COMMERCE COUNCIL MEETING PACKET

Thursday, April 20, 2006
12:30 – 2:30 p.m.
Room 404 HOB

Allan G. Bense
Speaker

Frank Farkas
Chair

HB 1361 / Brown

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1361 CS Insurance
SPONSOR(S): Brown
TIED BILLS: **IDEN./SIM. BILLS:** SB 2522

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Insurance Committee	18 Y, 0 N, w/CS	Callaway	Cooper
2) Commerce Council		Callaway	Randle
3)			
4)			
5)			

SUMMARY ANALYSIS

The bill allows insurers to offer a new insurance product, debt cancellation agreement and debt suspension agreement contractual liability insurance policy (CLP). This product will be offered to creditors for the purpose of covering losses suffered by the creditor in connection with debt cancellation or debt suspension agreements (DCA/DSA).

DCA/DSAs are lending transactions between the financial institutions and the debtor wherein the financial institution agrees to cancel or suspend the debt upon the happening of specified events. The risk of default due to a specified event, normally death, disability, or unemployment, shifts from the debtor to the financial institution. In exchange for this shifting of risk, the creditor charges a fee and agrees to cancel or suspend the debt according to the terms of the agreement. To protect itself, the bank either must set up reserves to cover the risk protected against or seek an insurance policy, a CLP, to indemnify the financial institution for the loss. DCA/DSAs are not regulated by the Office of Insurance Regulation (OIR). DCC/DSAs are not regulated by banking regulators, except for some regulation with regards to the sale of the agreements. Almost every state except Florida recognizes and approves CLPs as a viable way of protecting the financial institution against the business risk of DCA/DSAs.

The bill defines "contractual liability insurance for debt cancellation products." This will allow insurers to write CLPs to cover debt cancellation and debt suspension products issued by financial institutions. Forms and rates of CLPs will be regulated by the OIR.

The bill also removes the $50,000 policy limit in current law regarding the amount of insurance a debtor can obtain under the credit life insurance law. The deletion of the limit will allow debtors to obtain insurance up to the amount owed to the creditor. This statutory change allows Florida to join the rest of the states regarding the policy limit of credit life insurance and the limit provided in the National Association of Insurance Commissioner's Consumer Credit Insurance Model Act. The $50,000 policy limit is also removed from the amount of coverage under the debtor group life insurance law. Thus, the policy limit for each debtor having debtor group life insurance is limited to the amount of the debt of the debtor. This statutory change allows Florida to join the majority of the states regarding policy limits under the debtor group life insurance law. The bill increases the term of credit disability insurance from 10 years or 60 months to the term of the indebtedness.

The bill does not have a financial impact on state or local governments. It does; however, have an impact on the private sector. (See Fiscal Section for details).

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill creates a new insurance product to be regulated by the Office of Insurance Regulation. The bill removes the dollar policy limit on credit life insurance and debtor group insurance policies and replaces it with the amount of the debt covered.

Safeguard Individual Liberty: The bill removes the dollar policy limit on credit life insurance and debtor group insurance policies and replaces it with the amount of the debt covered.

B. EFFECT OF PROPOSED CHANGES:

The bill creates a new insurance product, debt cancellation agreement and debt suspension agreement contractual liability insurance policy (CLP), for insurance companies to offer to creditors for the purpose of covering losses suffered by the creditor in connection with debt cancellation or debt suspension agreements. Debt Cancellation and Debt Suspension Agreements (DCA/DSA) are frequently used by financial institutions when extending credit or issuing loans to their customers. When made in conjunction with a motor vehicle loans or leases, the agreements are generally referred to as Guaranteed Asset Protection or "GAP" agreements.

The U.S. Office of the Comptroller of the Currency (OCC) defines Debt Cancellation Contracts (DCC) and Debt Suspension Agreements (DSA) in 12 C.F.R. s. 37.2 as follows:

> *Debt cancellation contract* means a loan term or contractual arrangement modifying loan terms under which a bank agrees to cancel all or part of a customer's obligation to repay an extension of credit from that bank upon the occurrence of a specified event. The agreement may be separate from or a part of the other loan documents.
>
> *Debt suspension agreement* means a loan term or contractual arrangement modifying loan terms under which a bank agrees to suspend all or part of a customer's obligation to repay an extension of credit from that bank upon the occurrence of a specified event. The agreement may be separate from or part of the other loan documents. The term *debt suspension agreement* does not include loan payment deferral arrangements in which the triggering event is the borrower's unilateral election to defer repayment, or the bank's unilateral decision to allow a deferral of repayment.

In publishing the notice of the Part 37 final rules, 67 Fed. Reg. 58,962 (2003), the OCC noted the purposes and benefits of Debt Cancellation Products to lenders and borrowers as follows:

> Under a DCC or a DSA, the customer typically agrees to pay an additional fee to the bank in exchange for the bank's promise to cancel or temporarily suspend the borrower's obligation to repay the loan. The fee may be a lump sum that is payable at the outset of a loan (that may be financed over the term of the loan), or the fee may take the form of a monthly or other periodic charge. The fee compensates the bank for releasing borrowers from loan obligations under the circumstance specified in the DCC or DSA. These arrangements also provide customers a convenient method of extinguishing debt in times of financial or personal hardship, and enable the bank to avoid the time and expense of collecting the balance of the loan from a borrower's estate in the event of the borrower's death or other specified circumstances.

Simply put, DCA/DSAs are lending transactions between the financial institutions and the debtor wherein the financial institution agrees to cancel or suspend the debt upon the happening of specified events. It is an agreement between the financial institution and the consumer. The risk of default due

to a specified event, normally death, disability, or unemployment, shifts from the debtor to the financial institution. In exchange for this shifting of risk, the creditor charges a fee and agrees to cancel or suspend the debt according to the terms of the agreement. To protect itself, the bank either must set up reserves to cover the risk protected against or seek an insurance policy, a CLP, to indemnify the financial institution for the loss.

According to the Office of Insurance Regulation (OIR), the OCC has interpreted debt cancellation and debt suspension agreements as "incidental to banking" and thus exempt from the state insurance regulation. The OIR also notes the fees and forms of DCC/DSAs are not regulated by banking regulators, except for some regulation with regards to the sale of the agreements.[1]

National banks and federally charted credit unions are authorized, under federal law and regulations, to enter into DCC and DSA (collectively "Debt Cancellation Products") with their loan and credit customers. The regulations promulgated by the OCC and the National Credit Union Administration (NCUA) both note that such activities are incidental to the lending powers of the financial institutions. The OCC has also issued an opinion that GAP agreements are included within the scope of Debt Cancellation Products.

The Florida Statutes do not specifically reference or define debt cancellation products. The issue of whether Florida-chartered financial institutions were authorized to issue these products pursuant to their lending powers was recently addressed by the Office of Financial Regulation (OFR). On February 1, 2006, the OFR issued an Order of General Application to clarify that Florida-chartered financial institutions have the authority to enter into these agreements with their customers. According to OFR, this order ensures competitive equality of Florida-chartered financial institutions with federally chartered or regulated ones.

The OFR's order specifies a number of conditions that must be satisfied by Florida-chartered institutions that desire to enter into these agreements, including a requirement that the financial institution "[s]hall establish and maintain an effective risk management program to ensure the financial institution's safety and soundness concerning Debt Cancellation Products, as is required for a national bank by 12 C.F.R. s. 37.8"

A financial institution can address part of the safety and soundness requirement by ensuring that the financial institution has sufficient reserves to cover anticipated losses associated with its Debt Cancellation Products. Another way to potentially address the requirement would be to purchase insurance (a CLP) to cover anticipated losses that may result from issuing DCA/DSAs. This type of insurance product; however, is not currently authorized under the Florida Insurance Code.

Although authorized by the OFR to offer debt cancellation and debt suspension products, some financial institutions in Florida are reluctant to take on the added business risk without some way for the financial institutions to protect themselves against that risk. According to the bill's proponents, the inability of financial institutions to purchase a contractual liability policy (CLP) to protect against the business risks of offering debt protection products, Florida financial institutions are less competitive than their non-Florida domiciled competitors.

Almost every state except Florida recognizes and approves CLPs as a viable way of protecting the financial institution against the business risk of DCA/DSAs.[2] According to the bill's proponents, in the past 5 or 6 years, some insurance companies have attempted to get a CLP approved by the Office of Insurance Regulation (OIR) to offer to financial institutions. The OIR has denied such approval on several grounds.[3]

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[1] Legislative Analysis from the OIR received on March 28, 2006, on file with the Insurance Committee.
[2] Information provided by a proponent of the bill, on file with the Insurance Committee.
[3] Id.

First, the OIR posits that the underlying DCA/DSA is insurance under s. 624.02, F.S. Second, the OIR alleges CLPs are not consistent with the concepts of liability insurance under Florida law. In this respect, the OIR states the "liability created by the DCA is an accounting principle not an insurance principle." "Liability as used in insurance means a legal liability for loss or damage to a person or property resulting from the failure to fulfill a duty, whether the duty is contractual or a standard of care." Third, the OIR takes the position that CLPs are not specifically provided for under the property and casualty lines of insurance as those lines are defined in s. 624.605, F.S. Fourth, the OIR contends the definition of credit insurance specifically excludes loss or damage resulting from death and disability. Some in the insurance industry disagree with the OIR's positions regarding CLPs.[4]

The OIR believes CLPs replicate credit life and credit disability insurance and directly compete with these insurance products.[5] Part IX of Chapter 627 governs credit life and credit disability insurance. "Credit life insurance" is defined as insurance on the life of a debtor pursuant to or in connection with a specific loan or other credit transaction. "Credit disability insurance" is defined as insurance under which a borrower of money or a purchaser or a lessee of goods is insured in connection with a specific loan or credit transaction against loss or time resulting from accident or sickness. Both types of insurance are sold to a debtor at the time of purchase of goods. Insurers issuing either type of insurance must file its rates and rate changes with the OIR.[6] The Financial Services Commission sets the maximum allowable rates for these types of insurance.[7] Current law also contains restrictions on the amount of credit life and credit disability insurance that can be written and the term of such insurance.[8] The insurer offering a credit life or credit disability policy is required to get the OIR's approval of any forms used in conjunction with the insurance.[9] The OIR must disapprove any credit life or credit disability policy if the benefits of the policy are not reasonable in relation to the premiums charged or if the policy contains provisions that are unjust, unfair, inequitable, misleading, deceptive, or which encourage misrepresentation.[10] Only licensed agents can issue credit life or credit disability polices.[11] In most cases, the policy limit of credit life insurance is $50,000 per debtor.[12]

The bill defines "contractual liability insurance for debt cancellation products." This will allow insurers to write contractual liability policies to cover debt cancellation and debt suspension products issued by financial institutions. This type of insurance will be sold to financial institutions as opposed to credit life insurance which is sold to the debtor. The OIR will have authority to approve CLPs, approve forms associated with it, and approve rates associated with it. However, the bill does not specifically outline policy limits for such insurance as is set out in statute for credit life insurance.

According to the bill's proponents, the cost of goods financed on credit is increasing; thus, the monetary limit set by statute on credit life insurance and debtor group life insurance is outdated. Florida is the only state that limits credit life insurance policies to a set policy limit other than the amount of the borrower's indebtedness.[13] The National Association of Insurance Commissioners has adopted a Consumer Credit Insurance Model Act (Model Act). For most debts, the Model Act allows the amount of credit life insurance to be based on the net debt of the borrower, rather than a specified dollar amount.

The bill removes the $50,000 policy limit in current law regarding the amount of insurance a debtor can obtain from a creditor under the credit life insurance law. The deletion of the limit will allow debtors to obtain insurance up to the amount owed to the creditor. This statutory change allows Florida to join the

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[4] Id.
[5] Legislative Analysis from the OIR received on March 28, 2006, on file with the Insurance Committee.
[6] s. 627.6785, F.S. (2005).
[7] Id.
[8] s. 627.679, F.S. (2005); s. 627.681, F.S. (2005).
[9] s. 627.682, F.S. (2005).
[10] Id.
[11] s. 627.683, F.S. (2005).
[12] s. 627.679(1)(b), F.S. (2005).
[13] Information provided by a proponent of the bill, on file with the Insurance Committee.

rest of the states regarding the policy limit of credit life insurance and the limit provided in the Model Act.

Debtor group life insurance is governed by Part V of chapter 627, F.S. Section 627.553, F.S. provides "[t]he lives of a group of individuals may be insured under a policy issued to a creditor . . . to insure debtors of the creditor." The debtors eligible for debtor group life insurance are all the debtors of the creditor.[14] The policy premium is paid by the creditor and can be paid from sums collected by the creditor's debtors.[15] Generally, each debtor's policy limit is $50,000 or the amount owed to the creditor, whichever is less.[16] Thirty one states cap insurance under the debtor group life insurance law at the amount of the indebtedness; eight states either have no monetary limit or no provision.[17]

The $50,000 maximum policy limit is removed from the amount of coverage under the debtor group life insurance law. Thus, the policy limit for each debtor having debtor group life insurance is changed to the amount of the debt of the debtor and allows Florida to join the majority of the states regarding policy limits under the debtor group life insurance law.

The bill amends the policy term of the credit disability insurance from 10 years or 60 months for credit transactions exceeding 60 months to the term of the indebtedness.

Importantly, the changes to the policy limits of credit life insurance and debtor group life insurance do not require the consumer to purchase such insurance with the policy limit set as the amount of debt. Rather, the changes permit insurers to offer the insurance with the changed policy limits.

C. SECTION DIRECTORY:

Section 1: Creates s. 624.6086, F.S.; defining "contractual liability insurance for debt cancellation products."

Section 2: Amends s. 627.553, F.S.; requiring the policy limits of the amount of insurance for each debtor in a debtor group life insurance policy to be the amount of the debtor's debt; removing the maximum limit for policy limits for debtor group life insurance policies.

Section 3: Amends s. 627.679, F.S.; requiring the policy limits of the amount of insurance for a debtor under credit life insurance to be the amount of the debtor's debt; removing the $50,000 policy limit for credit life insurance polices.

Section 4: Amends s. 627.681, F.S.; requiring the term limit of credit disability insurance to increase from 10 years or 60 months for credit transactions exceeding 60 months to the amount of the indebtedness.

Section 4; Provides an effective date of "upon becoming a law."

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Department of Financial Services believes the bill will have no fiscal impact on the agency.

[14] s. 627.553(1), F.S. (2005).
[15] s. 627.553(2), F.S. (2005).
[16] s. 627.553(3), F.S. (2005).
[17] Information provided by a proponent of the bill, on file with the Insurance Committee.

The OIR believes the bill will have no fiscal impact on the office.

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 OIR, "[f]or a carrier issuing the newly authorized 'contractual liability' product, in the event of claims, to the extent such claims could bring a carrier to insolvency, the costs arising from a bank failure could be shifted to Florida policyholders through FIGA assessments for unpaid claims against that insurer issuing the contractual liability coverage."

Financial institutions would benefit by the bill because they could obtain insurance to protect against the risks of offering debt cancellation products. The purchase of such insurance may allow the financial institution to forgo reserving moneys to cover anticipated losses associated with its issuance of debt cancellation products.

The removal of the monetary policy limit on the amount of credit life insurance or debtor group insurance a policyholder/debtor/borrower can obtain will allow debtors/borrowers to purchase such insurance in amounts to cover their debts to protect them from having to repay the debts in the event of disability, death, unemployment, or other specified circumstances. However, retaining the cap of such insurance at the amount of indebtedness will protect the debtor/borrower from having to pay for too much insurance.

The change in the term limit on credit disability limit from 10 years or 60 months to the term of the indebtedness will ensure consumers have credit disability insurance for the life of their loan; thus allowing them to be protected for the full term of the loan in case they are unable to repay the loan due to becoming disabled during the term of the loan.

D. FISCAL COMMENTS:

None.

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.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The OIR expressed the following concerns in its Legislative Analysis submitted March 28, 2006:

Summary of Concerns

- The bill recognizes and expands the availability of largely unregulated contractual agreements between banks/credit unions and customers that are in competition with authorized carriers marketing similar products;

- The kind of insurance defined by this bill, "debt cancellation agreement and debt suspension agreement contractual liability insurance," fundamentally changes the definition of the term "liability" as used in the context of insurance. In current law, liability for the purpose of insurance means a legal liability for loss or damage to person or property resulting from the failure to fulfill a duty, whether that duty is contractual or a standard of care. With regard to debt cancellation agreements, it is not the failure to perform a duty but the cost of the performance of an agreed upon duty that is now being defined as a loss or damage to person or property;

  NOTE: The amended adopted in the Insurance Committee on April 5, 2006 changed the name of the insurance defined in the bill from "debt cancellation agreement and debt suspension agreement contractual liability insurance" to "contractual liability insurance for debt cancellation products." However, the change in the insurance name does not alleviate the OIR's concern expressed above.

- The potential risk of insolvency that could occur as result of the costs of performance associated with these agreements, voluntary foregoing the collection of a debt, is being shifted from the banking industry to Florida policyholders through potential FIGA assessments for unpaid claims against that insurer issuing the contractual "liability" coverage.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 5, 2006, the Insurance Committee heard the bill, adopted a strike-all amendment, and reported the bill favorably with a committee substitute. The amendment:

- Changed the definition of "debt cancellation agreement and debt suspension agreement contractual liability insurance " in the original bill text to "contractual liability insurance for debt cancellation products." Provided additional detail about the differences between the liability insurance created by the bill and debt cancellation agreements.

- Maintained sections 2 and 3 of the bill relating to the policy limits for credit life and debtor group life insurance.

- Amended the term of credit disability insurance from 10 years or 60 months to the term of the indebtedness.

The staff analysis was updated to reflect adoption of the strike-all amendment.

CHAMBER ACTION

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1 The Insurance Committee recommends the following:
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3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to insurance; creating s. 624.6086, F.S.;
7 defining the term "contractual liability insurance for
8 debt cancellation products"; describing debt cancellation
9 products; authorizing certain entities to offer debt
10 cancellation products under certain circumstances; ;
11 specifying such products as not constituting insurance;
12 amending ss. 627.553 and 627.679, F.S.; revising certain
13 limitations on certain amounts of life insurance on a
14 debtor; amending s. 627.681, F.S.; revising a limitation
15 on the term of credit disability insurance; providing an
16 effective date.
17
18 Be It Enacted by the Legislature of the State of Florida:
19
20 Section 1. Section 624.6086, Florida Statutes, is created
21 to read:
22 624.6086 Contractual liability insurance for debt
23 cancellation products; definition; exception.--

24 (1) The term "contractual liability insurance for debt
25 cancellation products" means insurance that a creditor may
26 purchase against the risk of financial loss from the use of debt
27 cancellation products with consumer loans and leases. For
28 purposes of this section, debt cancellation products, including,
29 but not limited to, debt cancellation contracts, debt suspension
30 agreements, and guaranteed asset protection contracts, are loan
31 and lease contract terms, or modifications to loan or lease
32 contracts, under which a creditor agrees to cancel or suspend
33 all or part of a customer's obligation to make payments upon the
34 occurrence of specified adverse events.
35 (2) Debt cancellation products may be offered by financial
36 institutions, as defined in s. 655.005(1)(h), pursuant to the
37 same terms and conditions as products offered by depository
38 institutions, as defined in 12 U.S.C. s. 1813(c), or federal
39 credit unions, as defined in 12 U.S.C. s. 1752(1), and such
40 products shall not constitute insurance for purposes of the
41 Florida Insurance Code.
42 Section 2. Subsection (3) of section 627.553, Florida
43 Statutes, is amended to read:
44 627.553 Debtor groups.--The lives of a group of
45 individuals may be insured under a policy issued to a creditor
46 or its parent holding company, or to a trustee or trustees or
47 agent designated by two or more creditors, which creditor,
48 holding company, affiliate, trustee or trustees, or agent shall
49 be deemed the policyholder, to insure debtors of the creditor or
50 creditors, subject to the following requirements:

51 (3) The amount of insurance on the life of any debtor
52 shall at no time exceed the amount owed by her or him which is
53 repayable in installments to the creditor ~~or $50,000, whichever~~
54 ~~is less, except that loans not exceeding 1 year's duration shall~~
55 ~~not be subject to such limits~~. ~~However, on such loans not~~
56 ~~exceeding 1 year's duration, the limit of coverage shall not~~
57 ~~exceed $50,000 with any one insurer.~~
58 Section 3. Paragraph (b) of subsection (1) of section
59 627.679, Florida Statutes, is amended to read:
60 627.679 Amount of insurance; disclosure.--
61 (1)
62 (b) The total amount of credit life insurance on the life
63 of any debtor with respect to any loan or loans covered in one
64 or more insurance policies shall at no time exceed the amount of
65 the indebtedness ~~$50,000 with any one creditor, except that~~
66 ~~loans not exceeding 1 year's duration shall not be subject to~~
67 ~~such limits, and on such loans not exceeding 1 year's duration,~~
68 ~~the limits of coverage shall not exceed $50,000 with any one~~
69 ~~insurer~~.
70 Section 4. Subsection (2) of section 627.681, Florida
71 Statutes, is amended to read:
72 627.681 Term and evidence of insurance.--
73 (2) The term of credit disability insurance on any debtor
74 insured under this section shall not exceed the term of
75 indebtedness ~~10 years, and for credit transactions that exceed~~
76 ~~60 months, coverage shall not exceed 60 monthly indemnities~~.
77 Section 5. This act shall take effect upon becoming a law.

HB 7263 / Ins. Comm.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7263 PCB IN 06-03 Motor Vehicle Insurance
SPONSOR(S): Insurance Committee
TIED BILLS: **IDEN./SIM. BILLS:** SB 2114

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Insurance Committee	14 Y, 4 N	Tinney	Cooper
1) Commerce Council		Tinney	Randle
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

All sections of law comprising the No-Fault/PIP laws are scheduled to repeal October 1, 2007 unless reenacted by the Legislature during its 2006 regular session. The bill makes the following major changes to the current No-Fault/PIP laws:

- Amends the law authorizing civil remedies against insurers for specified actions to require both a first and third party to give an auto insurer 60 days notice before filing a civil action, including allegations of bad faith.
- Increases PIP benefits by $10,000 specifically for catastrophic injuries sustained in a car crash if the injuries require treatment in an emergency room, trauma center, or as a hospital patient.
- Eliminates the application of a contingency risk multiplier to awards of attorney fees stemming from No-Fault/PIP claims.
- Amends provisions relating to a demand letter sent by an insured (or assignee of an insured) to an insurer by:
  1) subjecting an insurer to triple damages for engaging in the unfair trade practice of failing to pay valid claims until the insurer receives a pre-suit demand letter;
  2) authorizing the court to apply a multiplier to its award of attorney fees under the lodestar method when an unfair trade practice of denying claims has been established; and
  3) requiring the Attorney General to investigate and initiate actions against an insurer in these limited situations.
- Postpones the pending repeal of the No-Fault Law, from October 1, 2007 until October 1, 2012.

The bill creates law and makes other changes to existing law to:

- Require motorcyclists, aged 16 to 20, to purchase medical payments coverage and property damage liability coverage in the amount of $10,000 per coverage; and
- Amends various other laws relating to matters and criminal activities involving insurance fraud.

There is a fiscal impact to the private sector associated with implementing the bill. The bill currently does not create a fiscal impact to the public sector. See the Fiscal Analysis & Economic Impact section of the analysis for more detailed information.

The bill takes effect October 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Ensure Lower Taxes—An additional fine of $180 is added by the bill to the cost for a driver to reinstate his or her driver license following a conviction of specified crimes relating to motor vehicle insurance fraud.

Provide Limited Government—The bill maintains the basic premise of Florida's Motor Vehicle No-Fault Insurance Law by reenacting and amending several provisions relating to policyholder benefits and legal actions resulting from auto claims.

Safeguard Individual Liberty and **Promote Personal Responsibility**—Florida's laws still will require all registered drivers to purchase a basic level of personal injury protection (PIP) and property damage (PD) auto insurance to protect both the vehicle driver and other persons in the event of an auto accident. Under the bill, motorcyclists, aged 16 to 20 also will be required to purchase similar vehicle insurance coverage to pay for their own injuries and for damages caused to the property of others.

B. EFFECT OF PROPOSED CHANGES:

Background[1]

In 1971, Florida became the second state in the country to adopt a no-fault automobile insurance plan.[2] The no-fault reform was offered as a viable replacement for the tort system as a means to quickly and efficiently compensate injured parties in auto accidents regardless of fault. Several sections in the Florida Insurance Code comprise Florida's Motor Vehicle No-Fault Insurance Law.[3] All those sections of law are scheduled to repeal October 1, 2007 unless reenacted by the Legislature during its 2006 regular session, provided the reenactment takes effect for policies issued on or after October 1, 2007.[4]

Florida's Motor Vehicle No-Fault Insurance Law (Current Provisions, Mandatory and Optional Coverages, Tort Threshold, Financial Responsibility)

Under current law, motorists are required to purchase personal injury protection (PIP) and property damage (PD) liability coverages. The no-fault coverage, referred to as PIP, provides $10,000 of coverage for the following: payment of 80 percent of reasonable medical expenses, 60 percent for disability and lost wages, plus a $5,000 death benefit. These benefits cover bodily injury sustained in a motor vehicle accident, without regard to fault.[5] Personal injury protection covers the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in the insured motor vehicle, and persons struck by the insured motor vehicle.[6] This coverage also provides the policyholder with immunity from liability for economic damages (medical expenses) up to the $10,000 policy limits and for non-economic damages (pain and suffering) for most injuries.[7]

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[1] A detailed history of the No-Fault Law, its current provisions, and other similar information is available in *Review of Florida's No-Fault Automobile Insurance Law*; House Insurance Committee; February 2006; available at: http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2246&Session=2006&DocumentType=Reports&FileName=Review%20of%20FL%20auto%20ins%20law.pdf; viewed March 24, 2006.
[2] Chapter 71-252, Laws of Florida.
[3] The affected sections are: ss. 627.730, 627.731, 627.732, 627.733, 627.734, 627.736, 627.737, 627.739, 627.7401, 627.7403, and 627.7405, F.S. Insurers are authorized to provide, in all policies issued or renewed after October 1, 2006, that such policies may terminate on or after October 1, 2007.
[4] Chapter 2003-411, LOF, s. 19.
[5] Section 627.736(1), F.S., 2005.
[6] Id.
[7] Section 627.736(3), F.S., 2005.

Specifically, the immunity provision protects the insured from tort actions by others (and conversely, the insured may not bring suit to recover damages) for pain, suffering, mental anguish, and inconvenience arising out of the vehicle accident, except in the following cases:

1. significant and permanent loss of an important bodily function;
2. permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement;
3. significant and permanent scarring or disfigurement; or
4. death.

This is known as the "verbal threshold" which means that suits for pain and suffering may commence only if injuries meet these levels of seriousness.[8]

Current law also requires vehicle owners to obtain $10,000 in property damage (PD) liability coverage which pays for the physical damage expenses caused by the insured to third parties in the accident. Additionally, under Florida's Financial Responsibility law, motorists must provide proof of ability to pay monetary damages for bodily injury liability (BI) and PD liability after motor vehicle accidents or serious traffic violations. The minimum amounts of liability coverage are $10,000 in the event of injury to one person, $20,000 for injury to two or more persons, and $10,000 property damage, or $30,000 combined single limits.[9]

Many drivers purchase "optional" coverages in addition to mandatory insurance including bodily injury liability, uninsured motorist, collision, comprehensive, medical payments, towing, rental reimbursement and accidental death and dismemberment. Insurers may not require motorists to purchase any of these optional coverages.[10]

The Legislature has amended the No-Fault Law at least 50 times since the law was enacted in 1971, however, the law has not been reorganized during the 35 year period since its enactment.[11] Since the mid-1990s, lawmakers, insurers, and others have become aware that fraud and abuse are seen frequently in PIP claims. As recently as 2001 and 2003, the Legislature acted to curtail fraud in auto insurance claims.[12] However, according to insurers and investigators of the Division of Insurance Fraud of the Department of Financial Services (DFS), these reforms have not gone far enough in resolving the problems within the no-fault system which include fraud, abuse, inappropriate medical treatment, inflated claims, inadequate compensation to victims, increased premiums, and the proliferation of law suits.[13]

As a result of these concerns, in 2003 the Legislature repealed the Florida Motor Vehicle No-Fault Law, effective October 1, 2007, unless reenacted by the Legislature during the 2006 Regular Session and such reenactment takes effect for policies issued or renewed on or after October 1, 2006.[14] In preparation for the pending repeal of the No-Fault Law, both the Senate and the House of Representatives directed their respective standing committees having jurisdiction over insurance matters to review the laws before their scheduled repeal.

In the House, the Insurance Committee completed the review, including dedicating all or most of three committee meetings to hearing from parties interested in the future of the No-Fault Law. A report of the

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[8] Section 627.737, F.S., 2005.
[9] Section 324.021(7), F.S., 2005.
[10] For a discussion of the optional coverages available to drivers in Florida, *see Review of Florida's No-Fault Automobile Insurance Law*; House Insurance Committee; February 2006; pp. 17-19; available at: http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2246&Session=2006&DocumentType=Reports&FileName=Review%20of%20FL%20auto%20ins%20law.pdf; viewed March 24, 2006.
[11] *Id* at p. 8.
[12] *See* chapter 2001-271, LOF and chapter 2003-411, LOF.
[13] *See supra*, Note 9; pp. 39-52.
[14] Chapter 2003-411, LOF, s. 19.

committee's findings was published in February 2006.[15] Similarly, the Senate Banking and Insurance Committee undertook a review of the laws, produced a report on the issue, and spent several committee meetings also hearing from stakeholders interested in the future of the No-Fault laws.[16]

Both the House and Senate substantive committees with oversight of insurance issues found in their reviews of the No-Fault laws that fraud and abuse continue to appear in auto claims for PIP services and treatment. As a result, both committees recommended legislative consideration of committee bills to reenact the No-Fault laws while further attempting to curtail fraud in auto claims.

