is no provision currently found in chapter 517, Florida Statutes, which adequately penalizes and seeks to deter this commonly found aggravating circumstance in securities violation cases.

The White-Collar Crime Victim Protection Act ("WCCVPA") contained in section 775.0844, Florida Statutes, seeks to protect the elderly, veterans, and groups of 20 victims or more, against nonviolent frauds and swindles by enhancing criminal penalties for felony offenses specified in eleven enumerated chapters. Curiously, chapter 517, Florida Statutes, which authorizes the Office to regulate the securities industry in Florida, is not currently listed among these enumerated chapters, although chapter 560 (i.e., money transmitters, also regulated by the Office) is included. Nor does chapter 517 itself have any provision which allows for enhanced penalties for securities violations targeting the elderly (or veterans, or large groups of victims, for that matter). The closest provision is found in section 517.302(2), Florida Statutes, which enhances penalties for certain specified "boiler room" violations.

To help remedy this apparent oversight and provide an additional tool in protecting investors who may be elderly (and other uniquely situated groups, such as veterans, or groups of 20 or more victims, all covered by the WCCVPA), the Office should consider seeking to amend both (1) section 775.0844(3)(a), Florida Statutes (i.e., the WCCVPA) and (2) section 517.302, Florida Statutes.

An amendment to the WCCVPA, section 775.0844(3)(a), Florida Statutes, would merely require the insertion of the following verbiage above the current subsection (3)(a)1.: "Chapter 517, relating to fraudulent or deceptive practices in the securities industry." This simple addition would then include chapter 517 as an enumerated chapter covered by the WCCVPA.

Additionally, section 517.302, Florida Statutes, which governs criminal penalties for securities violations under chapter 517, would also be amended by including a new subsection after subsection (2) (i.e., enhanced penalties for boiler room violations). This new subsection could look similar to subsection (2), reading: "Any person who violates the provisions of s. 517.301 by obtaining or attempting to obtain money or property of an aggregate value exceeding $50,000 from ten or more elderly persons, as defined in s. 825.101, or veterans, as defined in s. 1.01, or twenty or more persons, as defined in s. 1.01, is guilty of a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.0844." This proposed language borrows from the WCCVPA found in section 775.0844(5)(a) through (c), Florida Statutes.

These two interconnected amendments to Florida law would make it clear that chapter 517 violators who use fraudulent or deceptive practices to target the elderly, veterans, and groups of 20 or more victims will be subject to enhanced criminal penalties under the WCCVPA.

H. <u>Simplify and Broaden Chapter 655 Subpoena Authorization Language</u>

Chapter 655, Florida Statutes, provides general rules for financial institutions. The provision at issue is section 655.032(2)(a), Florida Statutes, which authorizes the Office to administer oaths and affirmations, take testimony and depositions, and issue and serve subpoenas. The problem with this provision is that it is unnecessarily complex, narrow, and does not align with similar provisions in other chapters. Accordingly, the Office should consider amending section 655.032(2)(a), Florida Statutes, to (1) simplify and broaden chapter 655's subpoena, oaths and affirmation, and testimony and depositions authority; and (2) conform its language with that of other similar statutes.

> Section 655.032(2)(a), Florida Statutes, reads as follows:
> (2)(a) In the course of or in connection with an investigation by the office pursuant to the provisions of subsection (1) or an investigation or examination in connection with any application to the office for the organization or establishment of a state financial institution or a branch thereof, and in connection with an examination of a state financial institution, subsidiary, or service corporation by the office, the office, or any of its officers holding no lesser title and position than examiner in charge or attorney at law, shall have the power:
>
> 1. To administer oaths and affirmations;
>
> 2. To take or cause to be taken testimony and depositions; and
>
> 3. *To issue, revoke, quash, or modify subpoenas and subpoenas duces tecum under the seal of the office* or to cause any such subpoena or subpoena duces tecum to be issued by any county court judge or clerk of the circuit court or county court to require persons to be or appear before the office at a time and place to be therein named and to bring such books, records, and documents for inspection as may be therein designated. Such subpoenas may be served by a representative of the office or may be served as otherwise provided for by law for the service of subpoenas.

Currently, 655 is bulky and causes problems for BFI, while other statutes do not. For example, chapters 517[149] and 687[150] have the following subpoena authorization language, "[s]ubpoenas for witnesses whose evidence is deemed material to *any investigation or examination may be issued by the office under the seal of the office*[.]" Additionally, chapters 494[151] and 520[152] begin their authorization language with "The office may [] [i]ssue and serve subpoenas."

The language from these statutes is simple and broadly authorizes "the office" to issue subpoenas. This broad authorization appears to permit the Commissioner to delegate the power to issue subpoenas to any employee of the Office rather than "officers holding no lesser title and

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[149] § 517.201(3), Fla. Stat.
[150] § 687.144(3), Fla. Stat.
[151] § 494.00135(1)(a), Fla. Stat.
[152] § 520.994(1), Fla. Stat.

position than examiner in charge or attorney at law[.]"[153]Additionally, the broad authorization applies to "any investigation or examination," rather than the current longwinded authorization.[154]

Accordingly, a proposed amended version of section 655.032(2)(a), Florida Statutes, could read as:

> (2)(a) In connection with any investigation or examination pertaining to this chapter, the Office or its representatives may:
>
> 1. Issue, serve, revoke, quash, and modify subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of all books, accounts, records, and other documents and materials relevant to an examination or investigation conducted by the Office;
>
> 2. Administer oaths and affirmations; and
>
> 3. Take or cause to be taken testimony and depositions.

This proposed amendment is simpler than the current 655 section,[155] and it broadly authorizes its powers to the office. This gives the Commissioner broad authority to delegate the power of issuing subpoenas, administering oaths and affirmations, and taking testimony and depositions, to a wider variety of Office staff. Additionally, the proposed amendment is in conformance with other statutes which creates harmony within Florida law.

In sum, the Office should consider adopting an amendment to section 655.032(2)(a), Florida Statutes. Such an amendment, like the proposed amendment above, should (1) simplify and broaden chapter 655's subpoena authority; and (2) conform its language with other similar statutes.

I. <u>Chapter 687, Florida Statutes, Trust Fund</u>

Section 687.143, Florida Statutes, states that all fines collected pursuant to this chapter shall be deposited into the Bureau of Financial Investigations Administrative Trust Fund. However, given the small volume of fines collected,[156] all of these funds have been maintained in the general administrative regulatory trust fund, and have been classified under Revenue Source Code 697, to delineate that the funds were collected pursuant to chapter 687, F.S.

For background, this section of the statutes was last amended in 2003 to reflect the name change of the Bureau of Financial Investigations (prior thereto known as the "Division of Financial Investigations"). The substantive change occurred in 1997, when the language was changed from the "Finance Regulatory Trust Fund" to the "Financial Investigations Administrative Trust Fund." Prior to 1997, all funds collected were to be

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[153] § 655.032(2)(a), Fla. Stat.
[154] § 655.032(2)(a), Fla. Stat. ("In the course of or in connection with an investigation by the office pursuant to the provisions of subsection (1) or an investigation or examination in connection with any application to the office for the organization or establishment of a state financial institution or a branch thereof, and in connection with an examination of a state financial institution, subsidiary, or service corporation by the office").
[155] § 655.032(2)(a), Fla. Stat.
[156] Since 2014, only 5 fines have been collected totaling $40,000, and no fines have been collected since 2017.

deposited under the Division of Finance Regulatory Trust Fund, which is still in place to this day.

The Office may want to consider amending this language to reflect the actual ongoing practice.

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