HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 11 CS Indoor Smoking Places
SPONSOR(S): Robaina and others
TIED BILLS: None **IDEN./SIM. BILLS:** HB 317 1st Eng.; CS/SB 600; CS/SB 1536

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Business Regulation Committee	15 Y, 1 N, w/CS	Morris	Liepshutz
2) State Administration Appropriations Committee		Rayman	Belcher
3) Commerce Council			
4)			
5)			

SUMMARY ANALYSIS

For purposes of ensuring compliance with provisions of the Clean Indoor Air Act limiting those indoor work areas where smoking is allowed, Florida law requires certain alcoholic beverage establishments that allow smoking and that also serve food [those designated as stand-alone bars] to annually submit to the Division of Alcoholic Beverages and Tobacco [Division] in the Department of Business and Professional Regulation (DBPR) an affidavit that certifies compliance with a 10 percent threshold limitation for food sales. Every three years after the initial designation as a stand alone bar, the licensee is required to submit an "agreed upon procedures report" prepared by a Florida Certified Public Accountant that attests to the licensee's compliance with the food sales limitation for the preceding 36-month period.

The bill repeals the requirement that a stand-alone bar submit a CPA-prepared agreed upon procedures report to the Division every three years after receiving the designation as a stand-alone bar. The bill retains the requirement that a stand-alone bar submit an affidavit to the Division certifying compliance with the food sales limitation on an annual basis and provides additional penalties for knowingly making a false statement on the affidavit.

Further, the bill clarifies that a proprietor or other person in charge of an enclosed indoor workplace may not permit smoking in that workplace unless the workplace falls within one of the exceptions created in s. 386.2045, Florida Statutes. The bill further clarifies that the word "person" when used in chapter 386, has the same meaning as in s. 1.01(3), Florida Statutes.

The bill does not have any fiscal impact on state or local government.

The bill provides an effective date of July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government—This bill eliminates a requirement that certain alcoholic beverage establishments [stand-alone bars] submit an "agreed upon procedures report" prepared by a Florida CPA to the Division in the DBPR.

B. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

Article X, Section 20 – Smoking in Enclosed Indoor Workplaces

At the November 2002 General Election, voters approved Constitutional Amendment No. 6, to prohibit tobacco smoking in enclosed indoor workplaces. The stated purpose of this constitutional revision, codified as s. 20, art. X, Florida Constitution, was to protect people from the health hazards of second-hand tobacco smoke by prohibiting workplace smoking. The constitutional amendment provided limited exceptions to the prohibition on indoor smoking including an exception for "stand-alone bars". The constitutional amendment required the Legislature to implement the "amendment in a manner consistent with its broad purpose and stated terms." Implementing legislation, Chapter 2003-398, LOF, was subsequently enacted by the 2003 Legislature.

Stand-Alone Bars

The constitutional amendment defined a stand-alone bar to mean:

> …any place of business devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises; in which the serving of food, *if any, is merely incidental* to the consumption of any such beverage; and that is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue. [Emphasis supplied]

Section 561.695, Florida Statutes, created three specific requirements for a stand-alone bar. First, a stand alone bar must be "devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises." Second, the serving of food, if any, must be "merely incidental" to the consumption of alcoholic beverages. Third, the business must not be "located within, [or] share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue."

An important caveat of the stand-alone bar definition is the requirement that the serving of food must be "merely incidental" to the consumption of alcoholic beverages. Section 561.695(5), F.S., defines "merely incidental" as a limit that a stand-alone bar derive no more than 10 percent of its gross revenue from the sale of food.[1] The Division is authorized, pursuant to s. 561.695(7), F.S., to audit the records of a stand-alone bar as necessary to ensure compliance. Florida law requires stand-alone bars to annually submit to the Division in the DBPR an affidavit that certifies compliance with a 10 percent threshold limitation for food sales. Every three years after the initial designation as a stand alone bar,

[1] This section also prohibits stand-alone bars from serving free-food, but does allow customary bar snacks to be served without charge.

the licensee is required to submit an "agreed upon procedures report" prepared by a Florida Certified Public Accountant that attests to the licensee's compliance with the food sales limitation for the preceding 36-month period.