Current Law and Changes Proposed by the Bill

Required Security

Section 627.733, F.S., specifies that the owner or registrant of a motor vehicle must purchase the required PIP and PD coverages required by s. 324.021(7), F.S. as the security required for all licensed drivers and registered vehicles. That law, a part of the state's Financial Responsibility law, requires motorists to provide proof of ability to pay monetary damages for bodily injury liability (BI) and PD liability following involvement in or conviction of charges resulting from motor vehicle accidents or serious traffic violations. The minimum amounts of liability coverage are $10,000 in the event of injury to one person, $20,000 for injury to two or more persons, and $10,000 property damage, or $30,000 combined single limits. The No-Fault law requires a driver to purchase PIP coverage of $10,000 per person.

Motorcycle Insurance Laws[17]

In its review of Florida's No-Fault/PIP laws for motor vehicles, the House Insurance Committee also considered whether it might be appropriate to require motorcyclists to carry mandatory insurance for first-party medical (i.e., medical payments or "Med Pay" coverage) and PD coverage. As a result, staff researched other states and their respective insurance requirements for motorcycles in order to compare requirements throughout the country.

Most states have required automobile drivers to demonstrate financial responsibility for damages and injuries caused with their motor vehicles since the 1940s and 1950s. Many states currently also require some form of compulsory liability coverage for motorcycle drivers, as well, although the type of coverage or insurance for motorcycles varies widely among the states.

Florida, New Hampshire, Tennessee, and Wisconsin require drivers to meet a preset financial requirement instead of requiring insurance. Tennessee and Wisconsin, for example, require drivers to be financially responsible for $25,000 in personal injury damage for one person, or $50,000 for injuries sustained by a driver and any other passengers. It also requires the driver to show that he or she can pay $10,000 for the other person's property damage. Most other states require insurance coverage in a similar fashion.

In addition to the compulsory liability requirements, no-fault states (except Florida), require motorcyclists to carry personal injury protection (PIP) insurance. These states include Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania and Utah.

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[15] *See Review of Florida's No-Fault Automobile Insurance Law*; House Insurance Committee; February 2006; available at: http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2246&Session=2006&DocumentType=Reports&FileName=Review%20of%20FL%20auto%20ins%20law.pdf; viewed March 24, 2006.

[16] The Senate Committee on Banking and Insurance issued a report of its review of the No-Fault Laws entitled *Florida's Motor Vehicle No-Fault Law*; Report #2006-102; November 2005; available at http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-102bilong.pdf; viewed March 24, 2006.

[17] *See supra*, Note 9; pp. 28-32.

Florida's Motorcycle Insurance Law

Current law in Florida does not require registered motorcycle drivers to carry PIP and property damage coverage. The Department of Highway Safety and Motor Vehicles (DHSMV) reports that Florida is one of only four states including New Hampshire, Tennessee, and Wisconsin not to require minimum property damage and bodily injury insurance coverage for licensed motorcyclists.

The law (s. 316.211, F.S.), governs the use of motorcycle equipment in Florida. Current law generally does not require registered motorcycles and drivers licensed to drive motorcycles to carry PIP and property damage coverage. The same law outlines the conditions under which a motorcyclist in Florida must carry insurance. That law authorizes motorcyclists over the age of 21 to ride a motorcycle without the required headgear (helmet) if the licensed driver has $10,000 in medical benefits for injuries resulting from a motorcycle crash.

It is an important distinction that the Florida law requiring a motorcyclist to carry insurance specifies that the motorcyclist be ". . . covered by an insurance policy providing for at least $10,000 in medical benefits for injuries incurred as a result of a crash . . . ." This imperative for "$10,000 in medical benefits" does not require a motorcyclist to carry PIP or property damage coverage, however. DHSMV indicates that a motorcyclist who is covered by a general health insurance policy or health maintenance organization meets the legal requirement for having $10,000 in medical benefits.

Staff of DHSMV reports that an estimated 95 percent of licensed motorcyclists in Florida meet the requirement of having at least $10,000 in medical coverage.[18] The department further notes, however, that most serious injuries resulting from a motorcycle crash in which treatment is provided to the victim in an emergency room, cost more than $10,000.[19]

Changes Proposed by the Bill Relating to Motorcycles

The bill requires motorcyclists, aged 16 to 20, to purchase medical payments coverage and PD coverage in the amount of $10,000 per coverage. This requirement is substantially similar to current insurance requirements for licensed drivers and registered motor vehicles, however, the required motorcycle coverage is not no-fault coverage. Provisions regarding motorcycle insurance coverage are created in a newly-created section of law: s. 627.7441, F.S.

Civil Remedies Against Insurers

Section 624.155, F.S., authorizes any person to bring an action against an insurer for a violation of enumerated sections of law, including, for example, specified violations of the Unfair Methods of Competition and Unfair or Deceptive Practices in s. 626.9541, F.S. The law also authorizes such civil actions against an insurer for not attempting in good faith to settle a claim as provided by the policy; failing to settle claims promptly (except for liability claims), once an obligation to settle the claim has become reasonably clear, in order to influence settlements pending under other portions of the policy; and for other similar actions.

The bill amends the law authorizing civil remedies as the provisions relate to civil actions, including allegations of bad faith against an auto insurer. As proposed by the bill, both a first party and a third party are required to give notice of the intent to sue an auto insurer 60 days before initiating such an action.

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[18] *See supra*, Note 9; p. 30.
[19] *Id.*

Section 627.736(1), (2), and (3): Required Personal Injury Benefits

The existing benefits available to policyholders under PIP remain unchanged, however, a new benefit, of $10,000 for catastrophic medical care, is added. The bill provides an additional $10,000 benefit for emergency services and care if the services and care are rendered within the first 48 hours after a car crash.

The term "emergency services and care" is defined by s. 395.002(10), F.S., to mean medical screening, examination, and evaluation by a physician or other authorized personnel to determine whether an emergency medical condition exists and, if it does, the care, treatment, or surgery by a physician to eliminate the emergency medical condition.

The additional benefit for emergency care and services is available to the named insured; his or her parents and stepparents; his or her spouse and children, whether natural, adopted, or stepchildren, all of whom must reside in the home of the insured. Ambulance transportation and care rendered in the ambulance also are covered by the additional benefit. Charges due for in-patient hospital admissions also are covered by the additional benefit for emergency care and services if the admission occurred following treatment in an emergency department or trauma center.

Under the bill, all charges relating to emergency services and care, including inpatient services, are covered by the additional emergency care benefit. As a result, an accident victim has $20,000 in benefits available for injuries resulting from an auto accident, if treatment is initiated in an emergency room or trauma center within 48 hours of the auto accident. If a policyholder is involved in a minor accident and does not seek emergency care and treatment within 48 hours, the current benefit of $10,000 for medical care and services remains available to pay for necessary care and services.

Demand Letter

Under current law in s. 627.736(11), F.S., an insured or the assignee of an insured is required to notify an insurer at least 15 days before initiating a legal action to collect PIP benefits. The law authorizes an insurer to preclude the legal action by paying the outstanding bill, plus interest, and a penalty of 10 percent of the outstanding amount, not to exceed $250, within 15 days. The same law states it is an unfair trade practice for an insurer to make a general business practice of postponing payment of valid bills until receipt of a demand letter.

Changes Proposed by the Bill

The bill amends current law to require an insurer to pay three times the amount of benefits due or recovered as a result of establishing an insurer's general business practice of failing to pay valid claims until receipt of a demand letter. The law also is amended by the bill to authorize a judge to add a multiplier to the award of attorney fees determined by the lodestar method.

The Attorney General is required by the bill to investigate and initiate legal actions if he or she determines an insurer regularly postpones paying valid claims and bills until the insurer is notified via a demand letter of pending legal action to settle the disputed bill or claim. The Attorney General may administer oaths and subpoena records and witnesses as part of an investigation of an insurer's having committed an unfair trade practice of delaying the payment of valid claims and bills.

Application of a Contingency Risk Multiplier; Rewards Available from Insurers

Section 627.736(15), F.S., pertains to attorney's fees under the No-Fault/PIP laws. The bill eliminates the application of a contingency risk multiplier to awards of attorney fees in such cases.

Miscellaneous Provisions Regarding No-Fault/PIP Coverage

The bill postpones the pending repeal of the No-Fault Law, currently scheduled for October 1, 2007, until October 1, 2012. This deletion is made by amendment to section 19 of chapter 2003-411, LOF.

Section 627.7401, F.S., relates to the rights of policyholders/insureds and the notification of these rights. Current law requires the Financial Services Commission to adopt a standard form, to be used by motor vehicle insurers, to notify policyholders of their legal rights under the No-Fault Law. Provisions are added by the bill to require the Financial Services Commission to adopt a form to notify motor vehicle insurance policyholders of the prohibition against soliciting a person injured in an auto accident to file a PIP claim or to initiate a legal action in tort against an insurer. The commission also is required to include notice in its form of the rewards available to consumers for reporting specified information to the Division of Insurance Fraud.

Criminal Matters Relating to No-Fault/PIP Claims

In addition to reenacting and modifying the No-Fault laws, the bill also amends various other laws relating to matters and crimes involving motor vehicle insurance. Under current law, s. 316.068, F.S., describes the form to be used by law enforcement agencies for reporting car crashes to DHSMV. Although the crash report form provides a description of the information that must be included, the law does not currently specify the information to be included on the form. Under the bill, the following information is specified and required to be included on the form:

- date, time, and location of the crash;
- description of the vehicles involved;
- names and addresses of all parties to the crash;
- names and addresses of all drivers and passengers involved in the crash;
- name, badge number, and employing agency of the officer investigating the crash; and
- names of the insurers for the parties involved in the crash.

The bill further states that if a person is not listed on the crash report as a passenger in a vehicle involved in the accident, such absence becomes a rebuttable presumption that the person was not in the crash. This requirement for passengers to be listed on the crash report by the investigating officer is designed to inhibit the ability of a vehicle owner to add the names of passengers subsequently. The amendment of a crash report after it is filed by adding the names of passengers is one method of committing fraud related to auto insurance claims that has been identified by the Division of Insurance Fraud.

Section 322.21, F.S., establishes the fees DHSMV may charge for the issuance, renewal, extension, and reinstatement of driver licenses. The bill imposes an additional fee of $180 for reinstating a driver license following suspension for conviction of making a false or fraudulent insurance claim. Similarly, a fee of $180 is authorized for reinstating a driver license following a conviction for brokering patients as part of a fraudulent health or motor vehicle insurance claim. The bill also requires DHSMV to revoke the driver license of any person convicted of making a false or fraudulent insurance claim or convicted of brokering patients. The provisions requiring revocation of a driver license are contained in s. 322.26, F.S.

Section 817.2361, F.S., relates to false and fraudulent insurance cards. Current law requires a motor vehicle owner to present his or her insurance card annually at the time a vehicle registration is renewed. Under the bill, the reference to an "insurance card" is changed to refer to "proof of insurance" instead. This change clarifies that it is a crime to present false information relating to auto insurance coverage, whether the information is printed on a card or is a counterfeit insurance policy, or other false proof of insurance coverage.

C. SECTION DIRECTORY:

Section 1 amends s. 624.155, F.S., relating to civil remedies against insurers.

Section 2 amends s. 627.736, F.S., which outlines the benefits insurers are required to offer holders of PIP policies.

Section 3 amends s. 627.7401, F.S., regarding the notice an insurer is required to mail to each no-fault/PIP claimant.

Section 4 creates s. 627.7441, F.S., to require motorcyclists aged 16-20 to purchase mandatory motor vehicle insurance coverage.

Section 5 amends s. 316.068, F.S., relating to vehicle crash report forms.

Section 6 amends s. 322.21, F.S., relating to the Department of Highway Safety and Motor Vehicles (DHSMV) and its collections of fees for issuing and reinstating driver licenses.

Section 7 amends s. 322.26, F.S., relating to the requirement for DHSMV to revoke driver licenses under specified conditions.

Section 8 amends s. 817.234, F.S., relating to filing/making false or fraudulent insurance claims.

Section 9 amends s. 817.2361, F.S., relating to false and fraudulent motor vehicle insurance cards, i.e., proof of auto coverage.

Section 10 amends section 19 of chapter 2003-411, Laws of Florida, to postpone the pending repeal date of the Florida Motor Vehicle No-Fault Law from October 1, 2007, to October 1, 2012.

Section 11 provides an effective date of October 1, 2006 and states the law applies to auto claims arising after October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill authorizes an additional charge of $180 charge to reinstate a driver license following conviction for filing false or fraudulent motor vehicle insurance claims. The additional funds are required by the bill to be deposited into the Highway Safety Operating Trust Fund. The Department of Highway Safety and Motor Vehicles (DHSMV) reports that in 2005, approximately 50 drivers sought reinstatement of their driver licenses following a conviction for criminal activities related to insurance claims.

   Given the recent staff increases in the Division of Insurance Fraud, along with the addition of state attorneys to prosecute cases involving insurance fraud in the Miami-Dade County judicial circuit, it is likely there will more successful prosecutions involving insurance fraud in the future. It is not possible to estimate the number of convictions, however, or the subsequent number of drivers who will pay the fine to reinstate their driver licenses.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires insurers to notify PIP claimants regarding rewards available from DFS for reporting suspected motor vehicle insurance fraud and of the types of activities that may be fraudulent. The Financial Services Commission is required to adopt a standard form for auto insurers to use to fulfill this requirement. Insurers likely will incur some costs to reproduce the form following its adoption by the Financial Services Commission, however, the costs should be minimal.

Under the bill, PIP benefits are increased by the creation of an additional benefit of $10,000 for emergency services and care within 48 hours of a car crash. Currently, auto insurers do not charge a premium for this new benefit. This means rate filings by insurers following passage of the bill likely will reflect increases coinciding with the new benefit. It is not possible to estimate the magnitude of the increase, however.

An additional benefit of $10,000 is provided by the bill for exclusive use in hospital emergency rooms, in-patient departments, and in trauma centers. Similarly, physicians who treat patients in ERs should be paid at a higher rate for treating PIP claimants who are seriously injured in auto accidents. As a result of the bill, a hospital could be reimbursed a maximum of $20,000 for treating an insured accident victim. This is a $10,000 increase over the maximum available for hospitals and trauma centers under the current No-Fault Law.

The bill requires owners and registrants of motorcycles, between the ages of 16 and 20, to purchase insurance coverage for medical payments in the amount of $10,000 and property damage in the amount of $10,000. This is not a requirement for PIP coverage and the required coverage is not no-fault coverage.

In order to examine the possible cost for such motorcycle coverage, both GEICO and Progressive were asked to provide cost information for three different motorcycle owners, assuming each person lives in Lakeland/Polk County, Miami-Dade County, and in Orlando/Orange County. These two insurers were asked for information because each currently sells motorcycle coverage as a stand-alone policy. Many other insurers provide motorcycle coverage as a part of an auto policy. Only Progressive provided the cost data requested. The chart that follows shows the **annual premium** for each type of coverage for each rider in each locale.

Motorcycle Insurance Coverage Prices

	Lakeland		Miami-Dade		Orlando	
	Med. Pay.	BI/PD	Med. Pay.	BI/PD	Med. Pay.	BI/PD
#1	$2,884	$1,011	$3,665	$1,285	$3,261	$1,144
#2	$2,271	$731	$2,892	$932	$2,271	$731
#3*	$2,183	$1,309	$3,535	$2,425	$2,480	$1,488

NOTE: Progressive does not sell property damage (PD) liability coverage for motorcycles without bodily injury (BI) liability coverage. The prices for BI/PD liability coverage provide $10,000 in coverage for injuries caused by the insured to another person; up to $20,000 in BI coverage if more than one person

is injured, and $10,000 in property damage coverage, i.e., 10/20/10 coverage. All of the price quotes in the chart assume each motorcycle is 2 years old and each insured has average credit.

Person #1 is a single male, age 19. He has received two traffic citations, one for reckless driving and one for speeding. His motorcycle is a Yamaha YZFR1 sport bike with an engine size of 1,000 cubic centimenters.

Person #2 is a single female, age 16. She has a clean driving record, is an honor student who has completed a driver education class, and she qualifies for all available premium discounts. Her motorcycle is a Honda CBR 600 RR sport bike with a 600 c.c. engine.

*Person #3 is a single male, **age 21**. He has one speeding ticket and his motorcycle is a Harley Davidson Dyna Wide Glide with a 1,450 c.c. engine. **NOTE**: Person #3's information is for comparison purposes as only riders aged 16-20 are required by the bill to purchase insurance coverage for motorcycles.

D. FISCAL COMMENTS:

The bill does not currently contain enforcement provisions involving local or state agencies to ensure young motorcyclists purchase the insurance coverage required by the bill. If the sponsor adds such enforcement provisions, the Department of Highway Safety and Motor Vehicles may incur some costs, as yet indeterminable, to implement the enforcement provisions.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires the Financial Services Commission to adopt rules to implement the requirement in the bill for specified motorcyclists to purchase medical payments and property damage vehicle insurance coverage. The commission also is required to adopt a form to be used by insurers to notify PIP claimants of rewards available for reporting suspected fraudulent auto insurance claims and of the types of activities relating to auto claims that may be fraudulent in nature.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

At its March 30, 2006 meeting, the Insurance Committee adopted a strike-all amendment to the PIP PCB. The strike-all amendment deleted most provisions of the original draft of the PCB and added some new provisions. The new provisions include:

- Authorizing an insured or the assignee of an insured to collect three times the amount owed as a penalty if the insured proves the insurer engages in the unfair trade practice of failing to pay valid claims until the insurer receives a demand letter as notification of impending legal action.

- Authorizing the application of a multiplier to an award of attorney fees relating to a legal action proving an insurer engages in the unfair trade practice of failing to pay valid claims until the insurer receives a demand letter notifying the insurer of impending legal action.
- Postponing, from October 1, 2007 until October 1, 2012, the pending repeal of the No-Fault/PIP laws.

The strike-all amendment deleted the following provisions from the draft PCB:

- Increases in PIP benefits by 1) raising disability/lost wages from 60 percent to 70 percent; 2) eliminating deductibles and co-payments; and 3) increasing the death benefit from $5,000 to $7,000;
- Clarification that workers' compensation benefits are primary over PIP benefits;
- Clarifications and updates to billing and coding requirements for PIP benefits;
- Requirement for health care and service providers to maintain patient records for 5 years after the last patient contact;
- Requirement for service providers who render non-emergency services to send a statement of charges to the insurer within 35 days of initiating treatment.
- Precluding licensed chiropractors from determining permanent impairment to a claimant from an auto accident.
- Authorization for charges for emergency care and services to be sent to an insurer within 75 days after treatment.
- Providing new procedures for use in determining the validity and priority of one or more assignment of benefits.
- Requirement for an insured to request an insurer to reserve benefits for lost wages in writing.
- Determination of venue for a PIP lawsuit as the jurisdiction where the injured party resides or where the accident occurred, or in the judicial circuit where services were provided if an insured has assigned his or her benefits to a service provider.
- Increase in the notice requirements of a demand letter from 15 to 21 days.
- Requirement for the medical records of an injured person be available at the provider's principal place of business within 15 working days after receipt of an insurer request to review the records.
- Clarification as to which persons are subject to an examination under oath and requirement for the insurer to pay $175 per hour for a specified licensed health care provider to attend such an examination.
- Requirement for notice to an insurer of the existence of a claim within 1 year of the accident.
- Specification for procedures relating to independent medical examinations (IMEs).

This analysis has been updated to reflect the changes made to the PCB by the strike-all amendment.

1 A bill to be entitled
2 An act relating to motor vehicle insurance; amending s.
3 624.155, F.S.; providing notice requirements for causes of
4 action against motor vehicle insurers; amending s.
5 627.736, F.S.; providing for specified damages and
6 attorney's fees in cases involving certain unfair trade
7 practices by insurers; requiring investigations by the
8 Attorney General; providing for availability of additional
9 personal injury protection benefits for specified
10 emergency services and care; providing limitations on the
11 increased benefit; specifying application of certain
12 attorney fee provisions to certain disputes; prohibiting
13 application of a contingency risk multiplier applicable to
14 awards of attorney's fees in certain disputes; amending s.
15 627.7401, F.S.; specifying additional information
16 requirements for notification of an insured's right to
17 receive personal injury protection benefits under the
18 Florida Motor Vehicle No-Fault Law relating to anti-fraud
19 rewards; creating s. 627.7441, F.S.; requiring certain
20 owners and registrants of motorcycles to maintain property
21 damage and medical payments benefits coverage; authorizing
22 alternative methods for providing the required security;
23 authorizing insurers to offer various levels of
24 deductibles for the medical payments coverage; requiring
25 premium discounts at different deductible levels; making
26 an owner or registrant personally responsible for damages
27 for failure to maintain the required security; requiring
28 the Financial Services Commission to adopt rules; amending

29 s. 316.068, F.S.; specifying additional information to be
30 included in a crash report; creating a rebuttable
31 presumption relating to the existence of passengers in
32 vehicles involved in a crash; amending s. 322.21, F.S.;
33 providing an additional fee for certain offenses relating
34 to insurance crimes; requiring the Department of Highway
35 Safety and Motor Vehicles to collect and deposit the fee
36 into the Highway Safety Operating Trust Fund; amending s.
37 322.26, F.S.; providing an additional circumstance
38 relating to insurance crimes for mandatory revocation of a
39 person's driver's license; amending s. 817.234, F.S.;
40 prohibiting scheming to create documentation of a motor
41 vehicle crash that did not occur; providing a criminal
42 penalty; amending s. 817.2361, F.S.; providing that
43 creating, marketing, or presenting fraudulent proof of
44 motor vehicle insurance is a felony of the third degree;
45 amending section 19, ch. 2003, Laws of Florida; extending
46 the repeal of the Florida Motor Vehicle No-Fault Law;
47 providing an effective date.
48
49 Be It Enacted by the Legislature of the State of Florida:
50
51 Section 1. Subsection (10) is added to section 624.155,
52 Florida Statutes, to read:
53 624.155 Civil remedy.--
54 (10) Notwithstanding the provisions of subsection (8),
55 before a person may file any statutory or common law cause of
56 action arising out of a violation of a provision enumerated in

57 subsection (1) or subsection (2) or any other cause of action
58 alleging that a motor vehicle insurer did not act in good faith
59 or fairly and honestly toward an insured of the insurer or with
60 due regard for the insured's interests, the notice requirements
61 of paragraph (3)(a) must be met. These requirements apply to a
62 claim made by a first party or third party.
63 Section 2. Paragraph (f) of subsection (11) of section
64 627.736, Florida Statutes, is amended, and subsections (14) and
65 (15) are added to that section, to read:
66 627.736 Required personal injury protection benefits;
67 exclusions; priority; claims.--
68 (11) DEMAND LETTER.--
69 (f) Any insurer making a general business practice of not
70 paying valid claims until receipt of the notice required by this
71 subsection is engaging in an unfair trade practice under the
72 insurance code and shall be liable for damages in the amount of
73 three times the amount of benefits due or recovered resulting
74 from failing to pay the claims until receiving the demand letter
75 notices under this subsection. Any attorney who successfully
76 prosecutes an action based upon an insurer's general business
77 practice of not paying valid claims until receipt of the notice
78 required by this subsection may be awarded a lodestar multiplier
79 at the time that the court awards attorney's fees. The Attorney
80 General shall investigate and initiate actions for any violation
81 of this paragraph. In carrying out the duties and
82 responsibilities under this paragraph, the Attorney General may:
83 1. Administer oaths and affirmations.
84 2. Subpoena witnesses or materials.

85 3. Collect evidence for possible use in civil or criminal
86 judicial proceedings.
87 4. Request and receive the assistance of any state
88 attorney or law enforcement agency in the investigation and
89 prosecution of any violation of this paragraph.
90 5. Seek any civil remedy provided by law.
91 (14) EMERGENCY SERVICES AND CARE.--In addition to the
92 medical benefits contained in paragraph (1)(a), additional
93 benefits of up to $10,000 are available for emergency services
94 and care as defined in s. 395.002(10) or inpatient services,
95 provided in a hospital and by physicians in an emergency
96 department or trauma center or inpatient departments when such
97 services are continually rendered as a result of an admission
98 through the emergency department or trauma center. The
99 additional benefit for emergency services and care must be
100 rendered to the named insured, the named insured's spouse,
101 parents by blood or marriage, stepparents and stepchildren, and
102 children, natural or adopted, who reside in the same household.
103 Only emergency services and care, necessary inpatient services
104 following admission through the emergency department or trauma
105 center, or transport and treatment rendered by an ambulance
106 provider licensed under part III of chapter 401 may be paid from
107 the additional benefit. The additional benefit may only be used
108 when such emergency services and care are initiated or rendered
109 within 48 hours after the motor vehicle accident. All such bills
110 shall be submitted on a UB 92 or a CMS 1500 form or their
111 approved successor forms.

112 (15) ATTORNEY'S FEES.--With respect to any dispute under
113 ss. 627.730-627.7405 between the insured and the insurer or
114 between an assignee of an insured's rights and the insurer, s.
115 627.428 shall apply. A contingency risk multiplier may not be
116 applied to any attorney's fee award in any dispute under ss.
117 627.730-627.7405, except as permitted in paragraph (11)(f).
118 Section 3. Subsection (1) of section 627.7401, Florida
119 Statutes, is amended to read:
120 627.7401 Notification of insured's rights.--
121 (1) The commission, by rule, shall adopt a form for the
122 notification of insureds of their right to receive personal
123 injury protection benefits under the Florida Motor Vehicle No-
124 Fault Law. Such notice shall:
125 (a) Include a description of the benefits provided by
126 personal injury protection, including, but not limited to, the
127 specific types of services for which medical benefits are paid,
128 disability benefits, death benefits, significant exclusions from
129 and limitations on personal injury protection benefits, when
130 payments are due, how benefits are coordinated with other
131 insurance benefits that the insured may have, penalties and
132 interest that may be imposed on insurers for failure to make
133 timely payments of benefits, and rights of parties regarding
134 disputes as to benefits.
135 (b) Notify the insured that:
136 1. Pursuant to s. 626.9892, the Department of Financial
137 Services may pay rewards of up to $25,000 to persons providing
138 information leading to the arrest and conviction of persons
139 committing crimes investigated by the Division of Insurance

140 Fraud arising from violations of s. 440.105, s. 624.15, s.
141 626.9541, s. 626.989, or s. 817.234.
142 2. Solicitation of a person injured in a motor vehicle
143 crash for purposes of filing personal injury protection or tort
144 claims could be a violation of s. 817.234, s. 817.505, or the
145 rules regulating The Florida Bar and should be immediately
146 reported to the Division of Insurance Fraud if such conduct has
147 taken place.
148 Section 4. Section 627.7441, Florida Statutes, is created
149 to read:
150 627.7441 Motorcycles; requirement for insurance
151 coverage.--
152 (1)(a) Every owner or registrant of a motorcycle as
153 defined in s. 316.003 who is at least age 16 but younger than
154 age 21, must maintain security as follows:
155 1. Property damage coverage as required by s. 324.022.
156 2.a. An insurance policy delivered or issued for delivery
157 in this state by an authorized or eligible motor vehicle
158 liability insurer. The required insurance coverage shall provide
159 medical payments benefits of $10,000. Any policy of insurance
160 represented or sold as providing the security required under
161 this section shall be deemed to provide insurance for the
162 payment of the required benefits; or
163 b. Proof of financial responsibility pursuant to s.
164 324.031(2), (3), or (4) and approved by the Department of
165 Highway Safety and Motor Vehicles as affording security
166 equivalent to that afforded by a policy of insurance or by self-
167 insuring as authorized by s. 324.171. The person filing such

168 security has all of the obligations and rights of an insurer.
169 (b) The named insured may elect a deductible to apply to
170 the named insured alone or to the named insured and dependent
171 relatives residing in the same household but may not elect a
172 deductible or modified coverage to apply to any other person
173 covered under the policy.
174 (c) Upon the renewal of an existing policy, an insurer
175 shall offer to each applicant and to each policyholder
176 deductibles in amounts of $250, $500, and $1,000. The deductible
177 amount must be applied to 100 percent of the expenses and losses
178 described in this section. After the deductible is met, each
179 insured is eligible to receive up to $10,000 in total benefits
180 as provided by the policy.
181 (d) A named insured may not be prevented from electing a
182 deductible under paragraph (b). Each election made by the named
183 insured under this section shall result in an appropriate
184 reduction of premium associated with that election.
185 (2) An owner of a motor vehicle with respect to which
186 security is required by this section who fails to have such
187 security in effect at the time of an accident is personally
188 liable for the payment of benefits under this section. With
189 respect to such benefits, such an owner has all of the rights
190 and obligations of an insurer.
191 (3) The Financial Services Commission shall adopt rules
192 pursuant to ss. 120.536(1) and 120.54 to implement this section.
193 Section 5. Subsection (2) of section 316.068, Florida
194 Statutes, is amended to read:
195 316.068 Crash report forms.--

196 (2) Every crash report required to be made in writing must
197 be made on the appropriate form approved by the department and
198 must contain all the information required in the report,
199 including ~~therein~~:
200 (a) The date, time, and location of the crash.
201 (b) A description of the vehicles involved.
202 (c) The names and addresses of the parties involved.
203 (d) The names and addresses of all drivers and passengers
204 in the vehicles involved.
205 (e) The names and addresses of witnesses.
206 (f) The name, badge number, and law enforcement agency of
207 the officer investigating the crash.
208 (g) The names of the insurance companies for the
209 respective parties involved in the crash,
210
211 unless not available. The absence of information in such written
212 crash reports regarding the existence of passengers in the
213 vehicles involved in the crash constitutes a rebuttable
214 presumption that no such passengers were involved in the
215 reported crash. Notwithstanding any other provisions of this
216 section, a crash report produced electronically by a law
217 enforcement officer must, at a minimum, contain the same
218 information as is called for on those forms approved by the
219 department.
220 Section 6. Subsection (8) of section 322.21, Florida
221 Statutes, is amended to read:
222 322.21 License fees; procedure for handling and collecting
223 fees.--

