

A NEW REGULATORY STRUCTURE FOR INSURANCE AND FINANCIAL SERVICES IN FLORIDA

Travis L. Miller, Esq.¹
(850) 425-2695

The Florida Legislature has enacted several laws over the last decade profoundly affecting Florida's insurance markets. The legislature enacted a moratorium limiting insurers' ability to reduce their homeowners' writings after Hurricane Andrew and allowed that law to expire when it believed the law's purposes had been satisfied. It subsequently created the Florida Hurricane Catastrophe Fund as a tax-exempt reinsurance mechanism, which ultimately paved the way for private investors to form new insurers and reduce the state's residual property insurance market from nearly one million policies to fewer than 100,000. Even this year, the legislature adopted the proposal of Florida's Treasurer and Insurance Commissioner Tom Gallagher to combine the state's two residual property markets into a single tax-exempt insurer-of-last-resort. However, as significant as these changes have been, perhaps none will have an effect as lasting and pervasive as a bill enacted this spring revising the state's structure for regulating the insurance, banking and securities industries.

Constitutional Change Necessitates Statutory Revisions

Florida has long had a collegial form of government in which the Governor shares several key responsibilities with elected Cabinet officers. These Cabinet officers historically have included the state's Treasurer, Comptroller, Secretary of State, Commissioner of Education, Commissioner of Agriculture, and Attorney General. However, in 1998 Florida voters approved a constitutional amendment concentrating the authority of elected officials by reducing the number of Cabinet officers from six to three. The positions of Attorney General and Commissioner of Agriculture survived the constitutional amendment, and the separate positions of Treasurer and Comptroller were eliminated in favor of a new Chief Financial Officer. Current functions of the Department of State and Department of Education will be reassigned to statutory appointees. This new structure, approved nearly five years ago, takes effect in January 2003 after elections for each of the offices this fall.

Over the course of many decades, the legislature assigned various statutory functions to the state's elected constitutional officers. For more than 50 years, the Treasurer has served as the state's Insurance Commissioner and the Comptroller has been the head of banking and securities regulation. When voters decided to eliminate the Treasurer and Comptroller positions, the new Chief Financial Officer was understood to become the constitutional officer responsible for the collection and safekeeping of state funds and the disbursement of those funds. However, the allocation of the Treasurer's and Comptroller's statutory duties became subject to the legislature's discretion. For example, the legislature could have assigned all of the regulatory functions of the Department of Insurance and Department of Banking and Finance to one or more appointed regulators, with the appointments being made by the Governor, the Chief Financial Officer, or perhaps the Governor and Cabinet. On the other hand, the legislature could have decided that voters simply intended to merge the Treasurer and Comptroller offices when they approved the constitutional change, and the statutory duties of those officers could have been merged under the control of the new Chief Financial Officer.

Differences of opinion between the current Treasurer and Comptroller increased the challenge of appropriately assigning the statutory responsibilities for regulating insurance, banking and securities in Florida. Treasurer Gallagher, who announced his intention to run for the Chief Financial Officer position soon after winning the Treasurer's race in 2000, urged the legislature to ensure that regulatory responsibility would remain with a single elected official. "I think that's what voters thought they were getting when they voted in 1998. They thought they were combining those two officers into one," Gallagher said.² Comptroller Milligan believed instead that the regulation of insurance, banking and securities should be separated from the political pressures associated with supervision by an elected official. Milligan preferred that the regulatory offices become the responsibility of appointed professionals.³

The importance of separating regulation from politics prompted Milligan to announce that he would contest Gallagher for the Republican nomination for Chief Financial Officer. The legislature's subsequent inability to reach agreement on these issues in the 2002 regular session — the last before the effective date of the changes—suggested that the two current officers indeed might become locked in a primary battle. However, in a special session called by Governor Bush to address a limited number of issues not resolved in the regular session, the legislature, with the assistance of the Governor's office, Treasurer Gallagher and Comptroller Milligan, reached a compromise intended to satisfy the desire for a single elected official to be responsible to consumers and the goal of separating regulatory activities from political pressures. Milligan announced that due to the compromise, he would not run for Chief Financial Officer. This cleared the way for Gallagher to be the Republican nominee for the position, and ultimately for him to be assured the office when no other candidate, Democrat or Republican, qualified to run by the July qualifying deadline.