CPA Agreed Upon Procedures Reports

Following passage of the 2003 implementing legislation, the Florida Institute of Certified Public Accountants (FICPA) assigned a task force of CPAs that practice in the area of tax administration to review and comment on the legislation and the DBPR proposed rules. The FICPA has expressed concern regarding the proposed rules relating to the required agreed upon procedures report.

According to the FICPA, an "agreed upon procedures report" is defined in section 201 of the Attestation Standards of the American Institute of Certified Public Accountants [AICPA] as:

> An agreed-upon procedures engagement is one in which a practitioner is engaged by a client to issue a report of findings based on specific procedures performed on subject matter. The client engages the practitioner to assist specified parties in evaluating subject matter or an assertion as a result of a need or needs of the specified parties. Because the specified parties require that findings be independently derived, the services of a practitioner are obtained to perform procedures and report his or her findings. The specified parties and the practitioner agree upon the procedures to be performed by the practitioner that the specified parties believe are appropriate. Because the needs of the specified parties may vary widely, the nature, timing, and extent of the agreed-upon procedures may vary as well; consequently, the specified parties assume responsibility for the sufficiency of the procedures since they best understand their own needs. In an engagement performed under this section, the practitioner does not perform an examination or a review, as discussed in section 101, and does not provide an opinion or negative assurance. Instead, the practitioner's report on agreed-upon procedures should be in the form of procedures and findings.
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> As a consequence of the role of the specified parties in agreeing upon the procedures performed or to be performed, a practitioner's report on such engagements should clearly indicate that its use is restricted to those specified parties.

Further, Section 101 of the Attestation Standards of the AICPA defines an "examination" in which an opinion is given as:

> In an attest engagement designed to provide a high level of assurance (referred to as an examination), the practitioner's objective is to accumulate sufficient evidence to restrict attestation risk to a level that is, in the practitioner's professional judgment, appropriately low for the high level of assurance that may be imparted by his or her report. In such an engagement, a practitioner should select from all available procedures—that is, procedures that assess inherent and control risk and restrict detection risk—any combination that can restrict attestation risk to such an appropriately low level.

It is relevant to note that the Florida Board of Accountancy, which is the governing Board for Florida CPAs, adopts the AICPA standards into their administrative rules.[2]

[2] 61H1-20.0099, FAC – Standards for Attestation Engagements reads in part: "Standards for Attestation Engagements" shall be deemed and construed to mean Statements on Standards for Attestation Engagements published by the American Institute of Certified Public Accountants…"

According to the FICPA, in an agreed-upon procedures engagement or report, a CPA does not render an opinion regarding the sufficiency of the records provided by the client, including the accuracy and completeness of the records. In the context of the statute and rules, a CPA could only certify that the records provided by the stand-alone bar to a CPA reflect a stated percentage of gross food sales. The FICPA maintains that a Florida CPA could be disciplined by the Board of Accountancy for a violation of professional standards if, in the course of preparing the report, the CPA observes irregularities in the client's records, e.g., that the client is withholding pertinent records from the CPA, or the CPA determines that the client may have committed fraud or other malfeasance such as tax evasion and does not note them in the report. Further, the FICPA has expressed the concern that what the CPA is attesting to may not actually meet the Legislature's original expectation.

The FICPA maintains that the statutes and rules do not adequately address the licensee's required record retention and other internal control procedures while CPA standards of professional conduct require great specificity regarding the form in which records must be kept, e.g. whether a CPA can rely upon records maintained in an electronic format. Further, the FICPA is concerned that the statutes or rules do not adequately identify what specific steps or procedures are required by the CPA when addressing the lack of internal controls and the resultant reliability of the records.

The FICPA believes that a CPA's performance of an agreed upon procedures report under the current rules may likely be a violation of professional standards, and, consequently, the FICPA will advise its CPA members to refrain from performing the service for stand-alone bars.