224 (8) Any person who applies for reinstatement following the
225 suspension or revocation of the person's driver's license shall
226 pay a service fee of $35 following a suspension, and $60
227 following a revocation, which is in addition to the fee for a
228 license. Any person who applies for reinstatement of a
229 commercial driver's license following the disqualification of
230 the person's privilege to operate a commercial motor vehicle
231 shall pay a service fee of $60, which is in addition to the fee
232 for a license. The department shall collect all of these fees at
233 the time of reinstatement. The department shall issue proper
234 receipts for such fees and shall promptly transmit all funds
235 received by it as follows:
236 (a) Of the $35 fee received from a licensee for
237 reinstatement following a suspension, the department shall
238 deposit $15 in the General Revenue Fund and $20 in the Highway
239 Safety Operating Trust Fund.
240 (b) Of the $60 fee received from a licensee for
241 reinstatement following a revocation or disqualification, the
242 department shall deposit $35 in the General Revenue Fund and $25
243 in the Highway Safety Operating Trust Fund.
244
245 If the revocation or suspension of the driver's license was for
246 a violation of s. 316.193, or for refusal to submit to a lawful
247 breath, blood, or urine test, an additional fee of $115 must be
248 charged. However, only one $115 fee may be collected from one
249 person convicted of violations arising out of the same incident.
250 The department shall collect the $115 fee and deposit the fee
251 into the Highway Safety Operating Trust Fund at the time of

252 reinstatement of the person's driver's license, but the fee may
253 not be collected if the suspension or revocation is overturned.
254 If the revocation or suspension of the driver's license was for
255 a conviction for a violation of s. 817.234(8) or (9), an
256 additional fee of $180 is imposed for each such offense. The
257 department shall collect and deposit the additional fee into the
258 Highway Safety Operating Trust Fund at the time of reinstatement
259 of the person's driver's license.
260 Section 7. Subsection (9) is added to section 322.26,
261 Florida Statutes, to read:
262 322.26 Mandatory revocation of license by department.--The
263 department shall forthwith revoke the license or driving
264 privilege of any person upon receiving a record of such person's
265 conviction of any of the following offenses:
266 (9) Conviction in any court having jurisdiction over
267 offenses committed under s. 817.234(8) or (9).
268 Section 8. Subsection (9) of section 817.234, Florida
269 Statutes, is amended to read:
270 817.234 False and fraudulent insurance claims.--
271 (9) A person may not organize, plan, or knowingly
272 participate in an intentional motor vehicle crash or a scheme to
273 create documentation of a motor vehicle crash that did not occur
274 for the purpose of making motor vehicle tort claims or claims
275 for personal injury protection benefits as required by s.
276 627.736. Any person who violates this subsection commits a
277 felony of the second degree, punishable as provided in s.
278 775.082, s. 775.083, or s. 775.084. A person who is convicted of

279 a violation of this subsection shall be sentenced to a minimum
280 term of imprisonment of 2 years.
281 Section 9. Section 817.2361, Florida Statutes, is amended
282 to read:
283 817.2361 False or fraudulent proof of motor vehicle
284 insurance ~~card~~.--Any person who, with intent to deceive any
285 other person, creates, markets, or presents a false or
286 fraudulent proof of motor vehicle insurance ~~card~~ commits a
287 felony of the third degree, punishable as provided in s.
288 775.082, s. 775.083, or s. 775.084.
289 Section 10. Section 19 of chapter 2003-411, 2003 Laws of
290 Florida, is amended to read:
291 Section 19. (1) Effective October 1, 2012 ~~2007~~, sections
292 627.730, 627.731, 627.732, 627.733, 627.734, 627.736, 627.737,
293 627.739, 627.7401, 627.7403, and 627.7405, Florida Statutes,
294 constituting the Florida Motor Vehicle No-Fault Law, are
295 repealed, unless reenacted by the Legislature during the 2011
296 ~~2006~~ Regular Session and such reenactment becomes law to take
297 effect for policies issued or renewed on or after October 1,
298 2011 ~~2006~~.
299 (2) Insurers are authorized to provide, in all policies
300 issued or renewed after October 1, 2011 ~~2006~~, that such policies
301 may terminate on or after October 1, 2012 ~~2007~~, as provided in
302 subsection (1).
303 Section 11. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 45 CS False or Misleading Electronic Mail
SPONSOR(S): Porth
TIED BILLS: **IDEN./SIM. BILLS:** SB 80

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Utilities & Telecommunications Committee	12 Y, 1 N, w/CS	Cater	Holt
2) Criminal Justice Committee	7 Y, 0 N	Ferguson	Kramer
3) Criminal Justice Appropriations Committee	6 Y, 0 N	Sneed	DeBeaugrine
4) Commerce Council		Cater	Randle
5)			

SUMMARY ANALYSIS

HB 45 CS amends the Electronic Mail Communications Act and creates criminal penalties for sending unsolicited false or misleading commercial electronic mail messages. In addition, the bill creates the "Anti-Phishing Act," prohibiting the acquisition and fraudulent use of a Florida resident's personal identifying information through the use of a website or e-mail.

The bill requires that any state or local agency, as defined in s. 119.011, F.S., or legislative entity that operates a website and uses electronic mail to post the following statement in a conspicuous location on its website:

> *"Under Florida law, e-mail addresses are public records. If you do not want your e-mail address released in response to a public-records request, do not send electronic mail to this entity. Instead, contact this office by phone or in writing."*

In addition, the bill addresses the following:

False or Misleading Electronic Mail

- Provides that it is a misdemeanor of the first degree or a felony in the third degree under certain circumstances to send an unsolicited false or misleading commercial electronic mail.
- Provides immunity from criminal prosecution to an interactive computer service, customer premises equipment provider, communications services provider, or cable provider whose equipment is used to transport, handle, or retransmit a commercial electronic mail message.
- Provides that remedies and criminal penalties under the act are in addition to remedies and criminal penalties otherwise available under federal or state law.

Internet Phishing

- Creates a civil cause of action for internet access providers, financial institutions, web page, or trademark owners harmed by a violation.
- Provides power to seek injunctive relief and damages and creates a three-year statute of limitations.
- Grants the Department of Legal Affairs rulemaking authority to implement the provisions of this act.

The Criminal Justice Impact Conference met on February 28, 2006 and determined that this bill would have an insignificant impact on the inmate population in the Department of Corrections. The Department of Legal Affairs has stated that the bill will have an indeterminate impact on the department's revenues and expenditures. See fiscal comments.

This bill takes effect July 1, 2006 and applies to violations committed on or after that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility -- The bill creates criminal penalties for sending false or misleading electronic mail and creates a new civil cause of action to deter and punish identity theft.

Provide limited government -- The bill creates criminal penalties for sending false or misleading electronic mail and creates a new civil cause of action to deter and punish identity theft.

B. EFFECT OF PROPOSED CHANGES:

ELECTRONIC MAIL PUBLIC RECORDS NOTIFICATION

HB 45 CS requires that any state or local agency, as defined in s. 119.011, F.S.[1], or legislative entity that operates a website and uses electronic mail to post the following statement in a conspicuous location on its website:

"Under Florida law, e-mail addresses are public records. If you do not want your e-mail address released in response to a public-records request, do not send electronic mail to this entity. Instead, contact this office by phone or in writing."

FALSE OR MISLEADING ELECTRONIC MAIL

Background

Federal Legislation

In 2003, Congress passed the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" or the "CAN-SPAM Act of 2003."[2] The CAN-SPAM act provides that if the activity is in or affects interstate or foreign commerce, it is unlawful to knowingly:

- Access a protected computer, as defined in section 1030(e)(2)(B) of Title 18, without authorization, and intentionally initiate the transmission of multiple commercial electronic mail messages from or through the computer.
- Use a protected computer, as defined in section 1030(e)(2)(B) of Title 18, to relay or retransmit multiple commercial electronic mail messages, with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of such messages.
- Materially falsify header information in multiple commercial electronic mail messages and intentionally initiate the transmission of such messages.
- Register, using information that materially falsifies the identity of the actual registrant, for five or more electronic mail accounts or online user accounts or two or more domain names, and intentionally initiate the transmission of multiple commercial electronic mail messages from any combination of such accounts or domain names.
- Falsely represent oneself to be the registrant or the legitimate successor in interest to the registrant of five or more Internet Protocol addresses, and intentionally initiate the transmission of multiple commercial electronic mail messages from such addresses.

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[1] Section 119.011, F.S., states that an "agency" means any state, county, district, authority or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

[2] 15 U.S.C. ss. 7701-13.

The CAN-SPAM act specifies the penalties for a violation which may include a fine, imprisonment of up to five years, or both. Additionally, the court may order forfeiture of any property constituting or traceable to gross proceeds obtained from the offense or any equipment used or intended to be used to commit the offense.

State Legislation

In 2004, the Legislature passed the Electronic Mail Communications Act[3]. The act provides that a person may not:

- Initiate the transmission of an unsolicited commercial electronic mail message from a computer located in this state or to an electronic mail address that is held by a resident of this state which:
    - Uses a third party's internet domain name without permission of the third party;
    - Contains falsified or missing routing information or otherwise misrepresents, falsifies, or obscures any information in identifying the point of origin or the transmission path of the unsolicited commercial electronic mail message;
    - Contains false or misleading information in the subject line; or
    - Contains false or misleading information in the body of the message.
- Distribute software or any other system designed to falsify missing routing information identifying the point of origin or the transmission path of the commercial electronic mail message.

Summarily, the Electronic Mail Communications Act (act) also:

- Authorizes the Department of Legal Affairs to bring an action for damages, or to seek declaratory or injunctive relief, or to impose a civil penalty for a violation of the prohibited activities outlined in the act;
- Creates a cause of action for a person who receives an unsolicited commercial electronic mail message in violation of the act's provisions;
- Provides that a violation of the act's prohibited activities is also a violation of the Florida Deceptive and Unfair Trade Practices Act within the meaning of part II of chapter 501;
- Provides an exemption from liability for certain commercial electronic mail providers and wireless providers who transmit commercial electronic mail, and allows an interactive computer service provider to block transmission of a commercial electronic message it believes may be sent in violation of the act's provisions;
- Provides that prevailing plaintiffs are entitled to:
    - An injunction to enjoin future violations for sending unsolicited false or misleading commercial electronic mail message.
    - Compensatory damages equal to actual damages to have resulted from the initiation of the unsolicited false or misleading commercial electronic mail message or liquidated damages of $500 for each unsolicited false or misleading commercial electronic mail message.
    - Plaintiff's attorney's fees and other reasonably incurred litigation costs.
- Provides that any person outside this state who initiates or assists in the transmission of a commercial electronic mail message received in this state and who knows, or should have known, that the commercial electronic mail message will be received in this state, submits to the jurisdiction of this state;
- Provides that the Act's provisions do not interfere with the confidential status of certain information relating to intelligence or investigative information; and

[3] Section 668.60, F.S.

- Provides that an action must be commenced within 4 years following the date of any prohibited activity.

Section 668.6075, F.S., provides that sending an unsolicited false or misleading commercial electronic mail message shall be considered an unfair and deceptive trade practice within the meaning of part II of ch. 501, F.S., and that in addition to any remedies or penalties set forth in ch. 501, F.S., a violator is subject to the penalties and remedies provided in this part. The remedies in this part are in addition to the remedies otherwise available for the same conduct under federal or state law.

According to the Department of Legal Affairs, two cases under the current act were litigated in 2005, and at this time there are other active investigations. Other complaints have been filed, but the department has not been able to determine who sent the message; therefore, it has not been able to take further action.

Effect of bill

HB 45 CS amends section 668.606, F.S., to provide that the Act does not create a cause of action or provide for criminal charges against an interactive computer service, customer premises equipment provider, communications services provider, or cable provider whose equipment is used to transport, handle, or retransmit an unsolicited false or misleading commercial electronic mail message.

Currently, there are only civil remedies for sending an unsolicited false or misleading electronic mail message.[4] HB 45 CS creates section 668.608, F.S., which provides it is a misdemeanor in the first degree to send an unsolicited false or misleading commercial electronic mail message, which is punishable by a fine of up to $1,000[5] or imprisonment of up to one year.[6] It is a felony in the third degree punishable by a fine of up to $5,000,[7] or imprisonment up to five years[8], if:

- The volume of commercial electronic mail messages transmitted by the person exceeds 2,500 attempted recipients in any 24-hour period;
- The volume of commercial electronic mail messages transmitted by the person exceeds 25,000 attempted recipients in any 30-day period;
- The volume of commercial electronic messages transmitted by the person exceeds 250,000 attempted recipients in any 1-year period;
- The revenue generated from a specific commercial electronic mail message transmitted by the person exceeds $1,000;
- The total revenue generated from all commercial electronic mail messages transmitted by the person to any electronic mail message service provider or its subscribers exceed $50,000;
- The person knowingly hires, employs, uses, or permits any minor to assist in the transmission of a commercial electronic mail message in violation of section 668.603. F.S.;
- The person commits a violation within 5 years of a previous conviction under this section.

Felony violations may also be punishable under the provisions for habitual felony offenders contained in section 775.084, F.S.

HB 45 CS provides that the remedies and criminal penalties are in addition to the remedies and criminal penalties otherwise available under federal or state law.

INTERNET PHISHING

Background

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[3] Section 668.606(1), F.S.
[5] Section 775.083(1)(d), F.S.
[6] Section 775.082(4)(a), F.S.
[7] Section 775.083(1)(c), F.S.
[8] Section 775.082(3)(d), F.S.

Identity theft is a substantial problem in the United States and "phishing" represents the cutting edge of this practice.

"Phishing" refers to obtaining personal identifying information from individuals via the Internet with the intent to possess or use such information fraudulently. Typically, a person attempting to obtain information sends an e-mail that appears to come from a bank or other trusted business requesting an individual to verify their account by typing personal identifying information, such as credit card information, social security numbers, account usernames, passwords, etc. A person may also use a phony web site to trick citizens into revealing sensitive personal information.

The Federal Trade Commission (FTC) reported that 27.3 million Americans have been victims of identity theft in the last five years, including 9.9 million people in 2003 alone.[9] According to the FTC, last year's identity theft losses to businesses and financial institutions totaled nearly $48 billion and consumer victims reported $5 billion in out-of-pocket expenses.[10]

Moreover, according to the Anti-Phishing Working Group, the volume of fraudulent phishing e-mail is growing at a rate in excess of 30 percent each month.[11]

Federal Legislation

The Subcommittee on Crime, Terrorism, and Homeland Security of the U.S. House of Representatives is currently reviewing H.R. 1099, which criminalizes internet scams involving the fraudulent obtaining of information, commonly known as "phishing".[12]

H.R. 1099 imposes a fine or imprisonment for up to five years, or both, for a person who knowingly and with the intent to engage in an activity constituting fraud or identity theft under federal or state law: (1) creates or procures the creation of a website or domain name that represents itself as a legitimate online business without the authority or approval of the registered owner of such business; and (2) uses that website or domain name to solicit means of identification from any person.

In addition, H.R. 1099 imposes a fine or imprisonment for up to five years, or both, for a person who knowingly and with the intent to engage in activity constituting fraud or identity theft under federal or state law sends an electronic mail message that: (1) falsely represents itself as being sent by a legitimate online business; (2) includes an Internet location tool referring or linking users to an online location on the World Wide Web that falsely purports to belong to or be associated with a legitimate online business; and (3) solicits means of identification from the recipient.

Effect of bill

This bill creates the "Anti-Phishing Act".

Prohibited Acts

This bill prohibits obtaining identifying information from individuals through certain means via the internet with the intent to possess or use such information fraudulently. This bill prohibits:

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[9] See article issued by Federal Trade Commission, dated September 3, 2003 "FTC Releases Survey of Identity Theft in U.S. 27.3 Million Victims in Past 5 Years, Billions in Losses for Businesses and Consumers". See also http://www.ftc.gov/opa/2003/idtheft.htm.

[10] Id.

[11] The Anti-Phishing Working Group (APWG) is a global pan-industrial and law enforcement association that focuses on eliminating fraud and identity theft that results from phishing and e-mail spoofing of all types.

[12] The Senate companion, S.472 is before the Judiciary Committee.

- representing oneself, either directly or by implication to be another person, without the authority or approval of such other person, through the use of a web page or internet domain name; and
- using that web page, a link to the web page, or another site on the Internet to induce, request, or solicit another person to provide identifying information.

This bill also prohibits sending or causing to be sent an e-mail to a resident of this state that:

- is falsely represented as being sent by another person, without the authority or approval of such person;
- refers or links the recipient to a falsely represented web site; and
- directly or indirectly solicits from the recipient identifying information for a purpose that the recipient believed to be legitimate.

This bill defines or incorporates by reference definitions of terms as follows:

- "Department" means the Department of Legal Affairs.
- "Electronic mail message" means an electronic message or computer file that is transmitted between two or more telecommunications devices; computers; computer networks, regardless of whether the network is a local, regional, or global network; or electronic devices capable of receiving electronic messages, regardless of whether the message is converted to hard copy format after receipt, viewed upon transmission, or stored for later retrieval.[13]
- "Electronic mail address" means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.[14]
- "Identifying information" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any:
    - name, postal or electronic mail address, telephone number, social security number, date of birth, mother's maiden name, official state-issued or United States-issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food stamp account number, bank account number, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card;
    - unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
    - unique electronic identification number, address, or routing code;
    - medical records;
    - telecommunication identifying information or access device; or
    - other number or information that can be used to access a person's financial resources.[15]
- "Internet domain name" means a globally unique, hierarchical reference to an internet host or service, which is assigned through centralized Internet naming authorities and which is comprised of a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy.[16]
- "Web page" means a location that has a single uniform resource locator (URL) with respect to the world wide web or another location that can be accessed on the internet.

Remedies

[13] s. 668.602(7), F.S.
[14] s. 668.602(6), F.S.
[15] s. 817.568(1)(f), F.S.
[16] s. 668.602(10), F.S.

This bill gives standing to bring a civil action under this part to:

- a person engaged in the business of providing internet access to the public who was adversely affected by the violation;
- a financial institution as defined by s. 655.005(1)(h), F.S., adversely affected by the violation.
- an owner of a web page or trademark who was harmed by a violation under this bill; and
- the Attorney General.

A person bringing an action may seek injunctive relief to halt a violation under this bill, recover damages in the greater amount of the actual damages arising from the violation, or $5,000 for each violation of the same nature, or seek both injunctive relief and damages. Violations are considered of the same nature if they consisted of the same action or course of conduct regardless of how many times the act occurred. A court may increase damages to three times the actual damages sustained if violations constitute a pattern or practice. This bill also provides for an award of attorney's fees and costs to a prevailing plaintiff.

HB 45 CS provides that the violator submits personally to the jurisdiction of the courts of the State of Florida by committing a violation of this act. In addition, the bill establishes a 3-year statute of limitations to bring a suit under the act. This bill also provides that venue lies in any county in which the plaintiff resides or in which any part of the violation occurred. This bill does not preclude the award of damages otherwise available for the same conduct pursuant to federal or state law.

This bill requires that any moneys received by the Attorney General for attorney's fees and costs, or not utilized to reimburse persons harmed under this act, shall be deposited in the Legal Affairs Revolving Trust Fund. This bill grants the Department of Legal Affairs rulemaking authority to implement the provisions of this act.

Exemptions

This bill exempts from liability a telecommunication provider's or an Internet service provider's good faith transmission or intermediate temporary storing of identifying information. The bill also exempts providers of an interactive computer service when removing or disabling access to content that resides on an internet website or other online location controlled or operated by such provider if such provider believes in good faith that the content is used to engage in a violation of the provisions of this bill.

C. SECTION DIRECTORY:

Section 1: Requires any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency, or legislative entity that operates a website and uses electronic mail to post the following statement in a conspicuous location on its website:

"*Under Florida law, e-mail addresses are public records. If you don not want your e-mail address released in response to a public-records request, do not send electronic mail to this entity. Instead, contact this office by phone or in writing.*"

Section 2: Amends s. 668.606 (2), F.S., providing an exemption from criminal liability for certain carriers and equipment providers whose equipment transmits commercial electronic mail messages.

Section 3: Amends s. 668.6075, relating to unfair and deceptive trade practices and renumbers s. 668.6075 (2), F.S., as s. 668.610, F.S., relating to cumulative remedies.

Section 4: Creates s. 668.608, F.S., relating to criminal penalties.

Section 5: Creates ss. 668.701, 668.702, 668.703, 668.704, and 668.705., F.S., providing a title, definitions; prohibited acts; remedies and standing; and exemptions.

Section 6: Provides an effective date of July 1, 2006 and pertains to violations committed on or after that date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Indeterminate. HB 45 CS provides for fines and civil penalties that would accrue to the state as penalties for violations of the act. It is not known how many cases may be brought under the bill; thus, the revenue impact cannot be determined at this time.

2. Expenditures:

   This bill creates an unranked third degree felony offense. The Criminal Justice Impact Conference met on February 28, 2006 and determined that this bill would have an insignificant impact on the prison bed population in the Department of Corrections. The Department of Legal Affairs has stated that the bill will have an indeterminate impact on the department's revenues and expenditures. See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   Indeterminate. HB 45 CS provides for fines as a penalty for criminal violations. It is not known how many cases may be brought under the bill; thus, the revenue impact cannot be determined at this time.

2. Expenditures:

   The bill could result in increased demand for jail beds. Data is unavailable to estimate the impact. Based on data regarding civil actions under current law, the likely impact is insignificant.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill provides that the Attorney General may bring a civil action against a person that violates the Act, and would be able to collect the greater of the actual damages or $5,000, which is to be deposited into the Legal Affairs Revolving Trust Fund.

The bill grants the Attorney General authority to enforce violations under this bill. Therefore, the Attorney General will incur costs in order to prosecute persons that violate this bill. The costs, however, are indeterminate.

According to the Department of Legal Affairs, it prosecuted only two cases under the 2004 Electronic Mail Communications Act, which creates criminal penalties for sending unsolicited false or misleading commercial electronic mail messages to an electronic mail address that is held by a resident of Florida. A number of persons filed additional complaints; however the

Department of Legal Affairs has not been able to determine who sent the messages, preventing further action under the statute.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law. Other than the criminal provisions, the bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

3. Other:

FALSE OR MISLEADING ELECTRONIC MAIL

HB 45 CS creates section 668.608, F.S., to provide criminal penalties for sending unsolicited false or misleading commercial mail messages from a computer located in Florida or to an electronic mail address that is held by a resident of Florida. Constitutional challenges could be made based on the dormant commerce clause or the first amendment.

Dormant Commerce Clause

The commerce clause empowers Congress to regulate commerce among the several states.[17] "This affirmative grant of authority to Congress also encompasses an implicit or dormant limitation on the authority of the states to enact legislation affecting interstate commerce."[18] The aspect of the commerce clause which operates as an implied limitation upon state and local government authority is often referred to as the dormant commerce clause.[19]

In Pike v. Bruce Church Inc., [20] a two prong test was announced to determine if a state statute violates the dormant commerce clause:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The Supreme Court held that the critical consideration is the overall effect of the statute on both local and interstate activity with respect to both parts of the Pike test.[21] The Supreme Court has invalidated statutes under the Pike test on the grounds that their extraterritorial effect renders them unconstitutional.

> [T]he extraterritorial effects of state economic regulation stand at a minimum for the following proposition:

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[17] *See* U.S. Const., art. I, § 8, cl. 3.
[18] Healy v. The Beer Institute, 491 U.S. 324 (1989).
[19] MaryCle, LLC. v. First Choice Internet, Inc., 2006 WL 173659 (Md. App. 2006); citing Bd. of Trs. of the Employees' Ret. Sys. of Baltimore City v. Mayor and City Council of Baltimore, 317 Md. 72 at 131 (1989).
[20] 397 U.S. 137 (1970).
[21] *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority, 476 U.S. 573 at 579 (1986).

> First, the "commerce clause . . . preludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State" . . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other Sates and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the commerce clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state.[22]

"The Healy Court explained that the extraterritoriality principles detailed above are not a separated or distinct commerce clause analysis. Rather, they are simply a more detailed way of explaining the two-part test established in Pike and clarified in Brown-Forman."[23]

Under the first prong of Pike, section 668.603, F.S., appears to apply evenhandedly to in-state and out-of-state transmitters of unsolicited false or misleading commercial electronic mail. "A *person* may not . . . transmi[t] . . . an unsolicited commercial electronic mail message from a computer located in this state or to an electronic mail address that is held by a resident of this state. . . ."[24] Thus, section 668.603 applies to residents of Florida as well as residents of other states.

Under the second prong of Pike, the local benefit of section 668.603 is balanced against the alleged burden on interstate commerce.

Virtually identical statutes to section 668.608, F.S., pertaining to unsolicited false or misleading commercial electronic mail, have been examined by other courts under the dormant commerce clause and found to be constitutional.[25]

In Heckel, the court held that there was no sweeping extraterritorial effect that would outweigh the local benefits of the Act because the statute regulates only those emails directed to a Washington resident or sent from a computer located within Washington.[26]
In MaryCle, the court held that a Maryland statute was facially neutral because it applies to all email advertisers, regardless of their geographic location. It does not discriminate against out-of-state senders.[27]

In Ferguson, the court held that a California statute did not violate the commerce clause because the only burden on interstate commerce is that the email be truthful and non-deceptive email.[28]

Similarly, the local benefit of section 668.603 is to protect the public and legitimate business from deceptive and unsolicited commercial electronic mail[29], and the only burden imposed is sending truthful and non-deceptive email.

First Amendment

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[22] Healy at 336-37; *see also* MaryCle, at 15.
[23] Id.
[24] Section 668.603 (1), F.S.
[25] *See* State v. Heckel, 24 P.3d 404 (Wash 2001); MaryCle, LLC. v. First Choice Internet, Inc., 2006 WL 173659 (Md. App. 2006); Ferguson v. Friendfinders, Inc., 94 Cal.App.4th 1255 (1st Dist. 2002).
[26] Heckel ,at 412-13.
[27] MaryCle, at 19.
[28] Feruson, at 1265.
[29] *See* section 668.601, F.S.

In Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York,[30] the Supreme Court articulated a four part test for evaluating the constitutionality of a content-neutral regulation of commercial speech:

> First, the court must determine whether the speech is lawful and not misleading, otherwise it is outside the First Amendment's protection. If the speech is neither misleading nor unlawful, then the court must ascertain whether the government has asserted a substantial interest. If the government has asserted a substantial interest, then a court must evaluate whether the regulation directly advances the asserted governmental interest and whether it is more extensive than necessary to serve that interest.[31]

Here, if the content of the electronic mail communication is unlawful or misleading, then under Central Hudson it is outside the protection of the first amendment. However, if the content of the electronic mail communication is not unlawful or misleading, then the state could assert its substantial interest is protecting the public from deceptive and unsolicited commercial electronic mail.[32] A court would then evaluate whether section 668.608, F.S., is the least restrictive means in advancing Florida's interest in protecting its citizens.

INTERNET PHISHING

This Act creates sections 668.701 – 668.705, F.S., to provide civil penalties for the acquisition of personal identifying information from a resident of this State with the intent to possess or use such information fraudulently. Under certain circumstances, it is possible that this bill could assert Florida's police power over non-residents of Florida, and therefore this bill could possibly violate the Commerce Clause of the U.S. Constitution.

The Commerce Clause empowers Congress to regulate commerce among the several states.[33] "This affirmative grant of authority to Congress also encompasses an implicit or dormant limitation on the authority of the States to enact legislation affecting interstate commerce."[34] The aspect of the Commerce Clause, which operates as an implied limitation upon state and local government authority is often referred to as the dormant Commerce Clause.[35]

In Pike v. Bruce Church Inc., [36] the court devised a two prong test to determine if a state statute violates the dormant Commerce Clause:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The Supreme Court explained that the critical consideration is the overall effect of the statute on both local and interstate activity with respect to both parts of the Pike test.[37] The Supreme Court has invalidated statutes under the Pike test on the grounds that their extraterritorial effect renders them unconstitutional.

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[30] 447 U.S. 557 (1980).
[31] White Buffalo Ventures, LLC. v. The University of Texas, 2004 WL 1854168 (W.D. Tex. 2004).
[32] *See* section 668.601, F.S.
[33] *See* U.S. Const., art. I, § 8, cl. 3.
[34] Healy v. The Beer Institute, 491 U.S. 324 (1989).
[35] MaryCle, LLC. v. First Choice Internet, Inc., 2006 WL 173659 (Md. App. 2006); citing Bd. of Trs. of the Employees' Ret. Sys. of Baltimore City v. Mayor and City Council of Baltimore, 317 Md. 72 at 131 (1989).
[36] 397 U.S. 137 (1970).
[37] *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority, 476 U.S. 573 at 579 (1986).