New Financial Services Commission to Regulate Insurance, Banking and Securities

Beginning January 7, 2003, a new entity known as the Financial Services Commission (the "FSC" or "Commission") will be responsible for regulating most aspects of Florida's insurance, banking and securities industries. The Commission will be a four-member panel comprised of the Governor, Chief Financial Officer, Attorney General, and Commissioner of Agriculture. The Commission will take action by majority vote consisting of at least three affirmative votes.⁴ The Commission will be a separate budget entity under Florida law and although it is intended to procure administrative and information systems services from the new Department of Financial Services (discussed below), the Commission "shall not be subject to control, supervision, or direction by the Department of Financial Services in any manner."⁵

Under Florida law, agencies must adopt their general policies through administrative rules. In the new regulatory structure, the Commission will be responsible for establishing broad regulatory policies through rulemaking. However, the Commission's day-to-day regulation of insurance, banking and securities will be carried out by two regulatory offices — the Office of Insurance Regulation and the Office of Financial Institutions and Securities Regulation. The new law gives these offices authority to make final decisions for the Commission regarding regulatory matters. For example, the head of the Office of Insurance Regulation may issue a final decision to disapprove a rate filing or deny a license request without taking the matter to the Commission, and the affected insurer would be able to challenge the decision under Florida's Administrative Procedure Act. In sum, the Commission, consisting of four elected officials, will be responsible for promulgating rules that announce general regulatory policies, but final decision-making authority in most regulatory matters confronting the insurance, banking and securities industries will lie within the substantive offices.

- **Office of Insurance Regulation.** The new law specifies that the Office of Insurance Regulation will be responsible for "all activities concerning insurers and other risk bearing entities."⁶ Specifically, the Office of Insurance Regulation will oversee applications and issues pertaining to the licensing of insurers and other risk-bearing entities, rates, policy forms, market conduct, solvency, and administrative supervision. The new office also will regulate adjusters, premium finance companies, and prepaid limited health service organizations.⁷ For persons familiar with the Florida Department of Insurance's current organization, the Office of Insurance Regulation will include the entire Division of Insurer Services, including its form and rate, market conduct, and solvency bureaus, as well as parts of the current Division of Legal Services and Division of Agent and Agency Services.

The head of the new office will be known as the Director of the Office of Insurance Regulation. The appointment and removal of the Director must be made by majority vote of the Commission, with the further requirement that the Governor and Chief Financial Office be on the prevailing side. To qualify for appointment, a proposed Director must have had within the ten years preceding appointment at least five years of responsible private sector experience in areas within the scope of the Office of Insurance Regulation's jurisdiction, or at least five years' experience as a senior examiner or other senior employee of a state or federal agency having regulatory responsibility over insurers or insurance agencies.⁸

- **Office of Financial Institutions and Securities Regulation.** The Office of Financial Institutions and Securities Regulation will be responsible for the Commission's oversight of Florida's banks, credit unions, other financial institutions, finance companies and securities industry.⁹ The office will include a Bureau of Financial Investigations that will have a separate budget from the remainder of the office and will operate as a criminal justice agency. The bureau is authorized to conduct investigations in financial matters, to coordinate activities with federal law enforcement agencies, and to provide assistance to prosecutors.¹⁰

The head of this office will be known as the Director of the Office of Financial Institutions and Securities Regulation. To qualify for appointment, the Director must have had, within the ten years preceding appointment, at least five years' responsible private sector experience working in areas within the jurisdiction of the office, or at least five years' experience as a senior examiner or other senior employee of a state or federal agency having regulatory authority over financial institutions, finance companies, or securities companies.

Chief Financial Officer to Assume Consumer Responsibilities and Other Duties

The Chief Financial Officer will be the head of an agency known as the Department of Financial Services. The current constitutional duties of the Treasurer and Comptroller (collecting, maintaining and disbursing state funds) will be housed in this new agency. Although the new agency generally will not have regulatory authority over insurers, financial institutions or securities licensees, it will be responsible for addressing consumer concerns and for carrying out several insurance-related activities that may affect members of the industry from time to time.