Smoking Violations by Patrons, Employees and Licensees

A Division of Administrative Hearings (DOAH) decision has raised concerns regarding whether the DBPR has sufficient authority to sanction the proprietor or other person in charge of an enclosed indoor workplace with a violation of the act, if a person other than the proprietor or other person in charge of the location is smoking. Section 386.204, F.S., the substantive smoking prohibition, provides that a person may not smoke in an enclosed indoor workplace. Section 386.207(3), F.S., requires that the DBPR or the DOH, upon notification of observed violations of the act, issue to the proprietor or other person in charge of the enclosed indoor workplace a notice to comply with the act and establishes fines for subsequent violations of the act.

In *DBPR v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.,* DBPR attempted to discipline Old Cutler Oyster Co., an alcoholic beverage licensee, for permitting several patrons to smoke in the licensed premises in violation of s. 386.204, F.S. The licensee did not hold a stand-alone bar designation under s. 561.695, F.S. The Administrative Law Judge (ALJ), in his Recommended Order, held that there is no requirement in the statute that a proprietor or other person in charge of an enclosed indoor workplace must take any specific action when he or she observes a patron (or other non-employee) smoking in the enclosed indoor workplace. The ALJ also questioned whether the civil penalties in s. 386.207(3), F.S., which may be assessed against "the person" who fails to comply with a previously issued "notice to comply," apply to corporate or other non-human entities. The ALJ held that, in the context of s. 386.207(3), F.S., the term "person" appears to be limited to an individual human being. The Recommended Order did not reference the rule of statutory construction in s. 1.01, F.S., which provides that, where the context permits, the term person "includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."

The division rejected the ALJ's determination that the term "person" did not include a corporation. However, due to the criteria and limitations in s. 120.57(1)(l), F.S., for agency review of an ALJ's findings of fact, conclusions of law, and recommended disposition, the division adopted the recommendations of the ALJ and dismissed the case.

The DOAH decision in *Old Cutler Oyster Co., Inc.,* is also relevant to the Department of Health's (DOH) enforcement of the act. It creates uncertainty regarding the extent to which DOH can sanction

proprietors and persons in charge of an enclosed indoor workplace for smoking violations by patrons or other non-employees.

Old Cutler Oyster Co., Inc., did not address the issue of whether the division can sanction an alcoholic beverage licensee under the division's disciplinary authority in s. 561.29, F.S., which authorizes discipline of alcoholic beverage licensees for violations of any law in this state or permitting another person on the licensed premises to violate the laws of this state or the United States, and for maintaining a nuisance on the licensed premises. Although the licensee in *Old Cutler Oyster Co., Inc.,* is an alcoholic beverage licensee, the division did not seek to discipline the licensee pursuant to s. 561.29, F.S.

Penalty Provisions

Section 386.207(3), F.S., provides penalties for violations of the Clean Indoor Air Act by proprietors or persons in charge of an enclosed indoor workplace. The penalty for a first violation against a person who fails to comply with a previously issued "notice to comply" is a fine of not less than $250 and not more than $750.

Penalties for individuals who violate the act are provided in s. 386.208, F.S., which provides penalties in the amount of not more than $100 for a first violation and not more than $500 for a subsequent violation. The penalty range for an individual violation is identical to the penalties for violations of the Clean Indoor Air Act before the implementation of the constitutional smoking prohibition

Signage Requirement

Section 386.206(1), F.S., requires that any person in charge of an enclosed indoor workplace who was required before the adoption of the smoking ban in the State Constitution to post signage regarding designated smoking areas must now post signage stating that smoking is not permitted. Section 386.206(5), F.S., provides that this requirement expires on July 1, 2005.

EFFECT OF PROPOSED CHANGE

CPA Agreed Upon Procedures Reports

This legislation repeals the requirement that a stand-alone bar submit a CPA-prepared agreed upon procedures report to the Division every three years after receiving the designation as a stand-alone bar. The legislation retains the requirement that a stand-alone bar submit an affidavit to the Division certifying compliance with the food sales limitation on an annual basis.

The bill creates a new penalty provision which provides that a vendor's *alcoholic beverage license* may be subject to revocation if the vendor *knowingly* makes a false statement on the annual affidavit required by s. 561.695(5), F.S. Moreover, the Division maintains the authority to conduct compliance audits as deemed necessary pursuant to s. 561.695(7), F.S.