For instance, in Healy, the court held:

> [T]he extraterritorial effects of state economic regulation stand at a minimum for the following proposition:
>
> First, the "commerce clause . . . preludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State" . . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other Sates and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state.[38]

In American Libraries Ass'n v. Pataki[39], the first case to apply the dormant Commerce Clause to a state law on Internet use[40], a federal trial court granted an injunction preventing the State of New York from enforcing a statute that criminalized intentional communications via the internet for the purpose of engaging in harmful sexual conduct with a minor. The court held that the New York Act is concerned with interstate commerce and contravenes the Commerce Clause for three reasons:

> First, the Act represents an unconstitutional projection of New York law into conduct that occurs wholly outside New York. Second, the Act is invalid because although protecting children from indecent material is a legitimate and indisputably worthy subject of state legislation, the burdens on interstate commerce resulting from the Act clearly exceed any local benefit derived from it. Finally, the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether. Thus, the Commerce Clause ordains that only Congress can legislate in this area, subject, of course, to whatever limitations other provisions of the Constitution (such as the First Amendment) may require.[41]

"Many courts have followed the logic of American Libraries Ass'n."[42]

Moreover, courts have examined "spam" statutes, which prohibit unsolicited false or misleading commercial electronic mail under the dormant Commerce Clause and found those statutes to be constitutional.[43]

In Heckel, the court held that there was no sweeping extraterritorial effect that would outweigh the local benefits of the Act because the statute regulates only those emails directed to a Washington resident or sent from a computer located within Washington.[44] The Act specifically prohibited e-mail solicitors from using misleading information in the subject line or transmission path of any commercial

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[38] Healy at 336-37; *see also* MaryCle, at 15.
[39] Am. Libraries Ass'n, 969 F. Supp. 160 (S.D.N.Y. 1997).
[40] *See* State v. Heckel, 24 P.3d 404 (Wash 2001).
[41] Am. Libraries Ass'n, 969 F. Supp. at 169 (S.D.N.Y. 1997)
[42] *See* The Internet and the Dormant Commerce Clause, 110 The Yale Law Journal 787 (2001).
[43] *See* State v. Heckel, 24 P.3d 404 (Wash 2001); MaryCle, LLC. v. First Choice Internet, Inc., 2006 WL 173659 (Md. App. 2006); Ferguson v. Friendfinders, Inc., 94 Cal.App.4th 1255 (1st Dist. 2002).
[44] Heckel ,at 412-13.

e-mail message sent to Washington residents or from a computer located in Washington.[45] The court distinguished the case from American Libraries Ass'n stating that the Washington Act did not impose liability for messages that are merely routed through Washington or that are read by a Washington resident who was not the actual addressee.[46]

In MaryCle, the court held that a Maryland statute was facially neutral because it applies to all email advertisers, regardless of their geographic location. It does not discriminate against out-of-state senders.[47]

In Ferguson, the court held that a California statute did not violate the commerce clause because the only burden on interstate commerce is that the email be truthful and non-deceptive email.[48]

Similarly, in Cashatt, a Florida court, using the Pike test, upheld a statute that criminalized the use of a computer on-line service or Internet service to seduce, lure or entice, a child to commit any illegal act.[49]

The Anti-Phishing Act, appears to apply evenhandedly to in-state and out-of-state transmitters. The local benefit of this Act is to protect the public and businesses from misleading and deceptive practices involving fraudulent use of personal information, a legitimate local public interest, and the only burden imposed is not using the Internet for the purpose of obtaining another's personal information for a fraudulent purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 10, 2006, the Utilities & Telecommunications passed HB 45 with one amendment. The amendment provides that a customer premise equipment provider is immune from criminal penalties. Additionally, the amendment changed "telephone company" to "communications services provider" to ensure consistency.

On April 17, 2006, the Criminal Justice Appropriations Committee adopted a strike-all amendment to the bill and reported the bill favorably with committee substitute. The strike-all amendment adds a provision requiring all state and local agencies and legislative entities that operate a website and use electronic mail to post a public records disclaimer notification in a conspicuous location on its website. The amendment also creates the "Anti-Phishing Act," prohibiting the acquisition of personal identifying information from a Florida resident through the use of a website or e-mail with the intent to possess or use such information fraudulently.

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45 Id at 413.
46 Id.
47 MaryCle, at 19.
48 Feruson, at 1265.
49 *See* Cashatt v. State, 873 So.2d 430 (1st DCA 2004).

CHAMBER ACTION

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1 The Criminal Justice Appropriations Committee recommends the
2 following:
3
4 **Council/Committee Substitute**
5 Remove the entire bill and insert:
6 A bill to be entitled
7 An act relating to electronic communication; requiring
8 certain governmental entities to post a notice on their
9 websites that electronic mail addresses sent to them are
10 subject to release to the public; amending s. 668.606,
11 F.S.; providing an exemption from criminal liability for
12 certain carriers and equipment providers whose equipment
13 transmits commercial electronic mail messages that violate
14 s. 668.603, F.S., which prohibits specified actions
15 relating to transmission of false or misleading
16 unsolicited commercial electronic mail messages; amending
17 s. 668.6075, F.S., and renumbering and amending subsection
18 (2) thereof as s. 668.610, F.S.; providing that remedies
19 and penalties under the Electronic Mail Communications Act
20 are cumulative; creating s. 668.608, F.S.; providing
21 criminal penalties for violations of s. 668.603, F.S.,
22 which prohibits specified actions relating to transmission
23 of false or misleading unsolicited commercial electronic

24 mail messages; creating part IV of ch. 668, F.S.;
25 providing a short title; providing definitions;
26 prohibiting certain acts relating to fraudulent use or
27 possession of identifying information; authorizing civil
28 actions for violations; providing for injunctive relief
29 and damages; authorizing courts to increase awards of
30 actual damages under certain circumstances; providing for
31 recovery of attorney's fees and court costs; providing for
32 jurisdiction and venue; providing for deposit of certain
33 moneys received by the Attorney General into the Legal
34 Affairs Revolving Trust Fund; authorizing the Department
35 of Legal Affairs to adopt rules; providing for
36 nonapplication to certain entities' good faith handling of
37 identifying information; specifying the absence of
38 liability for certain actions taken to prevent certain
39 violations; providing applicability; providing an
40 effective date.
41
42 Be It Enacted by the Legislature of the State of Florida:
43
44 Section 1. Any agency, as defined in s. 119.011, Florida
45 Statutes, or legislative entity that operates a website and uses
46 electronic mail shall post the following statement in a
47 conspicuous location on its website:
48
49 Under Florida law, e-mail addresses are public records. If
50 you do not want your e-mail address released in response to
51 a public records request, do not send electronic mail to

52 this entity. Instead, contact this office by phone or in
53 writing.
54 Section 2. Subsection (2) of section 668.606, Florida
55 Statutes, is amended to read:
56 668.606 Civil remedies; immunity.--
57 (2) This part does not create a cause of action or provide
58 for criminal charges against an interactive computer service,
59 customer premise equipment provider, communications services
60 provider ~~telephone company~~, or cable provider whose equipment is
61 used to transport, handle, or retransmit a commercial electronic
62 mail message that violates s. 668.603.
63 Section 3. Section 668.6075, Florida Statutes, is amended,
64 and subsection (2) of that section is renumbered as section
65 668.610, Florida Statutes, and amended to read:
66 668.6075 Unfair and deceptive trade practices ~~Violations~~
67 ~~of s. 668.603~~.--
68 ~~(1)~~ A violation of s. 668.603 shall be deemed an unfair
69 and deceptive trade practice within the meaning of part II of
70 chapter 501. In addition to any remedies or penalties set forth
71 in that part, a violator shall be subject to the penalties and
72 remedies provided for in this part.
73 668.610 Cumulative remedies.--
74 ~~(2)~~ The remedies and criminal penalties of this part are
75 in addition to remedies and criminal penalties otherwise
76 available for the same conduct under federal or state law.
77 Section 4. Section 668.608, Florida Statutes, is created
78 to read:
79 668.608 Criminal violations.--

80 (1) Except as provided in subsection (2), any person who
81 violates s. 668.603 commits a misdemeanor of the first degree,
82 punishable as provided in s. 775.082 or s. 775.083.
83 (2) Any person who violates s. 668.603 commits a felony of
84 the third degree, punishable as provided in s. 775.082, s.
85 775.083, or s. 775.084, if:
86 (a) The volume of commercial electronic mail messages
87 transmitted by the person exceeds 2,500 attempted recipients in
88 any 24-hour period;
89 (b) The volume of commercial electronic mail messages
90 transmitted by the person exceeds 25,000 attempted recipients in
91 any 30-day period;
92 (c) The volume of commercial electronic mail messages
93 transmitted by the person exceeds 250,000 attempted recipients
94 in any 1-year period;
95 (d) The revenue generated from a specific commercial
96 electronic mail message transmitted by the person exceeds
97 $1,000;
98 (e) The total revenue generated from all commercial
99 electronic mail messages transmitted by the person to any
100 electronic mail message service provider or its subscribers
101 exceeds $50,000;
102 (f) The person knowingly hires, employs, uses, or permits
103 any minor to assist in the transmission of a commercial
104 electronic mail message in violation of s. 668.603; or
105 (g) The person commits a violation otherwise punishable
106 under subsection (1) within a 5-year period after a previous
107 conviction under this section.

108 Section 5. Part IV of chapter 668, Florida Statutes,
109 consisting of sections 668.701, 668.702, 668.703, 668.704, and
110 668.705, Florida Statutes, is created to read:
111
112 PART IV
113 FRAUDULENT USE OR POSSESSION OF IDENTIFYING INFORMATION
114
115 668.701 Short title.--This part may be cited as the "Anti-
116 Phishing Act."
117 668.702 Definitions.--As used in this part, the term:
118 (1) "Department" means the Department of Legal Affairs.
119 (2) "Electronic mail address" has the same meaning as
120 provided in s. 668.602.
121 (3) "Electronic mail message" has the same meaning as
122 provided in s. 668.602.
123 (4) "Identifying information" has the same meaning as the
124 term "personal identification information" as defined in s.
125 817.568(1).
126 (5) "Internet domain name" has the same meaning as
127 provided in s. 668.602.
128 (6) "Web page" means a location that has a single uniform
129 resource locator (URL) with respect to the World Wide Web or
130 another location that can be accessed on the Internet.
131 668.703 Prohibited acts.--
132 (1) A person with an intent to engage in conduct involving
133 the fraudulent use or possession of another person's identifying
134 information may not represent oneself, directly or by
135 implication, to be another person without the authority or

136 approval of such other person through the use of a web page or
137 Internet domain name and use that web page, Internet domain
138 name, or a link to that web page or domain name or another site
139 on the Internet to induce, request, or solicit a resident of
140 this state to provide identifying information.
141 (2) A person with an intent to engage in conduct involving
142 the fraudulent use or possession of identifying information may
143 not send or cause to be sent to an electronic mail address held
144 by a resident of this state an electronic mail message that is
145 falsely represented as being sent by another person without the
146 authority or approval of such other person, refers or links the
147 recipient of the message to a web page, and directly or
148 indirectly induces, requests, or solicits the recipient of the
149 electronic mail message to provide identifying information.
150 668.704 Remedies.--
151 (1) The following persons may bring a civil action against
152 a person who violates this part:
153 (a) A person engaged in the business of providing Internet
154 access service to the public who is adversely affected by the
155 violation.
156 (b) A financial institution as defined in s. 655.005(1)
157 that is adversely affected by the violation.
158 (c) An owner of a web page, trademark, or service mark who
159 is adversely affected by the violation.
160 (d) The Attorney General.
161 (2) A person bringing an action under this section may:
162 (a) Obtain injunctive relief to restrain the violator from
163 continuing the violation.

164 (b) Recover damages in an amount equal to the greater of:
165 1. Actual damages arising from the violation; or
166 2. The sum of $5,000 for each violation of the same
167 nature.
168 (3) The court may increase an award of actual damages in
169 an action brought under this section to an amount not to exceed
170 three times the actual damages sustained if the court finds that
171 the violations have occurred with a frequency as to constitute a
172 pattern or practice.
173 (4) For purposes of this section, violations are of the
174 same nature if the violations consist of the same course of
175 conduct or action, regardless of the number of times the conduct
176 or action occurred.
177 (5) A plaintiff who prevails in an action filed under this
178 section is entitled to recover reasonable attorney's fees and
179 court costs.
180 (6) By committing a violation under this part, the
181 violator submits personally to the jurisdiction of the courts of
182 this state. This section does not preclude other methods of
183 obtaining jurisdiction over a person who commits a violation
184 under this part.
185 (7) An action under this part may be brought in any court
186 of competent jurisdiction to enforce such rights and to recover
187 damages as stated in this part.
188 (8) The venue for a civil action brought under this
189 section shall be the county in which the plaintiff resides or in
190 any county in which any part of the alleged violation of this
191 part took place, regardless of whether the defendant was ever

192 actually present in that county. A civil action filed under this
193 section must be brought within 3 years after the violation
194 occurred.
195 (9) The remedies available under this section are in
196 addition to remedies otherwise available for the same conduct
197 under federal or state law.
198 (10) Any moneys received by the Attorney General for
199 attorney's fees and costs of investigation or litigation in
200 proceedings brought under this section shall be deposited as
201 received into the Legal Affairs Revolving Trust Fund.
202 (11) Any moneys received by the Attorney General that are
203 not for attorney's fees and costs of investigation or litigation
204 or used for reimbursing persons found under this part to be
205 damaged shall accrue to the state and be deposited as received
206 into the Legal Affairs Revolving Trust Fund.
207 (12) The Department of Legal Affairs may adopt rules
208 pursuant to ss. 120.536(1) and 120.54 to implement the
209 provisions of this part.
210 668.705 Exemptions.--
211 (1) This part does not apply to a telecommunications
212 provider's or Internet service provider's good faith
213 transmission or routing of, or intermediate temporary storing or
214 caching of, identifying information.
215 (2) A provider of an interactive computer service is not
216 liable under the laws of this state for removing or disabling
217 access to content that resides on an Internet website or other
218 online location controlled or operated by such provider if such

219 provider believes in good faith that the content is used to
220 engage in a violation of this part.
221 Section 6. This act shall take effect July 1, 2006, and
222 shall apply to violations committed on or after that date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 517 CS Corporation Not For Profit Self--Insurance Funds
SPONSOR(S): Ross
TIED BILLS: **IDEN./SIM. BILLS:** SB 1966

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Insurance Committee	18 Y, 0 N, w/CS	Callaway	Cooper
2) State Administration Appropriations Committee	9 Y, 0 N, w/CS	Rayman	Belcher
3) Commerce Council		Callaway	Randle
4)			
5)			

SUMMARY ANALYSIS

Pursuant to 624.462, F.S., commercial self-insurance funds can only be created by specified groups, including a not-for-profit trade association, industry association, or professional association of employers or professionals which has been organized for purposes other than that of obtaining or providing insurance. These funds are created for the purpose of pooling and spreading liabilities of its group members in any commercial property or casualty risk or surety insurance. Self-insurance funds can also be created by two or more employers for workers' compensation risks. Current law provides numerous requirements relating to the formation and regulation of self-insurance funds. The Office of Insurance Regulation (OIR) regulates self-insurance funds. Local governments are authorized under current law to form self-insurance funds, but only for workers' compensation purposes. Certain specified independent nonprofit colleges, universities, or secondary educational institutions are authorized to form self-insurance funds for property or casualty risks, workers' compensation risks, or for surety insurance. Self-insurance funds created by these entities do not have to comply with all the provisions in current law relating to self-insurance funds and thus are not subject to significant regulation by the OIR.

This bill provides that, notwithstanding any other provision of law, certain corporations not for profit may form a self-insurance fund to cover any property or casualty risk or surety insurance or worker's compensation risk. This authorization is predicated upon the fund: 1) having annual normal premiums in excess of $5 million; 2) having only members who receive at least 75 percent of its funding from governmental sources; 3) using a credentialed actuary to set rates that are not excessive, not inadequate or not discriminatory based on actuarial principles; 4) maintaining a continuing program of excess insurance coverage and reserve evaluation to protect the fund's financial stability; 5) submitting to the OIR annual audited financial statements; 6) having a governing body comprised entirely of corporation not for profit officials; and 7) using personnel to run the fund that have a minimum of 5 years' insurance experience.

The bill also exempts corporation not for profit self-insurance funds from many of the provisions in current law relating to self-insurance funds such as the solvency, reserve and financial reporting requirements pertaining to workers compensation self-insurance funds, as well as from the premium tax and participation in the Florida Self-Insurance Fund Guaranty Association. These exemptions will also preclude significant regulation of the newly created self-insurance funds by the OIR. The bill provides for payment of insurance premium tax at a reduced rate by corporation not for profit self-insurance funds.

The Revenue Estimating Conference met on April 7, 2006, and adopted a positive, but indeterminate, impact on the General Revenue Fund for Fiscal Year 2006-07 and beyond.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill exempts certain corporation not for profit from the current statutory requirements relating to formation and regulation of self-insurance funds, thus, preventing significant regulation of such funds by the Office of Insurance Regulation (OIR or office).

Safeguard Individual Liberty: Any inability of the self-insurance fund to pay claims could mean injured employees otherwise eligible for workers compensation benefits may not have medical and lost wage expenses paid; damaged property may go unrepaired; and fund participants may be drawn into costly litigation to personally defend against a liability claim.

Promote Personal Responsibility: The bill will place more responsibility for ensuring financial accountability and solvency on the corporation not for profit who participate in the self-insurance fund authorized by the bill.

B. EFFECT OF PROPOSED CHANGES:

Self-Insurance Funds

Sections 624.460-624.488, F.S. are known as the "Commercial Self-Insurance Fund Act." Self-insurance fund means both commercial insurance funds organized under s. 624.462, F.S., and group self-insurance funds organized under s. 624.4621, F.S. In general, self-insurance is the assumption of some or all of one's financial risk oneself, rather than paying an insurance company to assume it.[1]

Commercial Self-Insurance Funds

Commercial self-insurance funds may be authorized by the OIR to cover property or casualty or surety insurance risks. Such funds may be formed only by:

1) a not-for-profit trade association, industry association, or professional association of employers or professionals which has a constitution or bylaws, which is incorporated in Florida, and which has been organized for purposes other than that of obtaining or providing insurance and operated in good faith for a continuous period of 1 year;
2) a (medical malpractice) self-insurance trust fund organized pursuant to s. 627.357, F.S., and maintained in good faith for a continuous period of 1 year for purposes other than that of obtaining or providing insurance pursuant to this section;
3) a group of 10 or more health care providers for purposes of providing medical malpractice coverage; or
4) a not-for-profit group comprised of no less than 10 condominium associations meeting certain requirements.[2]

In most cases, a commercial self-insurance fund must be operated by a board of trustees.[3] If formed pursuant to (1) or (3), above, the board of trustees must be responsible for appointing independent certified public accountants, legal counsel, actuaries, and investment advisers as needed; approving payment of dividends to members; and contracting with an administrator authorized under s. 626.88, F.S., to administer the affairs of the fund. For funds formed pursuant to (2) or (4) above, a majority of

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[1] http://www.iii.org/ (last viewed on February 5, 2006).
[2] s 624.462(2)(a), F.S. (2005).
[3] s 624.462(2)(b), F.S. (2005).

the trustees or directors must be owners, partners, officers, directors, or employees of one or more members of the fund.[4]

Requirements for commercial self-insurance funds also include:

1) a certificate of authority from the OIR;
2) an indemnity agreement binding each fund member to individual, several, and proportionate liability;
3) a plan of risk management which has established measures to minimize the frequency and severity of losses;
4) proof of competent and trustworthy persons to administer or service the fund;
5) an aggregate net worth of all members of at least $500,000;
6) a combined ratio of current assets to current liabilities of more than 1 to 1;
7) a deposit of cash or securities, or a surety bond, of $100,000;
8) specific and aggregate excess insurance with limits and retention levels satisfactory to the OIR;
9) a fidelity bond or insurance providing coverage of at least 10 percent of the funds handled annually by the fund;
10) a plan of operation designed to provide sufficient revenues to pay current and future liabilities, as determined in accordance with sound actuarial principles, and a statement by an actuary to that effect;
11) participation in the Florida Self-Insurance Fund Guaranty Association and
12) such additional information as the Financial Services Commission or the OIR reasonably requires.[5]

After the OIR issues a certificate of authority for a commercial self-insurance fund, additional requirements are imposed related to restrictions on premiums that may be written, annual reports, dividends, assessments, and approval of forms and rates.[6] Under current law a commercial self insurance fund is also subject to the premium tax, form and rate approval, and regulatory oversight regarding rehabilitation, liquidation, reorganization and conservation, and is required to participate in the Florida Self-Insurance Guaranty Association.[7]

Rates for commercial self-insurance funds may not be excessive, inadequate, or unfairly discriminatory and must be filed with the OIR for approval.[8] But, the standard for excessiveness is limited to a determination of whether the expense factors are not justified or are not reasonable for the benefits and services provided.[9] A fund has the burden of proving a rate filed is adequate if, during the first 5 years of issuing policies, the fund files a rate that is below the rate for loss and loss adjustment expenses for the same type and classification of insurance that has been filed by the Insurance Services Office and approved by the OIR.[10]

The Commercial Self-Insurance Fund Act also contains a provision which makes over 228 sections of the Florida Insurance Code applicable to the self-insurance funds.[11] Among those many provisions are laws relating to civil remedy and civil liability; accounting, assets and liabilities investments, administration of deposits, insurance field representatives and operations; unfair methods of competition and unfair or deceptive acts or practices; powers of department and office; cease and desist procedures and penalties; policyholders bill of rights claims administration; payment of

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[4] Id.

[5] s. 624.466, F.S. (2005). Participation in the Florida Self-Insurance Guaranty Association is mandated under s. 624.462, F.S (2005).

[6] s. 624.468, F.S. (2005); s. 624.470, F.S. (2005) relating to annual reports; s. 624.473, F.S. (2005) relating to dividends; s. 624.474, F.S. (2005) relating to assessments.

[7] s. 624.475, F.S. (2005) relating to premium tax; s. 624.477, F.S. (2005) relating to liquidation, rehabilitation, reorganization, and conservation; s. 624.480, F.S. (2005) relating to approval of forms; s. 624.482, F.S. (2005) relating to rate approval; s. 624.462, F.S. relating to participation in the Florida Self-Insurance Guaranty Association.

[8] s. 624.482, F.S. (2005).

[9] s. 624.482(2), F.S. (2005).

[10] s. 624.482(6), F.S. (2005).

[11] s. 624.488, F.S. (2005).

settlements; attorney's fees; insurance rates and contracts; motor vehicle and casualty contracts; professional liability claims and actions; reports by insurers and health care providers; and, as previously indicated, provisions relating to insurer insolvency; rehabilitation and liquidation; and the Florida Self-Insurance Fund Guaranty Association.

Group Self-Insurance Funds

Under s. 624.4621, F.S., two or more employers are allowed to pool their workers' compensation liabilities and form a self insurance fund for workers' compensation purposes. This type of self-insurance fund is called a group self-insurance fund. Such a fund must comply with administrative rules adopted by the Financial Services Commission[12] relating to reserve requirements, organization, and operation. The rules relating to reserve requirements are designed to insure the self-insurance fund can maintain financial solvency. Current law also requires workers' compensation self-insurance funds to carry reinsurance, unless the fund is comprised of state or local government employers.[13]

Current law establishes restrictions on dividend or premium refunds made by a workers' compensation self insurance fund.[14] Workers' compensation self-insurance funds are subject to the insurance premium tax, but at a reduced rate. The rate is reduced from 1.75 percent of the gross receipt of insurance premiums to 1.6 percent.[15] Workers' compensation self-insurance funds are subject to license taxes and premium receipt taxes.[16] Current law also requires workers' compensation self-insurance funds to participate in the Florida Self-Insurance Fund Guaranty Association (Association).[17] The Association will step in and pay workers' compensation claims of self-insurance funds that become insolvent.[18]

In addition to complying with the administrative rules for workers' compensation self-insurance established by the Financial Services Commission, a workers' compensation self-insurance fund must comply with administrative rules adopted by the Department of Financial Services (DFS) relating to the filing of reports by workers' compensation self-insurance funds.[19]

Local Government and Independent Educational Institution Self-Insurance Funds

Pursuant to s. 624.4622, F.S., any two local governments may enter into interlocal agreements to create a self-insurance fund for the purpose of securing the payment of benefits under the workers' compensation law. Under s. 624.4623, F.S., any two or more independent nonprofit colleges or universities may form a self-insurance fund for the purpose of pooling and spreading liabilities of its group members in any property or casualty risk or surety insurance or securing the payment of benefits under the workers' compensation law. Both the local government and education self-insurance funds have similar requirements which include:

- having annual premiums in excess of $5 million;
- maintaining excess insurance coverage and reserve to protect the financial stability of the fund;
- submitting annual audited fiscal year end-financial statements by an independent certified public accountant to the OIR; and
- having a governing body comprised entirely of local elected officials (in local government self-insurance funds) and independent educational institution officials (in educational self-insurance funds).

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[12] The Financial Services Commission is comprised of the Governor and Cabinet.
[13] s. 624.4621(4), F.S. (2005).
[14] s. 624.4621(5), F.S. (2005).
[15] s. 624.4621(7), F.S. (2005); s. 624.509(1), F.S. (2005).
[16] s. 624.509(2), F.S. (2005).
[17] s. 624.4621(9), F.S. (2005).
[18] *See* s. 440.385(3)(a), F.S. (2005).
[19] s. 440.38(2)(b), F.S. (2005); *See* Chapter 69L-5, F.A.C. for the administrative rules relating to workers' compensation self-insurance funds.

Proposed Changes Regarding Self-Insurance Funds

This bill provides that, notwithstanding any other provision of law, any two or more corporation not for profit located in Florida and organized under Florida law may form a self-insurance fund for the purpose of pooling and spreading liabilities of its group members in any property or casualty risk or surety insurance or securing the payment of benefits under worker's compensation.[20] This authorization is predicated upon the fund:

1) having annual normal premiums in excess of $5 million;
2) having only members who receive at least 75 percent of its revenue from local, state, or federal government sources;
3) using a credentialed actuary to set rates that are not excessive, not inadequate or not discriminatory based on actuarial principles;
4) maintaining a continuing program of excess insurance coverage and reserve evaluation to protect the fund's financial stability;
5) submitting to the Office of Insurance Regulation annual audited financial statements;
6) having a governing body comprised entirely of corporation not for profit officials; and
7) using personnel to run the fund that have a minimum of 5 years' insurance experience.

The bill exempts corporation not for profit self insurance funds from the provisions in current law applicable to group self-insurance funds (i.e. those self-insurance funds covering workers' compensation risks only). The bill provides for payment of insurance premium tax at a reduced rate by corporation not for profit self-insurance funds. Premiums, contributions, and assessments received by a corporation not for profit self-insurance fund are subject to ss. 624.509(1) and (2) and 624.5092, except that the tax rate shall be 1.6 percent of the gross amount of such premiums, contributions, and assessments. Additionally, the bill exempts these self-insurance funds from the rules promulgated by DFS relating to reports workers' compensation self-insurance funds must file with DFS.

The bill revokes the exemptions described above if the corporation not for profit self-insurance fund does not have annual normal premiums in excess of $5 million, does not have members who receive at least 75 percent of its funding from governmental sources, does not use a credentialed actuary to set rates that are not excessive, not inadequate or not discriminatory based on actuarial principles, does not maintain a continuing program of excess insurance coverage and reserve evaluation to protect the fund's financial stability, does not annually submit an audited fiscal year end financial statement to the Office of Insurance Regulation, does not have a governing body comprised entirely of corporation not for profit officials, and does not use personnel to run the fund that have a minimum of 5 years' insurance experience.

There is statutory precedent for allowing specific types of organizations to have less stringent statutory requirements relating to the formation and regulation of self-insurance funds. The statutory requirements for self-insurance funds formed by local governments or independent nonprofit colleges or universities are different than the requirements for other commercial self-insurance funds and are less restrictive.

The language of this bill is modeled after the existing statutory authorization for local governments and independent colleges and universities and, in fact, is mostly identical. However, there are several important differences in the language. Regarding local government, the language allowing the formation of self-insurance funds for workers' compensation purposes only contains the following:

> (3) Notwithstanding subsection (2), a local government self-insurance fund created under this section after October 1, 2004, shall initially be subject to the requirements of a commercial fund

[20] In the 2005 Session, HB 881 was filed giving certain nonprofit community mental health and substance abuse providers the authority to form self-insurance funds; however, the bill died in messages. This bill is very similar to the original text of HB 881 from the 2005 Session.

> under s. 624.4621 and, for the first 5 years of its existence, shall be subject to all the requirements applied to commercial self-insurance funds or to group self-insurance funds, respectively.
>
> (4)(a) A local government self-insurance fund formed after January 1, 2005, shall, for its first 5 fiscal years, file with the office full and true statements of its financial condition, transactions, and affairs. An annual statement covering the preceding fiscal year shall be filed within 60 days after the end of the fund's fiscal year, and quarterly statements shall be filed within 45 days after each such date. The office may, for good cause, grant an extension of time for filing an annual or quarterly statement. The statements shall contain information generally included in insurers' financial statements prepared in accordance with generally accepted insurance accounting principles and practices and in a form generally used by insurers for financial statements, sworn to by at least two executive officers of the self-insurance fund. The form for financial statements shall be the form currently approved by the National Association of Insurance Commissioners for use by property and casualty insurers.
>
> (b) Each annual statement shall contain a statement of opinion on loss and loss adjustment expense reserves made by a member of the American Academy of Actuaries. Work papers in support of the statement of opinion must be provided to the office upon request.[21]

In other words, local government self-insurance funds must comply with current law governing self-insurance funds upon creation and for the first five years the fund is in existence. This involves significant oversight of the local government self-insurance fund by the OIR. Additionally, the OIR also reviews information on the local government self-insurance fund's financial status for the first five years the fund is in existence.

Self-insurance funds composed of independent colleges and universities also have less stringent formation and regulation requirements than other self-insurance funds. Even though this bill is modeled after existing law allowing these entities to self insure, there is a difference in the statutory language. Pursuant to s. 624.4623, F.S., only those educational institutions accredited by the Commission on Colleges of the Southern Association of Colleges and Schools or accredited schools chartered by the State of Florida are eligible to form self-insurance funds.