The Florida Department of Insurance's existing Division of Insurance Consumer Services maintains field offices throughout the state to which consumers may report concerns about insurers, agents or other aspects of their insurance transactions. When circumstances require, the division corresponds with licensees to gather additional facts and seeks efficient resolutions of consumers' concerns. If the division receives frequent complaints involving similar facts, it often refers the information to the Department's market conduct staff for potential examination. The new Department of Financial Services will include a Division of Consumer Services, which will perform a similar role for all insurance, banking and securities activities in Florida. One difference, however, is that any decision to conduct a market conduct examination based upon consumer complaints will lie with the separately-governed Office of Insurance Regulation.

The Department of Financial Services also will contain the Office of the Insurance Consumer Advocate. Florida's Insurance Consumer Advocate has standing to participate in certain types of filings and proceedings, such as rate filings and company acquisitions, on behalf of Florida consumers and serves on various boards of directors, task forces and committees responsible for insurance issues. With the Division of Consumer Services and the Office of the Insurance Consumer Advocate, the Department of Financial Services will be able to respond to consumer concerns and to represent consumers' interests in insurance-related proceedings when circumstances so require.

In addition, the Department of Financial Services will conduct most of the activities of the Department of Insurance's current Division of Agent and Agency Services. One might contend that if the legislature intended to separate the regulation of insurers, banks and securities licensees from political pressures, the same reasoning should have resulted in agent regulation being assigned to the Office of Insurance Regulation. However, agents' unique role in interacting with consumers in insurance transactions prompted the legislature to assign agent regulatory activities to the consumer-oriented Department of Financial Services.¹¹

Finally, the Department of Financial Services will contain several insurance-related functions that do not fit squarely within the core regulatory duties of the Office of Insurance Regulation or the consumer-centric duties of the Department of Financial Services. These responsibilities include the Division of Insurance Fraud, which uses law enforcement authority to prevent and investigate insurance fraud; the Division of Rehabilitation and Liquidation, which will rehabilitate or liquidate troubled insurers following adverse solvency determinations by the Office of Insurance Regulation; and workers' compensation statistical and

investigatory duties formerly performed by the Department of Labor, including reviewing the status of Florida employers' workers' compensation coverage and ordering employers' without coverage to suspend operations.¹²

“Single Subject” Requirement Threatens New Statutory Framework

This summer, a peculiar twist began to create uncertainty about the new law. In general, all subjects addressed in a bill passed by the legislature must relate to a single subject, even if that subject is broadly defined. The bill allocating the statutory functions of the Treasurer and Comptroller was broadly characterized as a bill pertaining to government reorganization. An amendment added to the bill during the legislative process allows state agricultural officials to bypass local tree preservation laws during emergency conditions. The impact of this amendment came to the forefront when agriculture officials exercised their authority to eradicate some citrus trees in South Florida to prevent the spread of citrus-canker. Broward County homeowners challenged the Department of Agriculture's authority to destroy these trees, arguing among other things that the bill granting this power violated the single-subject requirement.

Plaintiffs' counsel speculated to the media that a decision on the constitutional challenge may be several months away as of the submission of this article.¹³ If the law is upheld, the new regulatory structure will go into effect in January 2003 as planned. However, if the plaintiffs' challenge is successful, the legislature will be forced to reconsider the delicate balances it achieved this spring. Because regulators and the industry will have been preparing for the new structure to take effect, the legislature might simply readopt the planned structure in a stand-alone bill. Treasurer Gallagher recently reaffirmed his support for the new structure in light of the citrus-canker challenge, stating that the new law is “fine the way it is.”¹⁴ Nonetheless, it remains possible following this fall's elections that new legislators might make different decisions about the allocation of statutory functions.