Smoking Violations by Patrons, Employees and Licensees

To clarify the prohibitions and responsibilities relating to smoking in indoor workplaces, the bill amends s. 386.204, F.S., to specify that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person to smoke in the workplace. The bill does not, however, specify what action a proprietor or other person in charge of the workplace must take when a violation occurs. The bill also amends s. 561.695, F.S., to specify that an alcoholic beverage vendor may not permit smoking in the licensed premises unless it is designated as a stand-alone bar. The bill amends s. 386.203, F.S., to provide that the term "person" has the same meaning as in the rule of statutory construction in s. 1.01, F.S.

This bill clarifies that the penalties provided in s. 386.207(3), F.S, for violations of the Clean Indoor Air Act will apply to proprietors or other persons in charge of an enclosed indoor workplace. The penalty for a first violation against a person who fails to comply with a previously issued "notice to comply" is a fine of not less than $250 and not more than $750.

Signage Requirement

The bill amends s. 386.206, F.S., to delete an obsolete signage requirement which expired on July 1, 2005.

C. SECTION DIRECTORY:

Section 1. Amends s. 386.203, F.S., and creates a new subsection (7), which specifies that the term "person" has the same meaning as in the rule of statutory construction; makes technical and clarifying changes.

Section 2. Amends subsection (1) of s. 386.204, F.S., and creates a new subsection (2) to specify that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person to smoke in the workplace.

Section 3. Amends subsections (2) and (4) of s. 386.2045, F.S., to conform cross references.

Section 4. Deletes subsections (1) and (5) of s. 386.206, F.S., to remove provisions regarding the posting of signs that expired on July 1, 2005.

Section 5. Amends s. 561.695, F.S., to prohibit smoking in a licensed alcoholic beverage establishment unless it is designated as a stand-alone bar; to provide a penalty for knowingly making a false statement on required affidavits; to delete the requirement for a CPA-prepared procedures report; and to make technical changes.

Section 6. Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to the Division of Alcoholic Beverages and Tobacco, there are approximately 1,000 stand-alone bars that serve food.[3] These stand alone bars will no longer be required to incur the cost of a CPA to complete an "agreed upon procedures report." The cost savings to these businesses is indeterminate.

D. FISCAL COMMENTS:

The first triennial reports are due by September 30, 2006, which is the first applicable renewal date for designated stand-alone bars. There were no positions appropriated to the Division to audit these reports; therefore, removal of the requirement for triennial reports should have no impact on workload.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None noted.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The repeal of subsections (1) and (5) of s. 386.206, Florida Statutes, as set out in Section 4 of the bill is unnecessary since these repeals were accomplished in Chapter 2006-2, L.O.F.

The repeal of the requirement for stand-alone bars to submit a CPA-prepared procedures report and increased penalty for knowingly making a false statement on the required annual affidavit [s. 561.695 (5) and (6) as set out in Section 5 of HB 11 CS] are included in identical form in HB 317, 1st Engrossed, which passed the House on March 16, 2006.

Similar legislation was vetoed by the Governor in the 2005 Regular Session. That bill, CS/CS/SB 1348, contained two main provisions. First, it provided an exception to the smoking ban for stand-alone bars listed in the National Register of Historic Places; and, second, it provided enforcement provisions which included explicit directives to proprietors or other persons in charge of an indoor workplace when encountering violations of the smoking ban in the workplace. This legislation does not contain the exception for stand-alone bars listed in the National Register of Historic Places and does not contain the explicit directives to proprietors or other persons in charge of an indoor workplace to remove violators of the smoking ban from the premises if the person refuses to comply with a request to stop smoking.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 5, 2006, the Committee on Business Regulation adopted one amendment to this bill and passed the bill with CS. The amendment changed the requirement that a licensee "may not" knowingly make a false statement on an annual affidavit to a requirement that a licensed vendor "shall not" knowingly make a false statement on an annual affidavit. The amendment made other stylistic drafting changes to conform the language to that contained in HB 317 CS, which has already passed the House and awaits action in the Senate.

[3] According to the Division of Alcoholic Beverages and Tobacco, there were 731 stand alone bars that served no food. These data reflect designations as of January 3, 2006.