According to a representative of the Florida Independent Colleges and Universities Risk Management Association the prerequisite for accreditation requires their members submit to the rigorous programmatic and financial review of this federally sanctioned accrediting agency. This outside review ensures their pooled members are financially stable and have the appropriate resources to conduct their operations. The Federal government relies on this accreditation status for participation in all federally sponsored programs such as student financial aid, research contracts and other types of grants. Also, the colleges and universities rely on this accreditation status to be the primary test of an institution's financial strength.[22]

Among the financial and resource requirements necessary for good standing and membership are the following statements from the accrediting standards manual:

> 3.10 Financial and Physical Resources
>
> 1) The institution's recent financial history demonstrates financial stability.

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[21] s. 624.4622(4), F.S. (2005).

[22] Email from Ben Donatelli, Collaborative Ventures, Independent Colleges and Universities of Florida, March 19, 2005, on file with the Insurance Committee.

2) The institution provides financial statements and related documents, including multiple measures for determining financial health as requested by the Commission, which accurately and appropriately represent the total operation of the institution.
3) The institution audits financial aid programs as required by federal and state regulations.
4) The institution exercises appropriate control over all its financial and physical resources.
5) The institution maintains financial control over externally funded or sponsored research and programs.
6) The institution takes reasonable steps to provide a healthy, safe, and secure environment for all members of the campus community.
7) The institution operates and maintains physical facilities, both on and off campus, that are adequate to serve the needs of the institution's educational programs, support services, and other mission-related activities

There is no provision in the bill requiring accreditation of corporation not for profit wanting to form a self-insurance fund.

Corporations not for profit that would qualify to form self-insurance funds under the bill include Hospice organizations, community actions agencies such as Head Start and Meals on Wheels, community transportation coordinators, the Florida Council on Aging, and the Association of Retarded Citizens. It is unknown how many corporations not for profit will qualify to form a self-insurance fund under the bill or will choose to self-insure; however, the bill's proponents estimate a premium base of $15 – 25 million for qualifying corporations not for profit.[23]

Although the bill allows corporations not for profit to create self-insurance funds for property, casualty, surety or workers' compensation risks, proponents of the bill envision the self-insurance funds created will cover primarily workers' compensation risks. In many cases the workers' compensation insurance premiums for non-profit organizations are higher than the filed premium rate which leads to high insurance premiums. Additionally, according to the bill's proponents, although workers' compensation insurance is currently available for corporations not for profit, in many cases, it is written by the Florida Workers' Compensation Joint Underwriting Association, the workers' compensation insurer of last resort. The bill's proponents predict the newly created corporation not for profit self insurance fund will assume some of the Florida Workers' Compensation Joint Underwriting Association's policies, leading to depopulation of it.

The bill's proponents allege corporations not for profit cannot comply with existing law relating to the formation and regulation of self-insurance funds because of the high costs involved in managing a commercial self-insurance fund due to the restrictions and regulation of the funds by the OIR. They also cite the lack of a single entity covering all corporations not for profit that can assume management of the fund thereby reducing the costs of complying with current self-insurance fund laws and the overhead associated with running a self-insurance fund as a reason corporations not for profit cannot comply with existing self-insurance fund laws.[24]

One of the organizations that may qualify to form a self-insurance fund under the bill is the Florida Council for Community Mental Health (Council). The Council is a statewide association of 70 community-based mental health and substance abuse agencies. According to the Council, availability of property, liability, automobile and workers' compensation insurance is limited for its members and members of its sister organization, the Florida Council for Behavioral Healthcare. The Council maintains its 70 member treatment organizations are a critical part of the state's safety net, providing

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[23] Telephone conversation with representative of Public Risk Underwriters on February 3, 2006.
[24] Id.

publicly funded mental health and substance abuse services to Floridians who cannot afford the cost of their care. They report difficulty in obtaining insurance coverage that recognizes the type of services they provide and the risks to which they are exposed.[25] They also report a significant increase in liability insurance premiums for community mental health providers.[26] If this bill passes, the Council anticipates self-insuring for property, automobile, general and professional liability, and workers' compensation insurance. The Council estimates 30-50 members will participate in the self-insurance fund.[27]

Regulatory Issues

In Florida, regulation of the insurance industry is shared by the DFS and the OIR. The state's Chief Financial Officer (CFO) heads DFS while the head of the OIR is the Governor and Cabinet members sitting as the Financial Services Commission. Generally, the OIR is responsible for granting a certificate of authority or license to an insurer; a domestic insurer, (i.e. an insurer based in Florida), must possess a certificate of authority in order to conduct business in Florida. Similarly, many insurers are required by law to seek the OIR approval for their rates, or the prices they charge for coverage, and approval of the insurance forms they use for issuing policies. The OIR investigates allegations of fraud against insurers and administers state laws governing the financial reserve requirements imposed on insurers.

The OIR is concerned the bill effectively removes any and all solvency and rate regulation oversight over the corporation not for profit self-insurance fund authorized by the bill. The OIR exercises solvency and rate regulation oversight in order to protect Florida's insurance consumers. According to the OIR, if a corporation not for profit self-insurance fund assumes significant risk, the fund may be unable to pay resulting claims due to an inadequate financial framework. Any inability to pay claims means injured employees otherwise eligible for workers compensation benefits may not have medical and lost wage expense paid; damaged property may go unrepaired; and fund participants may be drawn into costly litigation to personally defend against a liability claim.[28]

However, the OIR notes local governments and state/private universities have a level of institutional expertise and experience in operating risk management programs, in administering and adjusting claims against the fund, and, most importantly, an outside source of financial scrutiny beyond the governing board of the self insurance fund itself. A local government Board of County Commissioners, a City Council, a university Board of Trustees – all assume implicit financial and managerial oversight for a self-insurance fund organized for the benefit of the local government or state/private university. In contrast, in the OIR's view, there may be no oversight organization or entity that would stand behind a corporation not for profit self-insurance fund created in accordance with the bill.

Unlike a local government with the authority to raise tax revenue or issue bonds or the ability of a state/private university to raise tuition and fees, there is no clear source of outside revenue available for a corporation not for profit self-insurance fund in the event a deficit occurs. In order to raise funds, the corporation not for profit self insurance fund would have to raise revenue. Revenue sources for nonprofits include public donations and government funding. Raising additional revenue from these sources may be difficult and is not a guaranteed revenue stream.

Regarding the bill's creation of s. 624.4624(2), F.S., if the self insurance fund fails to comply with the provisions of the entire section, the fund defaults to regulation under s. 624.4621, F.S., -- regulation

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[25] Florida Council for Behavioral Healthcare proposal "Community Mental Health and Substance Abuse Provider Self-Insurance Fund" on file with the Insurance Committee.

[26] According to the Council, the average cost of liability insurance for a community mental provider was $238,847 in FY 2002–2003. The average cost in FY 2003-2004 was $355,715, an increase of 49%. But, for some providers, the increase in premiums was 150% or more.

[27] Florida Council for Behavioral Healthcare proposal "Community Mental Health and Substance Abuse Provider Self-Insurance Fund" on file with the Insurance Committee.

[28] Concerns expressed are contained in Office of Insurance Regulation's Legislative Analysis dated January 30, 2006 on file with the Insurance Committee.

pertaining to group self-insurance funds writing only workers compensation insurance coverage. However, the bill allows corporation not for profit self-insurance funds to also write property, liability, and surety insurance coverage. The office notes the bill is silent with respect to a default regulation for the property, liability, or surety coverage being issued by the funds.

Additionally, the OIR opines it could be difficult to determine the proper division of reserves related to the multiple lines of coverage provided by the fund in any type of forensic handling of the corporation not for profit self-insurance fund. This problem is not present with local government self-insurance funds because those funds provide only workers' compensation insurance coverage.

C. SECTION DIRECTORY:

Section 1: Creates s. 624.4264, F.S., allowing creation of corporation not for profit self-insurance funds, providing requirements for formation of such funds, providing exceptions to current statutory requirements for self-insurance funds; providing for payment of insurance premium tax at a reduced rate by corporation not for profit self-insurance funds.

Section 2: Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The Revenue Estimating Conference met on April 7, 2006, and adopted a positive, but indeterminate, impact on the General Revenue Fund for Fiscal Year 2006-07 and beyond.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Inasmuch as the bill allows corporations not for profit to self-insure in lieu of obtaining insurance from a private insurance carrier, corporations not for profit may save money on insurance premiums.[29] The amount of premium dollars saved for each nonprofit is indeterminable. Additionally, if premiums collected by the self-insurance fund are not sufficient to pay claims and a deficit results, the fund's members must be assessed to cover the deficit.

D. FISCAL COMMENTS:

[29] The portion of the premium rate attributable to cover claims should be approximately the same as the portion charged by private insurers; however, premium rates for self-insurance funds typically do not include a profit factor (usually about 5 percent of premium). Additionally, self-insurance funds sometimes have less expense than private insurers. The absence of a profit factor built into premium rates and lower expenses could lead to premium rates for self-insurance funds that are lower than those of private insurers.

None.

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.

B. RULE-MAKING AUTHORITY:

This bill does not delegate rule-making authority to any administrative authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments

In its legislative analysis, the Office of Insurance Regulation provided the following technical comments[30]:

> The newly created SIF, as drafted in this legislation, does not contain the definition of "commercial" self-insurance fund (otherwise defined at 624.462). Thus, the provisions of 624.460 – 624.488 ("Commercial Self Insurance Funds") would not apply to this newly created SIF.
>
> And, the newly created SIF is, at subsection (2) of this bill, exempt from 624.4621 for purposes of definition and regulation as group self-insurance fund formed to provide workers compensation coverage.
>
> Thus, by construction of the statute, the newly created SIF appears regulated only by the specific provisions within its newly created statute, s. 624.4624. That construction:
>
> - Exempts the fund from any form of solvency requirement;
> - Does not provide the OIR with authority to protect member participants against inadequate rates and premium collection;
> - Does not contain requirements otherwise applicable to self-insurance funds – either those formed to provide self-insurance for workers compensation insurance or those formed for sharing property and casualty and surety risk; and,
> - Creates an ambiguity related to Guaranty Fund Protection – i.e.,:
> - For risks associated with property/casualty and surety, it is not clear if the newly created SIF would qualify for FIGA protection, because at s. 624.462(5) a commercial self-insurance fund is required to

[30] Office of Insurance Regulation Legislative Analysis dated January 30, 2006 on file with the Insurance Committee. (emphasis supplied)

participate in FIGA. This newly created SIF is not bound by the provisions of 624.462;

- For risks associated with workers compensation, s. 631.905(5) the FIGA workers compensation account may cover this SIF, because the definition of covered entities specifically excludes only local government SIFs organized under s. 624.4622 (group self-insurance funds formed specifically for providing workers compensation benefits);

Subsection (1)
In describing the risk being assumed by the newly created SIF the term "securing the payment of benefits under Chapter 440" may mean the SIF intends to provide workers compensation coverage to its participants.

However, at subsection (2) the legislation specifically exempts the newly created SIF from the requirements that apply to group self-insurance funds at s. 624.4621, designed for SIFs that provide workers compensation insurance to member participants.

Subsection (1)(a) -- requires the fund to have "annual normal premiums in excess of $5 million"
It appears the newly created statute implies no OIR oversight of policy form or rate approval. Member participants would not benefit from the protections of form and rate approval that assure rates are not excessive, inadequate, or non-discriminatory and that contracts issued by the fund provide reasonable benefits for the risks being assumed by the fund.

Subsection (1)(b) – requires for participation that each member receive at least 75% of its revenues from local, state, or federal governmental sources. While such requirement may suggest that these revenues are more likely to be received on a more consistent basis, the ability of the SIF's members to fund any deficits is also constrained to the level of public funding.

Subsection (1)(c) - requires the fund, as determined by a qualified actuary, to maintain a program of excess insurance coverage. The actuary is also to provide a reserve evaluation – but not an actuarial opinion -- in light of the need to protect the financial stability of the fund. Subsection (1)(c) does not require rate development by a qualified actuary and does not require the fund to maintain reserves sufficient to meet the cost of risks associated with the coverage the fund will provide.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 7, 2006, the Insurance Committee considered the bill, adopted a strike-all amendment, and reported the bill favorably. The strike-all amendment maintained the text of the original bill with the following additions:

- Requires the self-insurance fund to use an actuary to set rates that are not excessive, not inadequate, or not discriminatory and are based on actuarial principles.

- Requires the fund to purchase excess insurance to pay claims after a certain amount is paid on the claim by the fund.

- Requires the fund to use personnel with prior insurance experience to administer the fund.

The amendment also changed the name of the self-insurance fund from nonprofit organization self-insurance fund to corporation not for profit self insurance fund to maintain consistency with existing law.

On April 17, 2006, the State Administration Appropriations Committee considered the bill, adopted an amendment, and reported the bill favorably. The amendment provides for payment of insurance premium tax at a reduced rate by corporation not for profit self-insurance funds.

The staff analysis was updated to reflect the adoption of the amendment.

CHAMBER ACTION

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1 The State Administration Appropriations Committee recommends the
2 following:
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to corporation not for profit self-
7 insurance funds; creating s. 624.4624, F.S.; authorizing
8 two or more corporations not for profit to form a self-
9 insurance fund for certain purposes; providing specific
10 requirements; providing an exception; providing for
11 payment of insurance premium tax at a reduced rate by
12 corporation not for profit self-insurance funds; providing
13 an effective date.
14
15 Be It Enacted by the Legislature of the State of Florida:
16
17 Section 1. Section 624.4624, Florida Statutes, is created
18 to read:
19 624.4624 Corporation not for profit self-insurance
20 funds.--
21 (1) Notwithstanding any other provision of law, any two or
22 more corporations not for profit located in and organized under
23 the laws of this state may form a self-insurance fund for the

24 purpose of pooling and spreading liabilities of its group
25 members in any property or casualty risk or surety insurance or
26 securing the payment of benefits under chapter 440, provided the
27 corporation not for profit self-insurance fund that is created:
28 (a) Has annual normal premiums in excess of $5 million.
29 (b) Requires for qualification that each participating
30 member receive at least 75 percent of its revenues from local,
31 state, or federal governmental sources.
32 (c) Uses an actuary credentialed by the Casualty Actuarial
33 Society or American Academy of Actuaries to determine rates.
34 Rates and rating factors must be established using accepted
35 actuarial principles to develop rates that are not excessive,
36 inadequate, or discriminatory.
37 (d) Maintains a continuing program of excess insurance
38 coverage and reserve evaluation to protect the financial
39 stability of the fund in an amount and manner determined by a
40 qualified, independent actuary. At a minimum, this program must:
41 1. Purchase excess insurance from authorized insurance
42 carriers.
43 2. Retain a maximum per-loss occurrence of 2 percent of
44 normal premiums or $350,000, whichever is less.
45 (e) Submits to the office annually an audited fiscal year-
46 end financial statement by an independent certified public
47 accountant within 6 months after the end of the fiscal year.
48 (f) Has a governing body that is comprised entirely of
49 corporation not for profit officials.
50 (g) Uses knowledgeable persons to administer or service
51 the fund in claims administration, claims adjusting,

52 underwriting, risk management, loss control, policy
53 administration, financial audit, and legal areas. Such persons
54 must have at least 5 years' experience with commercial self-
55 insurance funds formed under s. 624.462, self-insurance funds
56 formed under s. 624.4622, or with domestic insurers.
57 (2) A corporation not for profit self-insurance fund that
58 meets the requirements of this section is not subject to s.
59 624.4621 and is not required to file any report with the
60 department under s. 440.38(2)(b) which is uniquely required of
61 group self-insurer funds qualified under s. 624.4621. If any of
62 the requirements of this section are not met, the corporation
63 not for profit self-insurance fund is subject to the
64 requirements of s. 624.4621.
65 (3) Premiums, contributions, and assessments received by a
66 corporation not for profit self-insurance fund are subject to
67 ss. 624.509(1) and (2) and 624.5092, except the tax rate shall
68 be 1.6 percent of the gross amount of such premiums,
69 contributions, and assessments.
70 Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1283 CS Innovation Incentives
SPONSOR(S): Attkisson and others
TIED BILLS: HB 1285 **IDEN./SIM. BILLS:** SB 2728

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Economic Development, Trade & Banking Committee	6 Y, 4 N, w/CS	Olmedillo	Carlson
2) Fiscal Council	15 Y, 6 N, w/CS	Gordon	Kelly
3) Commerce Council		Olmedillo	Randle
4)			
5)			

SUMMARY ANALYSIS

The bill creates within the Office of Tourism, Trade, and Economic Development (OTTED) the Innovation Incentive Program (Program) for qualified innovation businesses. The purpose of the Program is to improve the state's ability to compete effectively in attracting science-based research projects of significant scale and world class excellence and innovation business projects to this state.

The bill appropriates $250,000,000 from nonrecurring general revenue to OTTED for the fiscal year 2006-2007.

The bill requires Enterprise Florida, Inc. (EFI) to evaluate applications for incentive awards and make recommendations to OTTED, which in turn, shall make recommendations for approval to the Governor. The bill requires the Governor to consult with the Legislature and receive approval prior to releasing funds.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government – The bill creates the Innovation Incentive Program for qualified innovation businesses and appropriates $250,000,000 from general revenue for the 2006-2007 fiscal year.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Quick Action Closing Fund
The 1999 Legislature created the Quick Action Closing Fund (QACF) (s. 288.1088, F.S.) within the Office of Tourism, Trade, and Economic Development for the purpose of helping Florida compete for high-impact business facilities, critical private infrastructure in rural areas, and key businesses in economically distressed urban or rural communities.[2] Enterprise Florida. Inc., evaluates proposals for the use of the Quick Action Closing Fund, and makes recommendations to OTTED.[3]

Once Enterprise Florida, Inc. makes its evaluation and recommendation to OTTED, the director of OTTED must make a recommendation of approval or disapproval to the Governor. OTTED must also provide the Governor with proposed performance conditions the project must meet to obtain the incentive funds.

The Governor must consult with the Legislature before giving final approval for using the QACF for the project and must recommend approval of the project and release of moneys from the QACF pursuant to legislative consultation and review requirements of s. 216.177, F.S. This requires notice to the chair and vice chair of the Legislative Budget Commission.

Once approved by the Governor, OTTED enters into a performance contract with the business and establishes the conditions for payment of moneys from the QACF.

Enterprise Florida, Inc. shall validate the contractor's performance and provide a report regarding such performance to the Governor, the President of the Senate and the Speaker of the House, within 6 months after completion of the contract.

The Governor may, in an emergency or special circumstance, and in consultation with the Legislature pursuant to s. 216.177, reallocate unencumbered funds appropriated to the QACF to supplement statutorily created economic development programs and operations.

Effect of Proposed Changes

Background
In a press release dated January 30, 2006, Governor Bush launched new economic development initiatives to bolster the state's efforts to diversify and build Florida's Innovation Economy. To coincide with this initiative, the Governor is recommending a $630 million investment in the 2006-2007 budget for programs that will generate the innovation needed to create the industries of the future; this includes $250 million to create the Florida Innovation Incentive Fund to enable Florida to take advantage of

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[2] The 1996 Legislature created the Office of Tourism, Trade, and Economic Development (OTTED) in the Executive Office of the Governor. OTTED is responsible for promoting economic development, tourism, and international trade. OTTED oversees the activities public-private partnerships, including Enterprise Florida, Inc. (s. 14.2015, F.S.).

[3] In 1992, the Legislature created Enterprise Florida, Inc. (EFI), to assist in the coordination of the state's economic development efforts and to develop a strategic plan for economic development for Florida (s. 288.901, F.S.).

"once-in-a-lifetime opportunities" and big, statewide priorities that will yield a significant return for the tax payer in the long run.

Appropriations

The bill appropriates $250,000,000 from nonrecurring general revenue to OTTED for the fiscal year 2006-2007. The bill provides that any unexpended balance from this appropriation shall be carried forward at the end of each fiscal year until the 2010-2011 fiscal year, at which time, any obligated funds for qualified projects that are not yet disbursed shall remain to be used for the purposes set out in the bill. Any unobligated funds of this appropriation shall revert to the General Revenue Fund unallocated at the end of the 2010-2011 fiscal year.

Innovation Incentive Program

The bill creates within OTTED the Innovation Incentive Program for qualified innovation projects. The purpose of the Program is to ensure the availability of sufficient resources to respond expeditiously to extraordinary economic opportunities and compete effectively for high value research and development and business innovation projects.

Definitions

The bill provides the following definitions:

- "Average wage" means the statewide average wage in the private sector or the average of all private-sector wages and salaries in the county or in the standard metropolitan area in which the project is located as determined by the Agency for Workforce Innovation.
- "Cumulative investment" means the total private investment in buildings and equipment made by an applicant under a project approved pursuant to this section.
- "Director" means the director of the Office of Tourism, Trade, and Economic Development.
- "Innovation business" means a business expanding or locating in this state that is likely to serve as a catalyst for the growth of an existing or emerging technology cluster or will significantly impact the regional economy in which it is to expand or locate.
- "Fiscal year" means the state fiscal year.
- "Jobs" means full-time equivalent positions, as that term is consistent with terms used by the Agency for Workforce Innovation and the United States Department of Labor for purposes of unemployment compensation tax administration and employment estimation, resulting directly from a project in this state. The term does not include temporary construction jobs.
- "Match" means funding from local sources, public or private, which will be paid to the applicant and which is equal to 100 percent of the award. Eligible match funding may include any tax abatement granted to the applicant under s. 196.1995 or the appraised market value of land, buildings, infrastructure, or equipment conveyed or provided at a discount to the applicant. Complete documentation of match payment or other conveyance must be presented to and verified by the office before transfer of state funds to an applicant. An applicant may not provide, directly or indirectly, more than 5 percent of match funding in any fiscal year. The sources of such funding may not include, directly or indirectly, state funds appropriated from the General Revenue Fund or any state trust fund, excluding tax revenues shared with local governments pursuant to law.
- "Office" means the Office of Tourism, Trade, and Economic Development.
- "Project" means the location to or expansion in this state by an innovation business or research and development applicant approved for an award pursuant to this section.
- "Research and development" means basic and applied research in the sciences or engineering, as well as the design, development, and testing, of prototypes or processes of new or improved products. Research and development does not include market research, routine consumer product testing, sales research, research in the social sciences or psychology, nontechnological activities, or technical services.
- "Research and development facility" means a facility that is predominately engaged in research and development activities. For purposes of this paragraph, the term "predominately" means at least 51 percent of the time.

Application
An innovation business or research and development entity shall submit an application to Enterprise Florida, Inc. (EFI), prior to deciding to locate or expand in Florida, which shall include:

- The applicants' Federal Employer Identification Number (FEIN), unemployment account number, state sales tax registration number;[4]
- The proposed location of a project within Florida;
- A description of the type of business activity, product, or research and development undertaken by the applicant, including the North American Industry Classification System code;
- The applicant's projected investment in the project;
- The total investment from all sources in the project;
- The anticipated number of net new full-time equivalent jobs created as of December 31st of each year in Florida and the average wage of such jobs;
- The total number of full-time equivalent employees currently employed by the applicant in Florida, if applicable;
- The anticipated project commencement date;
- An explanation regarding the significance of the award as a factor to induce business to locate or expand in Florida; and
- An estimate of proportion of revenues from project that will be generated outside Florida, if applicable.

Eligibility
To be eligible, an applicant must establish the following to the satisfaction of EFI and OTTED:

1. The proposed jobs by the project will pay at least 130% of the average private sector wage in the anticipated location area or statewide for the project. OTTED may waive this requirement at its discretion or at the request of EFI, only if:
    - The project is located in a brownfield area, rural city, rural county, or in an Enterprise Zone,
    - The merits of the project or specific circumstances in the community in relationship to the project warrant such action;
    - If Enterprise Florida, Inc. recommends such waiver, it must be in writing and explain a specific justification supporting the waiver; and
    - If the director of OTTED waives the requirement, it must be stated in writing and explain the reasons for granting the waiver.

2. For research and development projects, the project will serve as a catalyst for an emerging or evolving technology cluster, demonstrate a plan for significant higher education collaboration, provide the state a break-even return on investment within a 20-year period, and receive a one-to-one match from the local community. However, the match requirement may be reduced or waived in rural areas of critical economic concern or reduced in rural communities, brownfields, and enterprise zones within an urban county.

3. For innovation business projects, the project will:
    - Create at least 1,000 direct, new jobs at the business; or if the project is located in a rural city or rural county, the project will create at least 750 direct, new jobs.
    - The activity or product for the applicant's project must be within an industry or industries that have been designated as a target industry business under s. 288.106 or a high-impact sector under s. 288.108.

[4] These items must be provided if available, however, they shall be provided prior to disbursement.

- The cumulative investment in the project is at least $500 million within a 3-year period; or if the project is located in a rural city or rural county, or in an enterprise zone, the cumulative investment in the project must exceed $375 million within a 3-year period.

Evaluation

The bill requires Enterprise Florida, Inc, to evaluate proposals for innovation incentive awards and recommend use of appropriated funds to OTTED. In its recommendation to OTTED, Enterprise Florida, Inc. must:

- Describe the project, its required facilities, and the associated product, service, or research and development associated with the project;
- Provide the number of full-time equivalent jobs that will be created by the project, the total estimated average annual wages of such jobs, and the types of business activities and jobs stimulated by the project;
- Provide the amount of the cumulative investment to be dedicated to the project within 3 years and the total investment expected in the project if more than 3 years;
- Describe the economic and fiscal impacts on the local and state economies relative to the investment
- Provide a statement of any special impacts the project is expected to stimulate in a particular business sector in the state or regional economy or in the state's universities and community colleges;
- Provide a statement of any anticipated or proposed relationships with state universities;
- Provide a statement of the role the incentive is expected to play in the decision of the applicant to locate or expand in this state;
- Provide an explanation of the amount of the award needed to cause the applicant to locate or expand in this state;
- Provide a discussion of the efforts and commitments made by the local community in which the project is to be located to induce the applicant's location or expansion, taking into consideration local resources and abilities; and
- Provide a recommendation for specific performance criteria the applicant would be expected to achieve to receive any payments from the fund and penalties or sanctions for failure to meet or maintain performance conditions.

For research and development facility projects, Enterprise Florida, Inc. must:

- Provide OTTED with a description of the projects' potential to serve as a catalyst for an emerging or evolving technology cluster;
- Provide the percentage of match provided for the project;
- Describe the extent to which the project has or could have a long-term collaborative research and development relationship with a state university or community college;
- Describe the existing or projected impact of the project on established technology clusters or targeted industry sectors;
- Describe the project's contribution to the diversity and resiliency of the innovation economy of Florida; and
- Describe the project's impact on special needs communities, including rural areas, distressed urban areas, and enterprise zones.

Negotiation of Awards/Process for Approval

OTTED may negotiate the proposed award for any applicant meeting the requirements of the bill, after consultation with Enterprise Florida, Inc., taking into consideration the amount of incentive needed to cause the applicant to locate or expand in this state in conjunction with other relevant applicants.

Emphasis must be given to those projects with a potential to stimulate additional private investment and high-quality employment opportunities.

Once Enterprise Florida, Inc. makes its evaluation and recommendation to OTTED, the director of OTTED must make a recommendation of approval or disapproval of the award to the Governor. In addition, OTTED must provide the Governor with proposed performance conditions the applicant must meet to obtain the award. The Governor must consult with the President of the Senate and Speaker of the House of Representatives before giving approval for an award. Thereafter, the Governor shall release funds pursuant to the requirements of s. 216.177, F.S.

Performance Contract
Once approved by the Governor, OTTED enters into a contract with the business and establishes the conditions for payment of moneys. Conditions in the contract include those factors identified by Enterprise Florida, Inc. in its request to OTTED, and sanctions for not meeting performance conditions. Enterprise Florida, Inc. shall assist OTTED in validating the performance of an innovation business or research and development facility that has received an award. Moreover, at the conclusion of the agreement, Enterprise Florida, Inc., shall report, within 90 days, the result of the innovation incentive award to the Governor and the Legislature.

Permit Review
The bill provides that the agencies involved in the project shall work with the office to review sites proposed for the location of facilities eligible for the Innovation Incentive Program. Within 20 days of the request for the review by the office, the agencies shall provide the office with a statement as to each site's necessary permits under local, state and federal law and a statement identifying any significant permitting issues, which may result in a denial or significant delay in issuing a license.

Effective Date; Repeal of Prior Acts The bill provides that the law will take effect on July 1, 2006 and will be repealed on July 1, 2011.

C. SECTION DIRECTORY:

Section 1. Creates s. 288.1089, F.S.; providing for the creation of a program, definitions, awards, limitations, application procedure, eligibility requirements, review and award process, report requirements, and additional uses of appropriations.
Section 2. Provides appropriations.
Section 3. Amends s. 403.973(16), F.S., creating a review process.
Section 4. 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:

   The bill appropriate $250,000,000 from nonrecurring general revenue to OTTED for fiscal year 2006-2007.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

The bill requires agencies involved in the permitting process for the project to notice OTTED of permitting issues within 20 days. These costs can be absorbed within the agencies' current budgets.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require a municipality or county to spend funds or to take any action requiring the expenditure of funds, does not reduce the county's authority to raise revenue, and does not reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 30, 2006, the Economic Development, Trade and Banking Committee adopted a strike-all amendment that made the following changes:

- It removes redundant legislative findings and intent language;
- It removes the power of the Governor to seep unencumbered funds from the Incentive Account;
- It creates a direct appropriation to OTTED from nonrecurring general revenue;
- It provides a carry forward of unencumbered funds through fiscal year 2010-2011; and
- It requires OTTED to review proposed sites for approved projects and it requires agencies involved in the permitting process for the project to notice OTTED of permitting issues within 20 days.

On April 11, 2006, the Fiscal Council adopted one amendment to HB 1283 which removed the language which created the Innovation Incentive Account within the Economic Development Trust Fund.