Expectations for 2003

The new law provides for a Committee of Transition Management to assist in the implementation of Florida's new regulatory structure in the months preceding its January effective date. The Committee of Transition Management is administratively housed in the Executive Office of the Governor but is intended to operate as an independent body. It consists of five members, with one member appointed by each of the Governor, the Comptroller, the Treasurer, the chair of the Fiscal Responsibility Council of the Florida House of Representatives and the chair of the Senate Appropriations Committee.

The Committee of Transition Management has three responsibilities as it assists in the transition. First, the committee must provide the Governor, Cabinet, and legislature with a written report detailing the assignment of personnel to the new regulatory offices. Second, the committee must propose an organizational plan for the new Financial Services Commission, which presumably will include defining the various substantive offices that will comprise the Office of Insurance Regulation and the Office of Financial Institutions and Securities Regulation. The Financial Services Commission may adopt the organizational plan by administrative rule, subject to any changes desired by members of the Commission. Finally, the committee must prepare a report by February 1, 2003, identifying statutory changes that are necessary or desirable to facilitate the operation of the new regulatory structure.

The legislature also recognized that insurance, banking and securities legislation adopted in the 2002 regular session might not conform to the new regulatory structure later enacted. The new law therefore directs Florida's Division of Statutory Revision to assist the committees of the Florida House of Representatives and Florida Senate responsible for insurance and banking issues in drafting any required statutory updates. In light of the responsibilities of the Committee of Transition Management and Division of Statutory Revision, the industry should expect at least minor changes or clarifications to the regulatory scheme in the 2003 session.

Conclusion

The Florida Legislature faced a difficult task in deciding how to allocate the statutory duties of the state's current Treasurer and Comptroller. The complexity of the task was compounded by the seemingly divergent views of Treasurer Gallagher and Comptroller Milligan. In the end, however, the substantial efforts of the legislature, the Treasurer, the Comptroller and Governor Bush's office led to a solution that preserves consumers' direct representation by an elected official while isolating primary responsibility for regulating Florida's financial services industries under appointed professional regulators. With this regulatory framework in place, the legislature, the new Chief Financial Officer and the directors of the new regulatory offices should strive to prevent the new structure from resulting in duplicative regulation and instead to take advantage of opportunities for the new structure to produce an efficient regulatory environment that remains responsible to consumers.

Endnotes

1. Travis Miller is a shareholder in the Tallahassee office of Katz, Kutter, Alderman, Bryant & Yon, P.A. The firm updates the development of Florida's new regulatory structure and other insurance issues on its website at www.katzlaw.com. An organizational chart depicting the new regulatory structure may be found on the website by selecting the "Articles" category of the "Publications and Resources" link and selecting the article entitled, "Cabinet Reorganization Passes Florida Legislature."
2. Joni James, "GOP State Comptroller, Treasurer May Face Off for New CFO Post," Miami Herald, November 16, 2001.
3. Joni James, "Senate Panel OKs Compromise on Chief Financial Officer," Miami Herald, May 1, 2002.
4. § 20.121(3), Fla. Stat. (citations are to the expected statute numbers as set forth in the new law). Note in the discussion of the regulatory offices below that the Governor and Chief Financial Officer must be on the prevailing side in votes by the Financial Services Commission to appoint or remove directors of the regulatory offices.
5. § 20.121(3), Fla. Stat.
6. § 20.121(3)(a), Fla. Stat.
7. *Id.*
8. 20.121(3)(d)1., Fla. Stat.
9. 20.121(3)(a)2., Fla. Stat.
10. 20.121(3)(a)2., Fla. Stat.
11. Note that the earlier discussion of the Office of Insurance Regulation indicates that some portions of the Division of Agent and Agency Services will become part of that office, while others will be assigned to the Department of Financial Services. This is because the current Division of Agent and Agency Services regulates parties other than agents such as adjusters and managing general agencies.
12. These duties pertain to whether Florida employers satisfy state worker's compensation insurance requirements and do not relate to the forms, rates, solvency or market conduct of workers' compensation insurers, which will be the responsibility of the Office of Insurance Regulation.
13. Joni James, "Citrus Conflict Threatens Financial Law," Miami Herald, July 22, 2002.
14. *Id.*