CHAMBER ACTION

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1 The Fiscal Council recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to innovation incentives; creating s.
7 288.1089, F.S.; creating within the Office of Tourism,
8 Trade, and Economic Development the Innovation Incentive
9 Program for certain purposes; providing definitions;
10 providing for innovation incentive awards; providing
11 limitations; providing qualification requirements for
12 review of applicants and projects by the office and
13 Enterprise Florida, Inc.; providing proposal evaluation
14 and recommendation requirements for Enterprise Florida,
15 Inc.; authorizing the office to negotiate award amounts to
16 applicants; providing negotiation requirements; requiring
17 the director of the office to make recommendations to the
18 Governor for approval or disapproval of certain projects;
19 providing recommendation requirements; requiring
20 consultation with the Legislature; providing for
21 certification of applicants as qualified innovation
22 businesses; providing for incentive payment agreements;
23 requiring Enterprise Florida, Inc., to assist the office

24 in validating certain business performances; requiring a
25 report; amending s. 403.973, F.S.; requiring the office to
26 review certain sites for projects funded under the
27 Innovation Incentive Program; amending s. 288.0655, F.S.;
28 correcting a cross-reference; providing an appropriation;
29 providing for carrying forward certain unexpended balances
30 of appropriations until a time certain; providing for
31 office retention of obligated funds to be used for certain
32 purposes; providing for reversion of unobligated funds;
33 providing an effective date.
34
35 Be It Enacted by the Legislature of the State of Florida:
36
37 Section 1. Section 288.1089, Florida Statutes, is created
38 to read:
39 288.1089 Innovation Incentive Program.--
40 (1) The Innovation Incentive Program is created within the
41 Office of Tourism, Trade, and Economic Development to ensure
42 that sufficient resources are available to allow the state to
43 respond expeditiously to extraordinary economic opportunities
44 and to compete effectively for high value research and
45 development and innovation business projects.
46 (2) As used in this section, the term:
47 (a) "Average wage" means the statewide average wage in the
48 private sector or the average of all private sector wages in the
49 county or in the standard metropolitan area in which the project
50 is located as determined by the Agency for Workforce Innovation.

51 (b) "Cumulative investment" means the total private
52 investment in buildings and equipment made by an applicant under
53 a project approved pursuant to this section.
54 (c) "Director" means the director of the Office of
55 Tourism, Trade, and Economic Development.
56 (d) "Innovation business" means a business expanding or
57 locating in this state that is likely to serve as a catalyst for
58 the growth of an existing or emerging technology cluster or will
59 significantly impact the regional economy in which it is to
60 expand or locate.
61 (e) "Fiscal year" means the state fiscal year.
62 (f) "Jobs" means full-time equivalent positions, as that
63 term is consistent with terms used by the Agency for Workforce
64 Innovation and the United States Department of Labor for
65 purposes of unemployment compensation tax administration and
66 employment estimation, resulting directly from a project in this
67 state. The term does not include temporary construction jobs.
68 (g) "Match" means funding from local sources, public or
69 private, which will be paid to the applicant and which is equal
70 to 100 percent of an award. Eligible match funding may include
71 any tax abatement granted to the applicant under s. 196.1995 or
72 the appraised market value of land, buildings, infrastructure,
73 or equipment conveyed or provided at a discount to the
74 applicant. Complete documentation of a match payment or other
75 conveyance must be presented to and verified by the office prior
76 to transfer of state funds to an applicant. An applicant may not
77 provide, directly or indirectly, more than 5 percent of match
78 funding in any fiscal year. The sources of such funding may not

79 include, directly or indirectly, state funds appropriated from
80 the General Revenue Fund or any state trust fund, excluding tax
81 revenues shared with local governments pursuant to law.
82 (h) "Office" means the Office of Tourism, Trade, and
83 Economic Development.
84 (i) "Project" means the location to or expansion in this
85 state by an innovation business or research and development
86 applicant approved for an award pursuant to this section.
87 (j) "Research and development" means basic and applied
88 research in the sciences or engineering, as well as the design,
89 development, and testing of prototypes or processes of new or
90 improved products. Research and development does not include
91 market research, routine consumer product testing, sales
92 research, research in the social sciences or psychology,
93 nontechnological activities, or technical services.
94 (k) "Research and development facility" means a facility
95 that is predominately engaged in research and development
96 activities. For purposes of this paragraph, the term
97 "predominantly" means at least 51 percent of the time.
98 (3) To be eligible for consideration for an innovation
99 incentive award, an innovation business or research and
100 development entity must submit a written application to
101 Enterprise Florida, Inc., before making a decision to locate new
102 operations in this state or expand an existing operation in this
103 state. The application must include, but not be limited to:
104 (a) The applicant's federal employer identification
105 number, unemployment account number, and state sales tax
106 registration number. If such numbers are not available at the

107 time of application, they must be submitted to the office in
108 writing prior to the disbursement of any payments under this
109 section.
110 (b) The location in this state at which the project is
111 located or is to be located.
112 (c) A description of the type of business activity,
113 product, or research and development undertaken by the
114 applicant, including six-digit North American Industry
115 Classification System codes for all activities included in the
116 project.
117 (d) The applicant's projected investment in the project.
118 (e) The total investment, from all sources, in the
119 project.
120 (f) The number of net new full-time equivalent jobs in
121 this state the applicant anticipates having created as of
122 December 31 of each year in the project and the average annual
123 wage of such jobs.
124 (g) The total number of full-time equivalent employees
125 currently employed by the applicant in this state, if
126 applicable.
127 (h) The anticipated commencement date of the project.
128 (i) A detailed explanation of why the innovation incentive
129 is needed to induce the applicant to expand or locate in the
130 state and whether an award would cause the applicant to locate
131 or expand in this state.
132 (j) If applicable, an estimate of the proportion of the
133 revenues resulting from the project that will be generated
134 outside this state.

135 (4) To qualify for review by the office, the applicant
136 must, at a minimum, establish the following to the satisfaction
137 of Enterprise Florida, Inc., and the office:
138 (a) The jobs created by the project must pay an estimated
139 annual average wage equaling at least 130 percent of the average
140 private sector wage in the area where the project is to be
141 located or the average private sector wage in the state. The
142 office may waive this average wage requirement at the request of
143 Enterprise Florida, Inc., for a project located in a brownfield
144 area designated under s. 376.80, in a rural city or rural county
145 as defined in s. 288.106, or in an enterprise zone, when the
146 merits of the individual project or the specific circumstances
147 in the community in relationship to the project warrant such
148 action. A recommendation for waiver by Enterprise Florida, Inc.,
149 must include a specific justification for the waiver and be
150 transmitted to the office in writing. If the director elects to
151 waive the wage requirement, the waiver must be stated in writing
152 and the reasons for granting the waiver must be explained.
153 (b) A research and development project must:
154 1. Serve as a catalyst for an emerging or evolving
155 technology cluster.
156 2. Demonstrate a plan for significant higher education
157 collaboration.
158 3. Provide the state, at a minimum, a break-even return on
159 investment within a 20-year period.
160 4. Be provided with a one to one match from the local
161 community. The match requirement may be reduced or waived in

162 rural areas of critical economic concern or reduced in rural
163 communities, brownfields, and enterprise zones.
164 (c) An innovation business project in this state, other
165 than a research and development project, must:
166 1.a. Result in the creation of at least 1,000 direct, new
167 jobs at the business; or
168 b. Result in the creation of at least 750 direct, new jobs
169 if the project is located in a rural city or rural county as
170 defined in s. 288.106 or in an enterprise zone.
171 2. Have an activity or product that is within an industry
172 that is designated as a target industry business under s.
173 288.106 or a designated sector under s. 288.108.
174 3.a. Have a cumulative investment of at least $500 million
175 within a 3-year period; or
176 b. Have a cumulative investment that exceeds $375 million
177 within a 3-year period if the project is located in a rural
178 county or rural city as defined in s. 288.106 or in an
179 enterprise zone.
180 (5) Enterprise Florida, Inc., shall evaluate proposals for
181 innovation incentive awards and transmit recommendations for
182 awards to the office. Such evaluation and recommendation must
183 include, but need not be limited to:
184 (a) A description of the project, its required facilities,
185 and the associated product, service, or research and development
186 associated with the project.
187 (b) The number of full-time equivalent jobs that will be
188 created by the project, the total estimated average annual wages

189 of such jobs, and the types of business activities and jobs
190 likely to be stimulated by the investment.
191 (c) The cumulative investment to be dedicated to the
192 project within 3 years and the total investment expected in the
193 project if more than 3 years.
194 (d) The projected economic and fiscal impacts on the local
195 and state economies relative to investment.
196 (e) A statement of any special impacts the project is
197 expected to stimulate in a particular business sector in the
198 state or regional economy or in the state's universities and
199 community colleges.
200 (f) A statement of any anticipated or proposed
201 relationships with state universities.
202 (g) A statement of the role the incentive is expected to
203 play in the decision of the applicant to locate or expand in
204 this state.
205 (h) A recommendation and explanation of the amount of the
206 award needed to cause the applicant to expand or locate in this
207 state.
208 (i) A discussion of the efforts and commitments made by
209 the local community in which the project is to be located to
210 induce the applicant's location or expansion, taking into
211 consideration local resources and abilities.
212 (j) A recommendation for specific performance criteria the
213 applicant would be expected to achieve in order to receive
214 payments from the fund and penalties or sanctions for failure to
215 meet or maintain performance conditions.
216 (k) For a research and development facility project:

217 1. A description of the extent to which the project has
218 the potential to serve as catalyst for an emerging or evolving
219 cluster.
220 2. The percentage of match provided for the project.
221 3. A description of the extent to which the project has or
222 could have a long-term collaborative research and development
223 relationship with one or more universities or community colleges
224 in this state.
225 4. A description of the existing or projected impact of
226 the project on established clusters or targeted industry
227 sectors.
228 5. A description of the project's contribution to the
229 diversity and resiliency of the innovation economy of this
230 state.
231 6. A description of the project's impact on special-needs
232 communities, including, but not limited to, rural areas,
233 distressed urban areas, and enterprise zones.
234 (6) In consultation with Enterprise Florida, Inc., the
235 office may negotiate the proposed amount of an award for any
236 applicant meeting the requirements of this section. In
237 negotiating such award, the office shall consider the amount of
238 the incentive needed to cause the applicant to locate or expand
239 in this state in conjunction with other relevant applicant
240 impact and cost information and analysis as described in this
241 section. Particular emphasis shall be given to the potential for
242 the project to stimulate additional private investment and high-
243 quality employment opportunities in the area.

244 (7) Upon receipt of the evaluation and recommendation from
245 Enterprise Florida, Inc., the director shall recommend to the
246 Governor the approval or disapproval of an award. In
247 recommending approval of an award, the director shall include
248 proposed performance conditions that the applicant must meet in
249 order to obtain incentive funds and any other conditions that
250 must be met before the receipt of any incentive funds. The
251 Governor shall consult with the President of the Senate and the
252 Speaker of the House of Representatives before giving approval
253 for an award. Upon approval of an award, the Executive Office of
254 the Governor shall release the funds pursuant to the legislative
255 consultation and review requirements set forth in s. 216.177.
256 (8) Upon approval by the Governor and release of the funds
257 as set forth in subsection (7), the director shall issue a
258 letter certifying the applicant as qualified for an award. The
259 office and the applicant shall enter into an agreement that sets
260 forth the conditions for payment of incentives. The agreement
261 must include the total amount of funds awarded; the performance
262 conditions that must be met to obtain the award or portions of
263 the award, including, but not limited to, net new employment in
264 the state, average wage, and total investment; demonstration of
265 a baseline of current service and a measure of enhanced
266 capability; the methodology for validating performance; the
267 schedule of payments; and sanctions for failure to meet
268 performance conditions.
269 (9) Enterprise Florida, Inc., shall assist the office in
270 validating the performance of an innovation business or research
271 and development facility that has received an award. At the

272 conclusion of the innovation incentive award agreement, or its
273 earlier termination, Enterprise Florida, Inc., shall, within 90
274 days, report the results of the innovation incentive award to
275 the Governor, the President of the Senate, and the Speaker of
276 the House of Representatives.
277 Section 2. Subsections (16) through (19) of section
278 403.973, Florida Statutes, are renumbered as subsections (17)
279 through (20), respectively, and a new subsection (16) is added
280 to that section, to read:
281 403.973 Expedited permitting; comprehensive plan
282 amendments.--
283 (16) The office, working with the agencies participating
284 in the memoranda of agreement, shall review sites proposed for
285 the location of facilities eligible for the Innovation Incentive
286 Program under s. 288.1089. Within 20 days after the request for
287 the review by the office, the agencies shall provide to the
288 office a statement as to each site's necessary permits under
289 local, state, and federal law and an identification of
290 significant permitting issues, which if unresolved, may result
291 in the denial of an agency permit or approval or any significant
292 delay caused by the permitting process.
293 Section 3. Paragraph (e) of subsection (2) of section
294 288.0655, Florida Statutes, is amended to read:
295 288.0655 Rural Infrastructure Fund.--
296 (2)
297 (e) To enable local governments to access the resources
298 available pursuant to s. 403.973(19) ~~(18)~~, the office may award
299 grants for surveys, feasibility studies, and other activities

300 related to the identification and preclearance review of land
301 which is suitable for preclearance review. Authorized grants
302 under this paragraph shall not exceed $75,000 each, except in
303 the case of a project in a rural area of critical economic
304 concern, in which case the grant shall not exceed $300,000. Any
305 funds awarded under this paragraph must be matched at a level of
306 50 percent with local funds, except that any funds awarded for a
307 project in a rural area of critical economic concern must be
308 matched at a level of 33 percent with local funds. In evaluating
309 applications under this paragraph, the office shall consider the
310 extent to which the application seeks to minimize administrative
311 and consultant expenses.
312 Section 4. For fiscal year 2006-2007, the sum of
313 $250,000,000 is appropriated from nonrecurring general revenue
314 to the Office of Tourism, Trade, and Economic Development.
315 Notwithstanding s. 216.301, Florida Statutes, and pursuant to s.
316 216.351, Florida Statutes, any unexpended balance from this
317 appropriation shall be carried forward at the end of each fiscal
318 year until the 2010-2011 fiscal year. At the end of the 2010-
319 2011 fiscal year, any obligated funds for qualified projects
320 that are not yet disbursed shall remain with the office to be
321 used for the purposes of this act. Any unobligated funds of this
322 appropriation shall revert to the General Revenue Fund
323 unallocated at the end of the 2010-2011 fiscal year.
324 Section 5. This act shall take effect July 1, 2006.

HB 1285 CS / Attkisson

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1285 CS Public Records Exemptions
SPONSOR(S): Attkisson
TIED BILLS: HB 1283 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Economic Development, Trade & Banking Committee	6 Y, 4 N	Carlson	Carlson
2) Governmental Operations Committee	5 Y, 1 N, w/CS	Williamson	Williamson
3) Commerce Council		Carlson MWC	Randle TMR
4)			
5)			

SUMMARY ANALYSIS

Current law provides an exemption from public records requirements for certain information held by the Office of Tourism, Trade and Economic Development, Enterprise Florida, Inc., or county or municipal governmental entities and their employees or agents pursuant to incentive programs for qualified businesses.

The bill will expand the existing exemption to include specific information relating to the "Innovation Incentive Program." It provides for future review and repeal of the exemption, provides a statement of public necessity, and provides a contingent effective date.

The bill does not grant rulemaking authority to any administrative agency.

The bill could have a minimal fiscal impact on state and local governments.

The bill requires a two-thirds vote of the members present and voting for passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government - The bill decreases access to public records.

B. EFFECT OF PROPOSED CHANGES:

Public Records Law

Article I, s. 24(a), Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a), Florida Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose. Public policy regarding access to government records also is addressed in the Florida Statutes.

Chapter 119, F.S., more completely addresses the issue of public records. Section 119.07(1), F.S., also guarantees every person a right to inspect, examine, and copy any state, county, or municipal record.

Open Government Sunset Review Act

Section 119.15, F.S., the "Open Government Sunset Review Act," sets forth a legislative review process that requires newly created or expanded exemptions to include an automatic repeal of the exemption on October 2nd of the fifth year after enactment or substantial amendment, unless the Legislature reenacts the exemption. It provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or
- Protecting trade or business secrets.

Public Records Exemption for Incentive Programs

Section 288.1067, F.S., provides that certain information held by the Office of Tourism, Trade and Economic Development, Enterprise Florida, Inc., or county or municipal governmental entities and their employees or agents pursuant to incentive programs for qualified businesses[1] is confidential and exempt[2] from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The specific information includes:

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[1] The incentive programs are the Capital Investment Tax Credit Program (s. 220.191), Qualified Defense Contractor Tax Refund Program (s. 288.1045), Qualified Target Industry Tax Refund Program (s. 288.106), High Impact Performance Grant Program (s. 288.108) and the Quick Action Closing Fund (s. 288.1088).

[2] There is a difference between information and records that the Legislature has designated exempt from public disclosure and those the Legislature has deemed confidential and exempt. Information and records classified exempt from public disclosure are permitted to be disclosed under certain circumstances. *See City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates certain information and records confidential and

- An employer's federal employer identification number, unemployment compensation account number, and Florida sales tax registration number;
- Trade secret information as defined in s. 812.081, F.S.;
- The percentage of non-state sales and the percentage of gross receipts from certain Department of Defense contracts;
- Anticipated wages for new jobs to be created;
- The average wage paid by the business for new jobs created, detailed proprietary business information or employee personal identifying information used to demonstrate wage and job creation requirements;
- Proprietary business information regarding capital investment in certain circumstances; and
- The amount of Florida taxes paid.

Effect of Proposed Changes

The bill expands the public records exemption provided in s. 288.1067, F.S., to include information held by the Office of Tourism, Trade and Economic Development; Enterprise Florida, Inc.; or county or municipal governmental entities and their employees or agents pursuant to s. 288.1089, F.S., the "Innovation Incentive Program" created by HB 1283.

The bill provides for future review and repeal of the expanded exemption on October 2, 2011, provides a public necessity statement, and provides an effective date contingent on the passage of HB 1283 or similar legislation.

C. SECTION DIRECTORY:

Section 1. Amends s. 288.1067, F.S., to expand the existing public records exemption to include information held pursuant to the Innovation Incentive Program under s. 288.1089, F.S.

Section 2. Provides a public necessity statement.

Section 3. Provides a July 1, 2006 effective date contingent on the passage of HB 1283 or similar legislation.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   See Fiscal Comments.

exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than the persons or entities specifically designated in the statutory exemption. *See Attorney General Opinion 85-62*, August 1, 1985.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill likely could create a fiscal impact on state and local governments, because staff responsible for complying with public records requests will require training relating to the newly created public records exemption. In addition, state and local governments could incur costs associated with redacting the confidential and exempt information prior to releasing a record.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created or expanded public records or public meetings exemption. The bill expands a current public records exemption. Thus, it requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution, requires a statement of public necessity (public necessity statement) for a newly created or expanded public records or public meetings exemption. The bill expands a current public records exemption. Thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 17, 2006, the Governmental Operations Committee adopted an amendment and reported the bill favorably with committee substitute. The amendment conformed the public necessity statement to the exemption.

CHAMBER ACTION

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1 The Governmental Operations Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to public records exemptions; amending s.
7 288.1067, F.S.; expanding the public records exemption for
8 incentive programs to include the Innovation Incentive
9 Program under s. 288.1089, F.S.; providing for future
10 review and repeal; providing a statement of public
11 necessity; providing a contingent effective date.
12
13 Be It Enacted by the Legislature of the State of Florida:
14
15 Section 1. Subsections (1) and (4) of section 288.1067,
16 Florida Statutes, are amended to read:
17 288.1067 Confidentiality of records.--
18 (1) The following information held by the Office of
19 Tourism, Trade, and Economic Development, Enterprise Florida,
20 Inc., or county or municipal governmental entities, and their
21 employees or agents, pursuant to the incentive programs for
22 qualified businesses as provided in s. 220.191, s. 288.1045, s.
23 288.106, s. 288.108, ~~or~~ s. 288.1088<u>, or s. 288.1089</u> is

24 confidential and exempt from the provisions of s. 119.07(1) and
25 s. 24(a), Art. I of the State Constitution, for a period not to
26 exceed the duration of the relevant tax refund, tax credit, or
27 incentive agreement:
28 (a) The business's federal employer identification number,
29 unemployment compensation account number, and Florida sales tax
30 registration number.
31 (b) Any trade secret information as defined in s. 812.081.
32 Notwithstanding any provision of this section, trade secret
33 information shall continue to be confidential and exempt after
34 the duration of the tax refund, tax credit, or incentive
35 agreement.
36 (c) The percentage of the business's sales occurring
37 outside this state and, for businesses applying under s.
38 288.1045, the percentage of the business's gross receipts
39 derived from Department of Defense contracts during the 5 years
40 immediately preceding the date the business's application is
41 submitted.
42 (d) The anticipated wages for the project jobs that the
43 business plans to create, as reported on the application for
44 certification.
45 (e) The average wage actually paid by the business for
46 those jobs created by the project and any detailed proprietary
47 business information or an employee's personal identifying
48 information, held as evidence of the achievement or
49 nonachievement of the wage requirements of the tax refund, tax
50 credit, or incentive agreement programs or of the job creation
51 requirements of such programs.

52 (f) Any proprietary business information regarding capital
53 investment in eligible building and equipment made by the
54 qualified business project when held by the Office of Tourism,
55 Trade, and Economic Development as evidence of the achievement
56 or nonachievement of the investment requirements for the tax
57 credit certification under s. 220.191, for the high-impact
58 performance agreement under s. 288.108, ~~or~~ for the Quick Action
59 Closing Fund agreement under s. 288.1088, or for the Innovation
60 Incentive Program agreement under s. 288.1089.
61 (g) The amount of:
62 1. Taxes on sales, use, and other transactions paid
63 pursuant to chapter 212;
64 2. Corporate income taxes paid pursuant to chapter 220;
65 3. Intangible personal property taxes paid pursuant to
66 chapter 199;
67 4. Emergency excise taxes paid pursuant to chapter 221;
68 5. Insurance premium taxes paid pursuant to chapter 624;
69 6. Excise taxes paid on documents pursuant to chapter 201;
70 or
71 7. Ad valorem taxes paid, as defined in s. 220.03(1),
72
73 which the qualified business reports on its application for
74 certification or reports during the term of the tax refund
75 agreement, and for which the qualified business claims a tax
76 refund under s. 288.1045 or s. 288.106, and any such information
77 held as evidence of the achievement or nonachievement of
78 performance items contained in the tax refund agreement.

79 (4) This section is subject to the Open Government Sunset
80 Review Act ~~of 1995~~ in accordance with s. 119.15 and shall stand
81 repealed on October 2, 2011 ~~2007~~, unless reviewed and saved from
82 repeal through reenactment by the Legislature.
83 Section 2. The Legislature finds that it is a public
84 necessity to provide confidentiality for certain information
85 concerning businesses that is obtained through the
86 administration of the Innovation Incentive Program for qualified
87 innovation businesses under s. 288.1089, Florida Statutes. The
88 disclosure of information such as trade secrets, tax
89 identification numbers, analyses of gross receipts, the amount
90 of taxes paid, the amount of capital investment, and the amount
91 of employee wages paid, and the detailed documentation to
92 substantiate such performance information, could injure a
93 business in the marketplace by providing its competitors with
94 detailed insights into the financial status and the strategic
95 plans of the business, thereby diminishing the advantage that
96 the business maintains over those that do not possess such
97 information. Without this exemption, private sector businesses,
98 whose records generally are not required to be open to the
99 public, might refrain from participating in the economic
100 development program and thus would not be able to use the
101 incentives available under the program. If a business were
102 unable to use the incentives, the business might choose to
103 locate its employment and other investment activities outside
104 the state, depriving the state and the public of the potential
105 economic benefits associated with such business activities in
106 this state. The harm to businesses in the marketplace and to the

107 effective administration of the economic development program
108 caused by the public disclosure of such information far
109 outweighs the public benefits derived from its release. In
110 addition, because the confidentiality provided by s. 288.1067,
111 Florida Statutes, does not preclude the reporting of statistics
112 in the aggregate concerning the program, as well as the names of
113 businesses participating in the program and the amount of
114 incentives awarded and claimed, the public has access to
115 information important to an assessment of the performance of the
116 program.
117 Section 3. This act shall take effect July 1, 2006, if
118 House Bill 1283 or similar legislation is adopted in the same
119 legislative session or an extension thereof and becomes a law.

HB 7055 CS / EDTB Comm.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7055 CS PCB EDTB 06-01 Enterprise Zone Act
SPONSOR(S): Economic Development, Trade & Banking Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Economic Development, Trade & Banking Committee	8 Y, 0 N	Carlson	Carlson
1) Finance & Tax Committee	6 Y, 0 N, w/CS	Rice	Diez-Arguelles
2) Transportation & Economic Development Appropriations Committee	15 Y, 0 N	McAuliffe	Gordon
3) Commerce Council		Carlson MWC	Randle
4)			
5)			

SUMMARY ANALYSIS

In 2005, the Florida Enterprise Zone Act was amended, re-enacted, and scheduled to repeal in 2015.[1] Subsequently, staff from the Department of Revenue, the Governor's Office of Tourism, Trade and Economic Development and House Members raised concerns over the application of certain provisions of the revised act.

The bill provides corrections and remedial changes to the act as follows:

- The bill amends two obsolete expiration dates for related provisions, to make them consistent with the expiration of the Enterprise Zone Act.
- The bill also clarifies that the enterprise zone building materials sales tax refund may only be used once per parcel of real property unless there is a change in ownership, a new lessor or new lessee of the real property.
- The bill amends the definition of "new job has been created" for purposes of the enterprise zone jobs tax credit against the sales and corporate income taxes.
- This bill also provides that a local government must provide notice 90 days prior to the adoption of a resolution proposing an enterprise zone boundary change. The notice must explain that businesses and property owners subject to exclusion due to the boundary change may lose their enterprise zone eligibility.
- The bill also provides a limited two-year grandfather period for projects involving the rehabilitation of real property that were excluded from an enterprise zone because of the 2005 revision to the law.

The Revenue Estimating Conference has determined a ($3.3) million impact on state revenues and a ($0.7) million loss to local revenues.

This bill takes effect upon becoming law.

[1] See ch. 2005-287, L.O.F.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Lower Taxes – The bill will grandfather certain businesses that would otherwise be excluded from eligibility under the act and will allow these businesses to receive enterprise zone tax incentives.

B. EFFECT OF PROPOSED CHANGES:

Present Situation:

Florida Enterprise Zone Program

The Florida Enterprise Zone Act (act), codified in ss. 290.001-290.016, F.S., was created:

> to provide the necessary means to assist local communities, their residents, and the private sector in creating the proper economic and social environment to induce the investment of private resources in productive business enterprises located in severely distressed areas and to provide jobs for residents of such areas.[2]

The Florida Enterprise Zone Act of 1994 was scheduled to be repealed on December 31, 2005, but was re-enacted as the Florida Enterprise Zone Act (act) by ch. 2005-287, L.O.F., for an additional ten years, and is now scheduled to be repealed December 31, 2015.

Under the act, areas of the state meeting specified criteria, including suffering from pervasive poverty, unemployment, and general distress, have been designated as enterprise zones. The act established a process for the nomination and designation of a maximum of 20 enterprise zones in 1994.[3] Subsequently, the Legislature has designated additional zones. Currently, there are 55 enterprise zones in the state. When the Enterprise Zone Act was re-enacted by ch. 2005-287, L.O.F., 53 existing enterprise zones were allowed to apply for re-designation; 51 of 53 have been re-designated. Four of the 55 enterprise zones were created by ch. 2005-244, L.O.F.: City of Lakeland, Indian River County, Sumter County, and Orange County. There are also three Federal Enterprise Communities and two Federal Empowerment Zones. Certain federal, state, and local incentives are authorized to induce private businesses to invest in these enterprise zones.

State Incentives

The program's incentives are as follows:

- Jobs credit against sales or corporate income taxes: In order to be eligible, businesses must increase the number of full time jobs. The credit amount varies based on job location and employee wage. [4]
- Property tax credit: New, expanded, or rebuilt businesses located within an enterprise zone are allowed a credit on their Florida corporate income tax based on the amount of property taxes paid.[5]
- Sales tax refund for building materials: A refund is available for sales taxes paid on the purchase of building materials used in the rehabilitation of real property in an enterprise zone.

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[2] Section 290.003, F.S.
[3] Sections 290.0055 and 290.0065, F.S.
[4] Sections 212.096 and 220.181, F.S.
[5] Section 220.182, F.S.

The amount of the refund is the lesser of 97 percent of the sales taxes paid or $5,000, or, if 20 percent or more of the business's employees reside in an enterprise zone, the lesser of 97 percent of the sales taxes paid or $10,000.[6]

- Sales tax refund for business property used in an enterprise zone: A refund is available for sales taxes paid on the purchase of business property with a purchase price of $5,000 or more purchased by and for use in a business located in an enterprise zone. The amount of the refund is the lesser of 97 percent of the sales taxes paid or $5,000, or, if 20 percent or more of the business's employees reside in an enterprise zone, the lesser of 97 percent of the sales taxes paid or $10,000.[7]

Local Incentives

The following are examples of local incentives:

- Sales tax exemption for electrical energy used in an enterprise zone: A sales tax exemption (state and local taxes) is available to qualified businesses located in an enterprise zone on the purchase of electrical energy. This exemption is only available if the municipality in which the business is located has passed an ordinance to exempt the municipal utility taxes on such business.[8]
- Economic development ad valorem tax exemption: Up to 100 percent of the assessed value of improvements to real or tangible property of a new or expanded business located in an enterprise zone may be exempted from property taxes if the voters of a municipality authorize the governing body of the municipality to grant such exemptions.[9]
- Occupational license tax exemption: By ordinance, the governing body of a municipality may exempt 50 percent of the occupational license tax for businesses located in an enterprise zone.[10]
- Local impact fee abatement or reduction, or low-interest or interest-free loans, or grants to businesses.[11]

State Agencies

The Governor's Office of Tourism, Trade, and Economic Development (OTTED) administers the Florida Enterprise Zone Act; the Department of Revenue (DOR) reviews and approves or denies a business's application for enterprise zone tax credits; and Enterprise Florida, Inc., is responsible for marketing the act.

Effect of Proposed Changes:

Building Materials Sales Tax Exemption

The bill clarifies that the sales tax refund for building materials used to rehabilitate real property in an enterprise zone may only be used once per parcel of real property, unless there is a change in ownership, a new lessor or new lessee of the real property. This section provides that this provision applies retroactively to July 1, 2005.

Until July 1, 2005, the sales tax refund for building materials could only be used once per parcel of real property. During the 2005 Regular Session, this provision was removed with the intent of allowing the exemption to be granted to subsequent owners of a parcel of property. However, the 2005 change had the unintended consequence of broadening the exemption by allowing it to be used multiple times per parcel. This bill restores the pre-2005 language, providing that the exemption may only be used once

[6] Section 212.08(5)(g), F.S.
[7] Section 212.08(5)(h), F.S.
[8] Sections 212.08(15) and 166.231(8), F.S.
[9] Section 196.1995, F.S.
[10] Section 205.054, F.S.
[11] Section 290.0057(1)(e), F.S.

per parcel, and allows subsequent owners, lessor or lessees of the parcel to be eligible for the exemption. This would allow two separate owners, lessors or lessees of the same piece of real property to apply for the tax refund in a single taxable year.

Definition of Job Creation

The bill amends the definition of "new job has been created" for purposes of the enterprise zone job tax credit against sales tax. This provides that to be eligible for the job tax credit a business located in an enterprise zone must demonstrate to DOR that, on the date of application, the total number of full-time jobs is greater than it was 12 months prior to such date. Currently, a business must demonstrate that the number of full time jobs has increased from the average of the previous 12 months. According to DOR, changing the provision will make it easier to calculate when a new job has been created, because it ties that calculation to a specified date.

The bill amends the definition of "new job has been created" for purposes of the enterprise zone job tax credit against the corporate income tax. This will provide that to be eligible for the job tax credit a business located in an enterprise zone must demonstrate to DOR that, on the date of application, the total number of full-time jobs is greater than it was 12 months prior to such date.

The bill also provides that a business is eligible for the enterprise zone job tax credit against corporate income tax, if they can demonstrate to DOR that, on the date of application, the total number of full time jobs is greater than it was 12 months prior to such date.

Notice of Proposed Zone Boundary Changes

The bill requires that a local government intending to seek an enterprise zone boundary change provide an explanation of this possibility and the consequences of it in the notice that is produced 90 days before the meeting regarding the adoption of the boundary change resolution. Currently, there is no notice requirement for such boundary changes and affected businesses may lose their eligibility without their knowledge.

Relief for Businesses Excluded in Zones by 2005 Law

The bill provides for a limited, two-year period in which a project excluded from an enterprise zone through the redesignation process required by ch. 2005-287, L.O.F., may retain eligibility for the building materials tax exemption provided by s. 212.08(5)(g) if it meets the following requirements:

- The project must be located in an enterprise zone on or before December 31, 2005;
- The project must have a duration extending beyond December 31, 2005;
- The project has been excluded from the enterprise zone because the portion of the zone in which the project is located did not meet the pervasive poverty rate requirements of s. 290.0058(2)(a) or (b);
- The difference between the pervasive poverty rate requirements of s. 290.0058(2)(a) and the actual poverty rate in the area in which the project is located must be five percentage points or less;
- The business applies for a certificate of eligibility for the project with the enterprise zone development agency by November 1, 2006 and demonstrates that the project meets the requirements of this section; and
- The enterprise zone development agency provides a copy of the certificate of eligibility to the Department of Revenue.

This provision is intended to provide limited relief for multi-year projects involving the rehabilitation of real property located in an enterprise zone that were planned and begun before the 2005 law took place and that have subsequently lost their planned tax benefit eligibility.

Expiration Dates

The bill changes an obsolete expiration date within the definition of "adjusted federal income," to correspond with the expiration date of the Florida Enterprise Zone Act, which is December 31, 2015.

C. SECTION DIRECTORY:

Section 1: Amends s. 195.099, F.S., to correct an expiration date.

Section 2: Amends s. 220.03(1)(ff), F.S., to revise the definition of "new job has been created."

Section 3: Amends s. 212.08(5)(g), F.S., to limit the exemption of taxes paid for the rehabilitation of real property in an enterprise zone to one exemption per parcel unless there has been a change in ownership; providing for retroactive application.

Section 4: Amends s. 212.096, F.S., to revise the definition of "new job has been created."

Section 5: Amends s. 220.13, F.S., to correct expiration dates.

Section 6: Amends s. 220.181, F.S., to revise the requirement for demonstrating an increase in jobs.

Section 7: Amends s. 290.0055, F.S., to require a local government to provide notice of affects of a proposed boundary change.

Section 8. Provides that certain multi-year projects may retain eligibility for the building materials tax exemption through December 31, 2007 if certain requirements are met.

Section 9: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The Revenue Estimating Conference estimates the following:

	FY 2006-07	FY 2007-08
General Revenue:	($3.3)m	($3.2)m
Total	($3.3)m	($3.2)m

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

	FY 2006-07	FY 2007-08
Revenue Sharing	($0.1)m	($0.1)m
Local Government Half Cent	($0.3)m	($0.3)m
Local Option:	($0.3)m	($0.3m
Total	($0.7)m	($0.7)m

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will provide limited relief to certain businesses excluded from an existing enterprise zone by operation of ch. 2005-287, L.O.F., if that business was excluded in the course of the redesignation process enacted in law because the area in which it was located fell short of the required poverty thresholds by five or fewer percentage points.

In addition, Commercial and residential owners of real property will only be eligible to receive the enterprise zone building materials sales tax credit once per parcel of real property.

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Although the bill reduces the authority of cities and counties to raise revenues in the aggregate, the impact is less than $1.8 million and is insignificant. The bill is therefore exempt from the provisions of Article VII, Section 18(b), Florida Constitution.

2. Other:

None

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 4, 2006, the Finance and Tax Committee adopted two amendments. The first was a technical change to s. 212.096(1)(a), F.S., relating to the enterprise zone building materials tax credit program. It corrected an omission of the change in the "new job has been created" definition. The second was to remove the requirement that every business and property owner subject to exclusion due to a boundary change receive written notification. Instead, the local government must explain this possibility and the consequences of it in the notice that is produced 90 days before the meeting regarding the adoption of the boundary change resolution.

This analysis is drawn to the committee substitute.

CHAMBER ACTION

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1 The Finance & Tax Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to enterprise zones; amending s. 195.099,
7 F.S.; reenacting a periodic review requirement; providing
8 for future expiration; amending s. 220.03, F.S.; revising
9 a definition; amending s. 212.08, F.S.; limiting the
10 exemption by refund of certain taxes for rehabilitation of
11 certain property in an enterprise zone; providing an
12 exception; providing for retroactive application; amending
13 s. 212.096, F.S.; revising definitions; revising an
14 information requirement for claiming an enterprise zone
15 jobs tax credit; amending s. 220.13, F.S.; reenacting a
16 definitional provision; providing for future expiration of
17 provisions relating to enterprise zone credits; amending
18 s. 220.181, F.S.; revising certain criteria for granting
19 an enterprise zone jobs tax credit; amending s. 290.0055,
20 F.S.; providing a meeting notice requirement for a
21 governing body adopting an enterprise zone boundary change
22 resolution; providing for time-limited continuing
23 eligibility for a building materials tax exemption for

24 certain businesses; specifying eligibility requirements;
25 providing for retroactive application; providing for
26 future repeal; providing an effective date.
27
28 Be It Enacted by the Legislature of the State of Florida:
29
30 Section 1. Subsection (1) of section 195.099, Florida
31 Statutes, is reenacted and amended to read:
32 195.099 Periodic review.--
33 (1)(a) The department shall periodically review the
34 assessments of new, rebuilt, and expanded business reported
35 according to s. 193.077(3), to ensure parity of level of
36 assessment with other classifications of property.
37 (b) ~~The provisions of~~ This subsection shall expire ~~and be~~
38 ~~void~~ on the date specified in s. 290.016 for the expiration of
39 the Florida Enterprise Zone Act ~~June 30, 2005~~.
40 Section 2. Paragraph (ff) of subsection (1) of section
41 220.03, Florida Statutes, is amended to read:
42 220.03 Definitions.--
43 (1) SPECIFIC TERMS.--When used in this code, and when not
44 otherwise distinctly expressed or manifestly incompatible with
45 the intent thereof, the following terms shall have the following
46 meanings:
47 (ff) "New job has been created" means that, on the date of
48 application, the total number of full-time jobs is greater than
49 the total was ~~has increased in an enterprise zone from the~~
50 ~~average of the previous~~ 12 months prior to that date, as

51 demonstrated to the department by a business located in the
52 enterprise zone.
53 Section 3. Paragraph (g) of subsection (5) of section
54 212.08, Florida Statutes, is amended to read:
55 212.08 Sales, rental, use, consumption, distribution, and
56 storage tax; specified exemptions.--The sale at retail, the
57 rental, the use, the consumption, the distribution, and the
58 storage to be used or consumed in this state of the following
59 are hereby specifically exempt from the tax imposed by this
60 chapter.
61 (5) EXEMPTIONS; ACCOUNT OF USE.--
62 (g) Building materials used in the rehabilitation of real
63 property located in an enterprise zone.--
64 1. Building materials used in the rehabilitation of real
65 property located in an enterprise zone shall be exempt from the
66 tax imposed by this chapter upon an affirmative showing to the
67 satisfaction of the department that the items have been used for
68 the rehabilitation of real property located in an enterprise
69 zone. Except as provided in subparagraph 2., this exemption
70 inures to the owner, lessee, or lessor of the rehabilitated real
71 property located in an enterprise zone only through a refund of
72 previously paid taxes. To receive a refund pursuant to this
73 paragraph, the owner, lessee, or lessor of the rehabilitated
74 real property located in an enterprise zone must file an
75 application under oath with the governing body or enterprise
76 zone development agency having jurisdiction over the enterprise
77 zone where the business is located, as applicable, which
78 includes:

79 a. The name and address of the person claiming the refund.
80 b. An address and assessment roll parcel number of the
81 rehabilitated real property in an enterprise zone for which a
82 refund of previously paid taxes is being sought.
83 c. A description of the improvements made to accomplish
84 the rehabilitation of the real property.
85 d. A copy of the building permit issued for the
86 rehabilitation of the real property.
87 e. A sworn statement, under the penalty of perjury, from
88 the general contractor licensed in this state with whom the
89 applicant contracted to make the improvements necessary to
90 accomplish the rehabilitation of the real property, which
91 statement lists the building materials used in the
92 rehabilitation of the real property, the actual cost of the
93 building materials, and the amount of sales tax paid in this
94 state on the building materials. In the event that a general
95 contractor has not been used, the applicant shall provide this
96 information in a sworn statement, under the penalty of perjury.
97 Copies of the invoices which evidence the purchase of the
98 building materials used in such rehabilitation and the payment
99 of sales tax on the building materials shall be attached to the
100 sworn statement provided by the general contractor or by the
101 applicant. Unless the actual cost of building materials used in
102 the rehabilitation of real property and the payment of sales
103 taxes due thereon is documented by a general contractor or by
104 the applicant in this manner, the cost of such building
105 materials shall be an amount equal to 40 percent of the increase
106 in assessed value for ad valorem tax purposes.

107 f. The identifying number assigned pursuant to s. 290.0065
108 to the enterprise zone in which the rehabilitated real property
109 is located.
110 g. A certification by the local building code inspector
111 that the improvements necessary to accomplish the rehabilitation
112 of the real property are substantially completed.
113 h. Whether the business is a small business as defined by
114 s. 288.703(1).
115 i. If applicable, the name and address of each permanent
116 employee of the business, including, for each employee who is a
117 resident of an enterprise zone, the identifying number assigned
118 pursuant to s. 290.0065 to the enterprise zone in which the
119 employee resides.
120 2. This exemption inures to a city, county, other
121 governmental agency, or nonprofit community-based organization
122 through a refund of previously paid taxes if the building
123 materials used in the rehabilitation of real property located in
124 an enterprise zone are paid for from the funds of a community
125 development block grant, State Housing Initiatives Partnership
126 Program, or similar grant or loan program. To receive a refund
127 pursuant to this paragraph, a city, county, other governmental
128 agency, or nonprofit community-based organization must file an
129 application which includes the same information required to be
130 provided in subparagraph 1. by an owner, lessee, or lessor of
131 rehabilitated real property. In addition, the application must
132 include a sworn statement signed by the chief executive officer
133 of the city, county, other governmental agency, or nonprofit
134 community-based organization seeking a refund which states that

135 the building materials for which a refund is sought were paid
136 for from the funds of a community development block grant, State
137 Housing Initiatives Partnership Program, or similar grant or
138 loan program.
139 3. Within 10 working days after receipt of an application,
140 the governing body or enterprise zone development agency shall
141 review the application to determine if it contains all the
142 information required pursuant to subparagraph 1. or subparagraph
143 2. and meets the criteria set out in this paragraph. The
144 governing body or agency shall certify all applications that
145 contain the information required pursuant to subparagraph 1. or
146 subparagraph 2. and meet the criteria set out in this paragraph
147 as eligible to receive a refund. If applicable, the governing
148 body or agency shall also certify if 20 percent of the employees
149 of the business are residents of an enterprise zone, excluding
150 temporary and part-time employees. The certification shall be in
151 writing, and a copy of the certification shall be transmitted to
152 the executive director of the Department of Revenue. The
153 applicant shall be responsible for forwarding a certified
154 application to the department within the time specified in
155 subparagraph 4.
156 4. An application for a refund pursuant to this paragraph
157 must be submitted to the department within 6 months after the
158 rehabilitation of the property is deemed to be substantially
159 completed by the local building code inspector or by September 1
160 after the rehabilitated property is first subject to assessment.
161 5. The provisions of s. 212.095 do not apply to any refund
162 application made pursuant to this paragraph. Not more than one

163 exemption through a refund of previously paid taxes for the
164 rehabilitation of real property shall be permitted for any
165 single parcel of property unless there is a change in ownership,
166 a new lessor, or a new lessee of the real property. No refund
167 shall be granted pursuant to this paragraph unless the amount to
168 be refunded exceeds $500. No refund granted pursuant to this
169 paragraph shall exceed the lesser of 97 percent of the Florida
170 sales or use tax paid on the cost of the building materials used
171 in the rehabilitation of the real property as determined
172 pursuant to sub-subparagraph 1.e. or $5,000, or, if no less than
173 20 percent of the employees of the business are residents of an
174 enterprise zone, excluding temporary and part-time employees,
175 the amount of refund granted pursuant to this paragraph shall
176 not exceed the lesser of 97 percent of the sales tax paid on the
177 cost of such building materials or $10,000. A refund approved
178 pursuant to this paragraph shall be made within 30 days of
179 formal approval by the department of the application for the
180 refund. This subparagraph shall apply retroactively to July 1,
181 2005.
182 6. The department shall adopt rules governing the manner
183 and form of refund applications and may establish guidelines as
184 to the requisites for an affirmative showing of qualification
185 for exemption under this paragraph.
186 7. The department shall deduct an amount equal to 10
187 percent of each refund granted under the provisions of this
188 paragraph from the amount transferred into the Local Government
189 Half-cent Sales Tax Clearing Trust Fund pursuant to s. 212.20
190 for the county area in which the rehabilitated real property is

191 located and shall transfer that amount to the General Revenue
192 Fund.
193 8. For the purposes of the exemption provided in this
194 paragraph:
195 a. "Building materials" means tangible personal property
196 which becomes a component part of improvements to real property.
197 b. "Real property" has the same meaning as provided in s.
198 192.001(12).
199 c. "Rehabilitation of real property" means the
200 reconstruction, renovation, restoration, rehabilitation,
201 construction, or expansion of improvements to real property.
202 d. "Substantially completed" has the same meaning as
203 provided in s. 192.042(1).
204 9. This paragraph expires on the date specified in s.
205 290.016 for the expiration of the Florida Enterprise Zone Act.
206 Section 4. Paragraphs (a) and (e) of subsection (1) and
207 paragraph (e) of subsection (3) of section 212.096, Florida
208 Statutes, are amended to read:
209 212.096 Sales, rental, storage, use tax; enterprise zone
210 jobs credit against sales tax.--
211 (1) For the purposes of the credit provided in this
212 section:
213 (a) "Eligible business" means any sole proprietorship,
214 firm, partnership, corporation, bank, savings association,
215 estate, trust, business trust, receiver, syndicate, or other
216 group or combination, or successor business, located in an
217 enterprise zone. The business must demonstrate to the department
218 that, on the date of application, the total number of full-time

219 jobs defined under paragraph (d) is greater than the total was
220 ~~has increased from the average of the previous~~ 12 months prior
221 to that date. An eligible business does not include any business
222 which has claimed the credit permitted under s. 220.181 for any
223 new business employee first beginning employment with the
224 business after July 1, 1995.
225 (e) "New job has been created" means that, on the date of
226 application, the total number of full-time jobs is greater than
227 the total was ~~has increased in an enterprise zone from the~~
228 ~~average of the previous~~ 12 months prior to that date, as
229 demonstrated to the department by a business located in the
230 enterprise zone.
231
232 A person shall be deemed to be employed if the person performs
233 duties in connection with the operations of the business on a
234 regular, full-time basis, provided the person is performing such
235 duties for an average of at least 36 hours per week each month.
236 The person must be performing such duties at a business site
237 located in the enterprise zone.
238 (3) In order to claim this credit, an eligible business
239 must file under oath with the governing body or enterprise zone
240 development agency having jurisdiction over the enterprise zone
241 where the business is located, as applicable, a statement which
242 includes:
243 (e) Demonstration to the department that, on the date of
244 application, the total number of full-time jobs defined under
245 paragraph (1)(d) is greater than the total was ~~has increased in~~

246 ~~an enterprise zone from the average of the previous~~ 12 months
247 prior to that date.
248 Section 5. Paragraph (a) of subsection (1) of section
249 220.13, Florida Statutes, is reenacted and amended to read:
250 220.13 "Adjusted federal income" defined.--
251 (1) The term "adjusted federal income" means an amount
252 equal to the taxpayer's taxable income as defined in subsection
253 (2), or such taxable income of more than one taxpayer as
254 provided in s. 220.131, for the taxable year, adjusted as
255 follows:
256 (a) Additions.--There shall be added to such taxable
257 income:
258 1. The amount of any tax upon or measured by income,
259 excluding taxes based on gross receipts or revenues, paid or
260 accrued as a liability to the District of Columbia or any state
261 of the United States which is deductible from gross income in
262 the computation of taxable income for the taxable year.
263 2. The amount of interest which is excluded from taxable
264 income under s. 103(a) of the Internal Revenue Code or any other
265 federal law, less the associated expenses disallowed in the
266 computation of taxable income under s. 265 of the Internal
267 Revenue Code or any other law, excluding 60 percent of any
268 amounts included in alternative minimum taxable income, as
269 defined in s. 55(b)(2) of the Internal Revenue Code, if the
270 taxpayer pays tax under s. 220.11(3).
271 3. In the case of a regulated investment company or real
272 estate investment trust, an amount equal to the excess of the

273 net long-term capital gain for the taxable year over the amount
274 of the capital gain dividends attributable to the taxable year.
275 4. That portion of the wages or salaries paid or incurred
276 for the taxable year which is equal to the amount of the credit
277 allowable for the taxable year under s. 220.181. ~~The provisions~~
278 ~~of~~ This subparagraph shall expire ~~and be void~~ on the date
279 specified in s. 290.016 for the expiration of the Florida
280 Enterprise Zone Act ~~June 30, 2005~~.
281 5. That portion of the ad valorem school taxes paid or
282 incurred for the taxable year which is equal to the amount of
283 the credit allowable for the taxable year under s. 220.182. ~~The~~
284 ~~provisions of~~ This subparagraph shall expire ~~and be void~~ on the
285 date specified in s. 290.016 for the expiration of the Florida
286 Enterprise Zone Act ~~June 30, 2005~~.
287 6. The amount of emergency excise tax paid or accrued as a
288 liability to this state under chapter 221 which tax is
289 deductible from gross income in the computation of taxable
290 income for the taxable year.
291 7. That portion of assessments to fund a guaranty
292 association incurred for the taxable year which is equal to the
293 amount of the credit allowable for the taxable year.
294 8. In the case of a nonprofit corporation which holds a
295 pari-mutuel permit and which is exempt from federal income tax
296 as a farmers' cooperative, an amount equal to the excess of the
297 gross income attributable to the pari-mutuel operations over the
298 attributable expenses for the taxable year.
299 9. The amount taken as a credit for the taxable year under
300 s. 220.1895.

301 10. Up to nine percent of the eligible basis of any
302 designated project which is equal to the credit allowable for
303 the taxable year under s. 220.185.
304 11. The amount taken as a credit for the taxable year
305 under s. 220.187.
306 Section 6. Paragraph (a) of subsection (1) and paragraph
307 (f) of subsection (2) of section 220.181, Florida Statutes, are
308 amended to read:
309 220.181 Enterprise zone jobs credit.--
310 (1)(a) There shall be allowed a credit against the tax
311 imposed by this chapter to any business located in an enterprise
312 zone which demonstrates to the department that, on the date of
313 application, the total number of full-time jobs is greater than
314 the total was ~~has increased from the average of the previous~~ 12
315 months prior to that date. The credit shall be computed as 20
316 percent of the actual monthly wages paid in this state to each
317 new employee hired when a new job has been created, as defined
318 under s. 220.03(1)(ff), unless the business is located in a
319 rural enterprise zone, pursuant to s. 290.004(6), in which case
320 the credit shall be 30 percent of the actual monthly wages paid.
321 If no less than 20 percent of the employees of the business are
322 residents of an enterprise zone, excluding temporary and part-
323 time employees, the credit shall be computed as 30 percent of
324 the actual monthly wages paid in this state to each new employee
325 hired when a new job has been created, unless the business is
326 located in a rural enterprise zone, in which case the credit
327 shall be 45 percent of the actual monthly wages paid, for a
328 period of up to 24 consecutive months. If the new employee hired

329 when a new job is created is a participant in the welfare
330 transition program, the following credit shall be a percent of
331 the actual monthly wages paid: 40 percent for $4 above the
332 hourly federal minimum wage rate; 41 percent for $5 above the
333 hourly federal minimum wage rate; 42 percent for $6 above the
334 hourly federal minimum wage rate; 43 percent for $7 above the
335 hourly federal minimum wage rate; and 44 percent for $8 above
336 the hourly federal minimum wage rate.
337 (2) When filing for an enterprise zone jobs credit, a
338 business must file under oath with the governing body or
339 enterprise zone development agency having jurisdiction over the
340 enterprise zone where the business is located, as applicable, a
341 statement which includes:
342 (f) Demonstration to the department that, on the date of
343 application, the total number of full-time jobs is greater than
344 the total was ~~has increased from the average of the previous~~ 12
345 months prior to that date.
346 Section 7. Paragraph (c) is added to subsection (6) of
347 section 290.0055, Florida Statutes, to read:
348 290.0055 Local nominating procedure.--
349 (6)
350 (c) At least 90 days before adopting a resolution seeking
351 a change in the boundary of an enterprise zone, the governing
352 body shall include in a notice of the meeting at which the
353 resolution will be considered an explanation that a change in
354 the boundary of an enterprise zone will be considered and that
355 the change may result in loss of enterprise zone eligibility for
356 the area affected by the boundary change.

357 Section 8. (1) Notwithstanding the provisions of s.
358 212.08(5)(g), Florida Statutes, as amended by this act, a
359 business developing a project involving the rehabilitation of
360 real property that has been excluded from an enterprise zone
361 because of the redesignation requirements of s. 290.012 or s.
362 290.0065, Florida Statutes, shall remain eligible to apply for
363 the building materials tax exemption under s. 212.08(5)(g),
364 Florida Statutes, for that project through December 31, 2007, if
365 the following requirements are met:
366 (a) The project must have been located in an enterprise
367 zone on or before December 31, 2005.
368 (b) The project must have a duration extending beyond
369 December 31, 2005.
370 (c) The project must have been excluded from the
371 enterprise zone due to the portion of the enterprise zone in
372 which the project is located not meeting the pervasive poverty
373 rate requirements of s. 290.0058(2)(a) or (b), Florida Statutes.
374 (d) The difference between the pervasive poverty rate
375 requirements of s. 290.0058(2)(a), Florida Statutes, and the
376 actual poverty rate in the area in which the project is located
377 must be 5 percentage points or less.
378 (e) The business must apply for a certificate of
379 eligibility for the project with the enterprise zone development
380 agency by November 1, 2006, and demonstrate that the project
381 meets the requirements of this section.
382 (f) The enterprise zone development agency must provide a
383 copy of the certificate of eligibility to the Department of
384 Revenue.

385 (2) The provisions of this section are remedial in nature
386 and shall apply retroactively to December 31, 2005. This section
387 is repealed December 31, 2007.
388 Section 9. This act shall take effect upon becoming a law.

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	7 Y, 0 N	Rayman	Belcher
3) Commerce Council		Morris	Randle
4)			
5)			

SUMMARY ANALYSIS

The bill clarifies certain responsibilities and prohibitions pertinent to enforcement of the Clean Indoor Air Act.

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 for submission of a triennial CPA-prepared agreed upon procedures report. However, 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 appear to have a fiscal impact on state or local revenue expenditures or collections.

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

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

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.

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.
>
> 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. This signage requirement expired on July 1, 2005.[3]

EFFECT OF PROPOSED CHANGE

The bill clarifies certain responsibilities and prohibitions pertinent to enforcement of the Clean Indoor Air Act.

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

[3] s. 386.206(5), F.S.

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.

The bill does not appear to have a fiscal impact on state or local revenue expenditures or collections; however, repeal of the requirement to submit triennial procedures reports may reduce operation costs to stand-alone bars. The bill provides that the act will take effect July 1, 2006.

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.[4] 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

[4] 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.

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.

CHAMBER ACTION

---

1 The Business Regulation Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to indoor smoking places; amending s.
7 386.203, F.S.; defining the term "person" for purposes of
8 the Florida Clean Indoor Air Act; amending s. 386.204,
9 F.S.; prohibiting a proprietor or other person in charge
10 of an enclosed indoor workplace from permitting smoking in
11 that workplace; amending s. 386.2045, F.S.; conforming
12 cross-references; amending s. 386.206, F.S.; deleting
13 obsolete provisions requiring that signs be posted in an
14 enclosed indoor workplace; amending s. 561.695, F.S.;
15 conforming cross-references; prohibiting a vendor from
16 permitting smoking in a licensed premises unless it is
17 designated as a stand-alone bar; providing a penalty for a
18 vendor who knowingly makes a false statement on an
19 affidavit of compliance; deleting a provision requiring
20 that a vendor operating a stand-alone bar certify to the
21 Division of Alcoholic Beverages and Tobacco that it
22 derives only a certain percentage of its gross revenue
23 from the sale of food; providing an effective date.

24
25 Be It Enacted by the Legislature of the State of Florida:
26
27 Section 1. Subsection (5) of section 386.203, Florida
28 Statutes, is amended, present subsections (7) through (13) are
29 renumbered as subsections (8) through (14), respectively, and a
30 new subsection (7) is added to that section, to read:
31 386.203 Definitions.--As used in this part:
32 (5) "Enclosed indoor workplace" means any place where one
33 or more persons engages in work, and which place is
34 predominantly or totally bounded on all sides and above by
35 physical barriers, regardless of whether such barriers consist
36 of or include, without limitation, uncovered openings; screened
37 or otherwise partially covered openings; or open or closed
38 windows, jalousies, doors, or the like.
39 (a) A place is "predominantly" bounded by physical
40 barriers during any time when both of the following conditions
41 exist:
42 1. ~~(a)~~ It is more than 50 percent covered from above by a
43 physical barrier that excludes rain. ~~, and~~
44 2. ~~(b)~~ More than 50 percent of the combined surface area of
45 its sides is covered by closed physical barriers. In calculating
46 the percentage of side surface area covered by closed physical
47 barriers, all solid surfaces that block air flow, except
48 railings, must be considered as closed physical barriers. This
49 section applies to all such enclosed indoor workplaces and
50 enclosed parts thereof without regard to whether work is
51 occurring at any given time.

52 (b) ~~(c)~~ The term does not include any facility owned or
53 leased by and used exclusively for noncommercial activities
54 performed by the members and guests of a membership association,
55 including social gatherings, meetings, dining, and dances, if no
56 person or persons are engaged in work as defined in subsection
57 (13) ~~(12)~~.
58 (7) "Person" has the same meaning as in s. 1.01(3).
59 Section 2. Section 386.204, Florida Statutes, is amended
60 to read:
61 386.204 Prohibition.--Except as otherwise provided in s.
62 386.2045:
63 (1) A person may not smoke in an enclosed indoor
64 workplace~~, except as otherwise provided in s. 386.2045~~.
65 (2) A proprietor or other person in charge of an enclosed
66 indoor workplace may not permit smoking in that enclosed indoor
67 workplace.
68 Section 3. Subsections (2) and (4) of section 386.2045,
69 Florida Statutes, are amended to read:
70 386.2045 Enclosed indoor workplaces; specific
71 exceptions.--Notwithstanding s. 386.204, tobacco smoking may be
72 permitted in each of the following places:
73 (2) RETAIL TOBACCO SHOP.--An enclosed indoor workplace
74 dedicated to or predominantly for the retail sale of tobacco,
75 tobacco products, and accessories for such products, as defined
76 in s. 386.203(9) ~~(8)~~.
77 (4) STAND-ALONE BAR.--A business that meets the definition
78 of a stand-alone bar as defined in s. 386.203(12) ~~(11)~~ and that

79 otherwise complies with all applicable provisions of the
80 Beverage Law and this part.
81 Section 4. Section 386.206, Florida Statutes, is amended
82 to read:
83 386.206 Posting of signs; requiring policies.--
84 ~~(1) The person in charge of an enclosed indoor workplace~~
85 ~~that prior to adoption of s. 20, Art. X of the State~~
86 ~~Constitution was required to post signs under the requirements~~
87 ~~of this section must continue to conspicuously post, or cause to~~
88 ~~be posted, signs stating that smoking is not permitted in the~~
89 ~~enclosed indoor workplace. Each sign posted pursuant to this~~
90 ~~section must have letters of reasonable size which can be easily~~
91 ~~read. The color, design, and precise place of posting of such~~
92 ~~signs shall be left to the discretion of the person in charge of~~
93 ~~the premises.~~
94 (1) ~~(2)~~ The proprietor or other person in charge of an
95 enclosed indoor workplace must develop and implement a policy
96 regarding the smoking prohibitions established in this part. The
97 policy may include, but is not limited to, procedures to be
98 taken when the proprietor or other person in charge witnesses or
99 is made aware of a violation of s. 386.204 in the enclosed
100 indoor workplace and must include a policy which prohibits an
101 employee from smoking in the enclosed indoor workplace. In order
102 to increase public awareness, the person in charge of an
103 enclosed indoor workplace may, at his or her discretion, post
104 "NO SMOKING" signs as deemed appropriate.
105 (2) ~~(3)~~ The person in charge of an airport terminal that
106 includes a designated customs smoking room must conspicuously

107 post, or cause to be posted, signs stating that no smoking is
108 permitted except in the designated customs smoking room located
109 in the customs area of the airport. Each sign posted pursuant to
110 this section must have letters of reasonable size that can be
111 easily read. The color, design, and precise locations at which
112 such signs are posted shall be left to the discretion of the
113 person in charge of the premises.
114 (3) ~~(4)~~ The proprietor or other person in charge of an
115 enclosed indoor workplace where a smoking cessation program,
116 medical research, or scientific research is conducted or
117 performed must conspicuously post, or cause to be posted, signs
118 stating that smoking is permitted for such purposes in
119 designated areas in the enclosed indoor workplace. Each sign
120 posted pursuant to this section must have letters of reasonable
121 size which can be easily read. The color, design, and precise
122 locations at which such signs are posted shall be left to the
123 discretion of the person in charge of the premises.
124 ~~(5) The provisions of subsection (1) shall expire on July~~
125 ~~1, 2005.~~
126 Section 5. Section 561.695, Florida Statutes, is amended
127 to read:
128 561.695 Stand-alone bar enforcement; qualification;
129 penalties.--
130 (1) The division shall designate as a stand-alone bar the
131 licensed premises of a vendor that operates a business that
132 meets the definition of a stand-alone bar in s. 386.203 (12) ~~(11)~~
133 upon receipt of the vendor's election to permit tobacco smoking
134 in the licensed premises. A vendor may not permit smoking in the

135 licensed premises unless it is designated as a stand-alone bar
136 under this section.
137 (2) Upon this act becoming a law and until the annual
138 renewal of a vendor's license, a licensed vendor who makes the
139 required election under subsection (1) may permit tobacco
140 smoking on the licensed premises and must post a notice of the
141 ~~such~~ intention at the same location at which the vendor's
142 current alcoholic beverage license is posted. The notice must
143 ~~shall~~ affirm the vendor's intent to comply with the conditions
144 and qualifications of a stand-alone bar imposed pursuant to part
145 II of chapter 386 and the Beverage Law.
146 (3) Only the licensed vendor may provide or serve food on
147 the licensed premises of a stand-alone bar. Other than customary
148 bar snacks as defined by rule of the division, the licensed
149 vendor may not provide or serve food to a person on the licensed
150 premises without requiring the person to pay a separately stated
151 charge for the food that reasonably approximates the retail
152 value of the food.
153 (4) A licensed vendor operating a stand-alone bar must
154 conspicuously post signs at each entrance to the establishment
155 stating that smoking is permitted in the establishment. The
156 color and design of the ~~such~~ signs shall be left to the
157 discretion of the person in charge of the premises.
158 (5) After the initial designation, to continue to qualify
159 as a stand-alone bar the licensee must provide to the division
160 annually, on or before the licensee's annual renewal date, an
161 affidavit that certifies, with respect to the preceding 12-month
162 period, the following:

163 (a) No more than 10 percent of the gross revenue of the
164 business is from the sale of food consumed on the licensed
165 premises as defined in s. 386.203(12) ~~(11)~~.
166 (b) Other than customary bar snacks as defined by rule of
167 the division, the licensed vendor does not provide or serve food
168 to a person on the licensed premises without requiring the
169 person to pay a separately stated charge for food that
170 reasonably approximates the retail value of the food.
171 (c) The licensed vendor conspicuously posts signs at each
172 entrance to the establishment stating that smoking is permitted
173 in the establishment.
174
175 The division shall establish by rule the format of the affidavit
176 required by this subsection. A licensed vendor shall not
177 knowingly make a false statement on the affidavit required by
178 this subsection. In addition to the penalties provided in
179 subsection (7), a licensed vendor who knowingly makes a false
180 statement on the affidavit required by this subsection may be
181 subject to suspension or revocation of the vendor's alcoholic
182 beverage license under s. 561.29.
183 ~~(6) Every third year after the initial designation, on or~~
184 ~~before the licensee's annual license renewal, the licensed~~
185 ~~vendor must additionally provide to the division an agreed upon~~
186 ~~procedures report in a format established by rule of the~~
187 ~~department from a Florida certified public accountant that~~
188 ~~attests to the licensee's compliance with the percentage~~
189 ~~requirement of s. 386.203(11) for the preceding 36-month period.~~
190 ~~Such report shall be admissible in any proceeding pursuant to s.~~

191 ~~120.57. This subsection does not apply to a stand-alone bar if~~
192 ~~the only food provided by the business, or in any other way~~
193 ~~present or brought onto the premises for consumption by patrons,~~
194 ~~is limited to nonperishable snack food items commercially~~
195 ~~prepackaged off the premises of the stand-alone bar and served~~
196 ~~without additions or preparation; except that a stand-alone bar~~
197 ~~may pop popcorn for consumption on its premises, provided that~~
198 ~~the equipment used to pop the popcorn is not used to prepare any~~
199 ~~other food for patrons.~~
200 (6) ~~(7)~~ The Division of Alcoholic Beverages and Tobacco
201 shall have the power to enforce the provisions of part II of
202 chapter 386 and to audit a licensed vendor that operates a
203 business that meets the definition of a stand-alone bar as
204 provided in s. 386.203(12) ~~(11)~~ for compliance with this section.
205 (7) ~~(8)~~ Any vendor that operates a business that meets the
206 definition of a stand-alone bar as provided in s.
207 386.203(12) ~~(11)~~ who violates the provisions of this section or
208 part II of chapter 386 shall be subject to the following
209 penalties:
210 (a) For the first violation, the vendor shall be subject
211 to a warning or a fine of up to $500, or both.~~;~~
212 (b) For the second violation within 2 years after the
213 first violation, the vendor shall be subject to a fine of not
214 less than $500 or more than $2,000.~~;~~
215 (c) For the third or subsequent violation within 2 years
216 after the first violation, the vendor shall receive a suspension
217 of the right to maintain a stand-alone bar in which tobacco
218 smoking is permitted, not to exceed 30 days, and shall be

219 subject to a fine of not less than $500 or more than $2,000.~~;~~
220 ~~and~~
221 (d) For the fourth or subsequent violation, the vendor
222 shall receive a 60-day suspension of the right to maintain a
223 stand-alone bar in which tobacco smoking is permitted and shall
224 be subject to a fine of not less than $500 or more than $2,000
225 or revocation of the right to maintain a stand-alone bar in
226 which tobacco smoking is permitted.
227 (8) ~~(9)~~ The division shall adopt rules governing the
228 designation process, criteria for qualification, required
229 recordkeeping, auditing, and all other rules necessary for the
230 effective enforcement and administration of this section and
231 part II of chapter 386. The division is authorized to adopt
232 emergency rules pursuant to s. 120.54(4) to implement the
233 provisions of this section.
234 Section 6. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1351 CS Contracts entered into by unlicensed contractors
SPONSOR(S): Reagan and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1894

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Business Regulation Committee	15 Y, 0 N, w/CS	Livingston	Liepshutz
2) Commerce Council		Livingston	Randle
3)			
4)			
5)			

SUMMARY ANALYSIS

Part I of chapter 489, F.S., addresses construction contracting. Construction contractors are governed by the Construction Industry Licensing Board (CILB), under the Department of Business and Professional Regulation (DBPR). Part II of chapter 489, F.S., addresses electrical and alarm system contractors who are governed by the Electrical Contractors' Licensing Board (ECLB) under the DBPR. With certain statutorily specified exceptions, individuals who practice contracting in Florida must be certified (i.e., licensed by the state to contract statewide) by or registered (i.e., licensed by a local jurisdiction and registered by the state to contract work within the geographic confines of the local jurisdiction only) with the CILB or ECLB, as appropriate.

Various unlicensed activity provisions and penalties apply to construction contracting. One provision provides, in part, that a contract may be rendered unenforceable for work performed by an unlicensed person. A claim against a lien or bond would not exist for the unlicensed contractor for any labor, services, or materials that may have been provided under the contract.

The provisions of the bill are designed to prevent an individual who is not required to be licensed for work that is outside the "scope of work" parameters from being considered unlicensed for purposes of contract enforceability.

Current law provides "an individual is unlicensed if the individual does not have a license required by this part [construction, electrical, alarm system] concerning the scope of the work to be performed under the contract."

The bill adds "if no state or local license is required for the scope of work to be performed under the contract, the individual performing that work shall not be considered unlicensed."

The bill is not anticipated to have a significant fiscal impact on state or local government.

The effective date of the bill is July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government/Promote personal responsibility - The bill is designed to clarify work opportunities that are outside licensure requirements when contracting to provide construction, electrical, or alarm system services.

B. EFFECT OF PROPOSED CHANGES:

Present situation

Part I of chapter 489, F.S., addresses construction contracting. Construction contractors are governed by the Construction Industry Licensing Board (CILB), under the DBPR. Part II of chapter 489, F.S., addresses electrical and alarm system contractors who are governed by the Electrical Contractors' Licensing Board (ECLB) under the DBPR.

Construction contracting essentially means building or altering a structure, for compensation. Several specific varieties of contracting are set forth in the chapter, each with a license that may be obtained for that activity, such as for roofing, plumbing, etc. Section 489.115, F.S., provides that no person may engage in the business of contracting in the state without first being certified or registered in one or more of the defined contracting categories. The reference to the term license is often statutorily used interchangeably with the terms certificate or registration. Similar regulatory provisions apply to electrical contracting.

With certain statutorily specified exceptions, individuals who practice contracting in Florida must be certified by or registered with the CILB or ECLB, as appropriate. Certification allows an individual to practice contracting in any jurisdiction in the state. A "certificate" may be issued to a person who makes application, shows appropriate education and experience and passes a state examination. "Registration" allows an individual to practice contracting only in the jurisdiction which issues that individual's local license. The registration is issued by the DBPR upon proof of local licensure. Proof consists of an occupational license issued by the local jurisdiction, and evidence of compliance with local licensing requirements, if a local licensing requirement exists.

The "scope of work" for which licensure is required is specified in statute by definition. Each definition of the various professions is known as the "practice act" for that profession and establishes the guidelines for the individual practitioners.

Construction contracting essentially means building or altering a structure, for compensation. Section 489.115, F.S., provides that no person may engage in the business of contracting in the state without first being certified or registered in one or more of the defined contracting categories. The reference to the term license is often statutorily used interchangeably with the terms certificate or registration.

Unlicensed construction contracting, as generally understood, is actually a set of specific violations set forth as paragraphs under s. 489.127(1), F.S., that provides, in part, that no person shall:

- engage in the business or act in the capacity of a contractor or advertise himself or herself or a business organization as available to engage in the business or act in the capacity of a contractor without being duly registered or certified or having a certificate of authority; and
- commence or perform work for which a building permit is required pursuant to part VII of chapter 553, F.S., without such building permit being in effect; or

- willfully or deliberately disregard or violate any municipal or county ordinance relating to uncertified or unregistered contractors.

Similar provisions apply to electrical and alarm system contracting.

Chapter 455, F.S., provides general powers for the regulation of the areas of jurisdiction under the DBPR. Among these powers is the authority to enforce unlicensed activity.

The provisions of ss. 489.128 and 489.532, F.S., also address unlicensed activity. It provides, in part, that a contract may be rendered unenforceable for work performed by an unlicensed person. A claim against a lien or bond would not exist for the unlicensed contractor for any labor, services, or materials that may have been provided under the contract.

Additionally, s. 713.02, F.S., relating to liens generally, specifies that a lien shall not exist against a contractor, subcontractor, or sub-subcontractor who is unlicensed pursuant to the provisions of s. 489.128, F.S.

Effect of proposed changes

The provisions of the bill are designed to prevent an individual who is not required to be licensed for work that is outside the "scope of work" parameters from being considered unlicensed for purposes of contract enforceability.

Current law provides "an individual is unlicensed if the individual does not have a license required by this part [construction, electrical, alarm system] concerning the scope of the work to be performed under the contract."

The bill adds "if no state or local license is required for the scope of work to be performed under the contract, the individual performing that work shall not be considered unlicensed."

C. SECTION DIRECTORY:

Section 1. Amends s. 489.128, F.S., to specify certain conditions under which a person may engage in the business of construction contracting without certification or registration.

Section 2. Amends s. 489.532, F.S., to specify certain conditions under which a person may provide certain electrical and alarm system contracting services without a license.

Section 3. Effective date - 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:

Not anticipated to be significant

D. FISCAL COMMENTS:

There is not anticipated to be a significant fiscal impact on the DBPR and, therefore, any additional workload is expected to be absorbed within current staffing.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 30, 2006, the Business Regulation Committee considered the bill, adopted a strike all amendment, and reported the bill favorably with CS. The changes in the CS are reflected below.

- Removes licensure exemption language in the original bill that provided an exemption for a person who is under the supervision of the owner of the property who is acting as his or her own contractor.
- Expands the application of the bill to electrical and alarm system contractors.
- Specifies that if no state or local license is required for the scope of work to be performed under contract, the individual performing that work shall not be considered unlicensed.

CHAMBER ACTION

---

1 The Business Regulation Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to contracts entered into by unlicensed
7 contractors; amending ss. 489.128 and 489.532, F.S.;
8 providing that individuals performing certain construction
9 contracting or electrical and alarm system contracting
10 work are not considered unlicensed for purposes of
11 contract enforceability; providing an effective date.
12
13 Be It Enacted by the Legislature of the State of Florida:
14
15 Section 1. Paragraph (a) of subsection (1) of section
16 489.128, Florida Statutes, is amended to read:
17 489.128 Contracts entered into by unlicensed contractors
18 unenforceable.--
19 (1) As a matter of public policy, contracts entered into
20 on or after October 1, 1990, by an unlicensed contractor shall
21 be unenforceable in law or in equity by the unlicensed
22 contractor.

23 (a) For purposes of this section, an individual is
24 unlicensed if the individual does not have a license required by
25 this part concerning the scope of the work to be performed under
26 the contract. A business organization is unlicensed if the
27 business organization does not have a primary or secondary
28 qualifying agent in accordance with this part concerning the
29 scope of the work to be performed under the contract. For
30 purposes of this section, if no state or local license is
31 required for the scope of work to be performed under the
32 contract, the individual performing that work shall not be
33 considered unlicensed.
34 Section 2. Paragraph (a) of subsection (1) of section
35 489.532, Florida Statutes, is amended to read:
36 489.532 Contracts entered into by unlicensed contractors
37 unenforceable.--
38 (1) As a matter of public policy, contracts entered into
39 on or after October 1, 1990, by an unlicensed contractor shall
40 be unenforceable in law or in equity by the unlicensed
41 contractor.
42 (a) For purposes of this section, an individual is
43 unlicensed if the individual does not have a license required by
44 this part concerning the scope of the work to be performed under
45 the contract. A business organization is unlicensed if the
46 business organization does not have a primary or secondary
47 qualifying agent in accordance with this part concerning the
48 scope of the work to be performed under the contract. For
49 purposes of this section, if no state or local license is
50 required for the scope of work to be performed under the

51 contract, the individual performing that work shall not be
52 considered unlicensed.
53 Section 3. This act shall take effect July 1, 2006.

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Commerce Council
2 Representative(s) Reagan offered the following:
3
4 **Amendment (with title amendment)**
5 Remove everything after the enacting clause and insert:
6 Section 1. Paragraphs (a) and (b) of subsection (1) of
7 section 489.128, Florida Statutes, are amended to read:
8 489.128 Contracts entered into by unlicensed contractors
9 unenforceable.--
10 (1) As a matter of public policy, contracts entered into
11 on or after October 1, 1990, by an unlicensed contractor shall
12 be unenforceable in law or in equity by the unlicensed
13 contractor.
14 (a) For purposes of this section, an individual is
15 unlicensed if the individual does not have a license required by
16 this part concerning the scope of the work to be performed under
17 the contract. A business organization is unlicensed if the
18 business organization does not have a primary or secondary
19 qualifying agent in accordance with this part concerning the
20 scope of the work to be performed under the contract. For
21 purposes of this section, if no state or local license is

22 required for the scope of work to be performed under the
23 contract, the individual performing that work shall not be
24 considered unlicensed.
25 (b) For purposes of this section, an individual or
26 business organization may ~~shall~~ not be considered unlicensed for
27 failing to have an occupational license certificate issued under
28 the authority of chapter 205. A business organization may ~~shall~~
29 not be considered unlicensed for failing to have a certificate
30 of authority as required by ss. 489.119 and 489.127. For
31 purposes of this section, a business organization entering into
32 the contract may not be considered unlicensed if, before the
33 date established by paragraph (c), an individual possessing a
34 license required by this part concerning the scope of the work
35 to be performed under the contract had submitted an application
36 for a certificate of authority designating that individual as a
37 qualifying agent for the business organization entering into the
38 contract, and the application was not acted upon by the
39 department or applicable board within the applicable time
40 limitations imposed by s. 120.60.
41 Section 2. Subsection (21) is added to section 489.503,
42 Florida Statutes, to read:
43 489.503 Exemptions.--This part does not apply to:
44 (21) Inspections, audits, or quality assurance services
45 performed by a nationally recognized testing laboratory that the
46 Occupational Safety and Health Administration has recognized as
47 meeting the requirements of 29 C.F.R. s. 1910.7.
48 Section 3. Subsection (29) is added to section 489.505,
49 Florida Statutes, to read:
50 489.505 Definitions.--As used in this part:

51 (29) "Nationally recognized testing laboratory" means an
52 organization that the Occupational Safety and Health
53 Administration has legally recognized to be in compliance with
54 29 C.F.R. s. 1910.7 and that provides quality assurance ,
55 product testing, or certification services.
56 Section 4. Paragraph (a) of subsection (1) of section
57 489.532, Florida Statutes, is amended to read:
58 489.532 Contracts entered into by unlicensed contractors
59 unenforceable.--
60 (1) As a matter of public policy, contracts entered into
61 on or after October 1, 1990, by an unlicensed contractor shall
62 be unenforceable in law or in equity by the unlicensed
63 contractor.
64 (a) For purposes of this section, an individual is
65 unlicensed if the individual does not have a license required by
66 this part concerning the scope of the work to be performed under
67 the contract. A business organization is unlicensed if the
68 business organization does not have a primary or secondary
69 qualifying agent in accordance with this part concerning the
70 scope of the work to be performed under the contract. For
71 purposes of this section, if no state or local license is
72 required for the scope of work to be performed under the
73 contract, the individual performing that work shall not be
74 considered unlicensed.
75 Section 5. Sections 1 and 4 are intended to be remedial in
76 nature and to clarify existing law. Sections 1 and 4 shall apply
77 retroactively to all actions, including any action on a lien or
78 bond claim, initiated on or after, or pending as of, July 1,
79 2006. If the retroactivity of any provision of section 1 or
80 section 4 or its retroactive application to any person or

81 circumstance is held invalid, the invalidity does not affect the
82 retroactivity or retroactive application of other provisions of
83 sections 1 and 4.
84 Section 6. This act shall take effect July 1, 2006.
85
86
87 ========== T I T L E A M E N D M E N T ==========
88 Remove the entire title and insert:
89 A bill to be entitled
90 An act relating to contracting; amending s. 489.503, F.S.;
91 exempting nationally recognized testing laboratories from
92 certain electrical and alarm system contracting
93 provisions; amending s. 489.505, F.S.; providing a
94 definition; amending ss. 489.128 and 489.532, F.S.;
95 providing that individuals performing certain construction
96 contracting work, certain business organizations entering
97 into construction contracts, or individuals performing
98 certain electrical and alarm system contracting work are
99 not considered unlicensed for purposes of contract
100 enforceability; providing for retroactive application;
101 providing an effective date.
102

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 449 CS Economic Development
SPONSOR(S): Detert
TIED BILLS: **IDEN./SIM. BILLS:** HB 305, SB 624

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Economic Development, Trade & Banking Committee	13 Y, 0 N, w/CS	Olmedillo	Carlson
2) Finance & Tax Committee	6 Y, 0 N, w/CS	Rice	Diez-Arguelles
3) Growth Management Committee	(W/D)		
4) Commerce Council		Olmedillo	Randle
5)			

SUMMARY ANALYSIS

The bill renames the Urban High-Crime Area Job Tax Credit Program as the Designated Urban Job Tax Credit Area Program; changes the designation eligibility requirements; changes a variable tax credit of $500, $1000, or $1,500 to a uniform tax credit of $1,000; and limits designations to a period of six years. This bill grandfathers the value of existing tax credits for selected businesses already in the program until 2012.

This bill also authorizes Charlotte County or Charlotte County and the City of Punta Gorda to apply to the Office of Tourism, Trade, and Economic Development for designation as an enterprise zone.

The Revenue Estimating Conference has determined that the Designated Urban Job Tax Credit Area Program portion of the bill will result in a loss of $300,000 in state revenues in fiscal year 2006-2007 and a loss of $2.2 million in state revenues and $500,000 in local revenues annually thereafter. The fiscal impact of the creation of the Charlotte County enterprise zone has not been estimated.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Lower Taxes – The bill provides tax incentives for businesses that relocate to or expand in a designated urban job tax credit area. The bill also authorizes OTTED to designate a new enterprise zone.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Section 212.097, F.S., authorizes the Urban High-Crime Area Job Tax Credit Program. Under this program, job tax credits are provided to businesses located in qualified high crime areas. The credits can be applied either toward the businesses' sales tax or corporate income tax liability. To be eligible, the business must be predominantly engaged in agriculture, forestry, fishing, manufacturing, retail, public warehousing/storage, hotel/lodging, research, development, motion picture related services, public golf courses, amusement parks, or customer centers serving multi-state or international markets.

The tax credits are awarded based on the number of employees a qualified business hires and on the severity of the crime rate where it is located.

Designation
Every three years the Urban High-Crime Area Job Tax Credit Program requires the area to be nominated by the local governing body and to apply to the Office of Tourism, Trade, and Economic Development (OTTED). OTTED is required to rank areas into three tiers along the following criteria:

1. Highest arrest rates within the geographic area for violent crime and for such other crimes as drug sale, drug possession, prostitution, vandalism, and civil disturbances;
2. Highest reported crime volume and rate of specific property crimes such as business and residential burglary, motor vehicle theft, and vandalism;
3. Highest percentage of reported index crimes that are violent in nature;
4. Highest overall index crime volume for the area; and
5. Highest overall index crime rate for the geographic area.

Tier-one areas are ranked 1 through 5 representing the highest crime areas, tier-two areas are ranked 6 through 10, and tier-three areas are ranked 11 through 15. Federal Empowerment Zones as designated under the Taxpayer Relief Act of 1997 (Miami-Dade Empowerment Zone) are automatically given one of the fifteen slots in the program.

High crime areas under the program are required to meet the following specifications:

- No area may exceed 20 square miles;
- The selected area must have either a continuous boundary or consist of no more than three noncontiguous parcels;
- For communities that have a population of 150,000 or more, the selected area must not exceed 20 square miles;
- For communities with populations of 50,000 to 149,999, the selected area must not exceed 10 square miles;
- For communities with populations of 20,000 to 49,999, the selected area must not exceed 5 square miles; and
- For communities having a population of less than 20,000, the selected area must not exceed 3 square miles.

Tax Credit
New eligible businesses in tier-one areas that have at least 10 qualified employees on the date of application receive a $1,500 tax credit for each employee. New eligible businesses in tier-two areas that have at least 20 qualified employees on the date of application for a credit receive a $1,000 tax credit for each employee. New eligible businesses in tier-three areas that have at least 30 qualified employees on the date of application for a credit receive a $500 tax credit for each employee. New eligible businesses may also qualify for an additional $500 credit for each qualified employee who is a welfare transition program participant.

An existing eligible business in a tier-one area, which on the date of application for a credit has at least 5 more qualified employees than it had one year prior to the date of application, receives $1,500 for each additional employee. An existing eligible business in a tier-two area, which on the date of application for a credit has at least 10 more qualified employees than it had one year prior to the date of application, receives $1,000 for each additional employee. An existing eligible business in a tier-three area, which on the date of application for a credit has at least 15 more qualified employees than it had one year prior to the date of application, receives $500 for each additional employee.

A tax credit under the Urban High-Crime Area Job Tax Credit Program may not be sold or transferred, but may be carried forward to future tax returns. Any unused portion applied toward sales tax liability may be used within 12 months after the tax credit is approved. Any unused portion applied toward corporate income tax liability may be used within five years after the tax credit is approved.

The maximum credit amount that may be approved in one year is $5 million of which $1 million is reserved for tier-one areas.

A history of the credits used and remaining is described below.

Year	Credits Approved	Credits Not Used
1999	$260,500	$4,739,500
2000	$4,999,500	$500
2001	$2,486,500	$2,513,500
2002	$2,673,500	$2,326,500
2003	$1,069,000	$3,931,000
2004	$1,053,500	$3,946500
2005	$1,761,000	$3,239,000

* Universal Studios received credits in 2000
Source: OTTED

Proposed Changes

The bill renames the Urban High-Crime Job Tax Credit Program as the Designated Urban Job Tax Credit Area Program.

Designation
The bill increases the types of businesses eligible for tax credits by including federal Empowerment Zones as designated in the federal Community Tax Relief Act of 2000 (Jacksonville Empowerment Zone) as well as targeted industries included in the tax refund program for qualified target industry businesses described in section 288.106, F.S.

The bill removes the existing ranking criteria designated for use by OTTED. Instead, each nominated area must possess the following characteristics:

Income characteristics:

- Forty percent of area residents are earning wages on an annual basis that are equal to or less than the annual wage of a person who is earning minimum wage; or
- More than 20 percent of residents or families live below the federal standard of poverty for individuals or a family of four;

Workforce and Employment Characteristics:

- The area has an unemployment rate at least three percentage points higher than the state's unemployment rate;

Crime Characteristics:

- The area has an arrest rate higher than the state's average rate for such crimes as drug sale, drug possession, prostitution, vandalism, and civil disturbances;

Residential and Commercial Property-Related Characteristics:

- Fifty percent or more of area residents rent; or
- Property values are within the lower 50 percent of the county's assessed property values;
- More than five percent of area commercial buildings are currently vacant or have been condemned within the previous 24 months; or
- Tax or special assessment delinquencies exceed the fair value of the land for 25 percent of such delinquencies.

Every five years OTTED is required to select the 30 highest-distress urban job tax credit areas based on the above categories.

The bill revises population and distance criteria by requiring the designated urban job tax credit areas to be within 10 miles of an urban infill and redevelopment area if the tax credit area has a total population of 150,000 persons or more; to be within 7.5 miles of an urban infill and redevelopment area if the tax credit area has a total population of 50,000 persons or more but fewer than 150,000; to be within 5 miles of an urban infill and redevelopment area for tax credit areas having total population of 20,000 persons or more but fewer than 50,000; and to be within three miles of an urban infill and redevelopment area for tax credit areas having a total population of fewer than 20,000 persons.

The bill also provides that an area designated under this section as of June 30, 2006, shall retain designation through June 30, 2012. Upon expiration of an area's designation, that area may seek approval from OTTED for designation under the revised program.

The bill defines the term "urban" to mean a densely populated nonrural area located within an urban county consisting of a cluster of one or more census blocks, each having a population density of at least 400 people per square mile, or an area defined as "urban" by the most recent United States Census.

The bill also adopts the definition of an "urban infill and redevelopment area" from s. 163.2514, F.S., to mean an area or areas designated by the local government in which:

- Public services such as water and wastewater, transportation, schools, and recreation are already available or are scheduled to be provided in an adopted five-year schedule of capital improvements;
- The area, or one or more neighborhoods within the area, suffers from pervasive poverty, unemployment, and general distress as defined by s. 290.0058;
- The area exhibits a proportion of properties that are substandard, overcrowded, dilapidated, vacant or abandoned, or functionally obsolete which is higher than the average for the local government;

- More than 50 percent of the area is within 1/4 mile of a transit stop, or a sufficient number of such transit stops will be made available concurrent with the designation; and
- The area includes or is adjacent to community redevelopment areas, brownfields, enterprise zones, or Main Street programs, or has been designated by the state or Federal Government as an urban redevelopment, revitalization, or infill area under empowerment zone, enterprise community, or brownfield showcase community programs or similar programs.

Tax Credit

The bill alters the tax credits available to eligible businesses, providing a uniform credit of $1,000 (instead of $500, $1000, or $1,500 depending on the tier classification). The bill also provides for a $1,000 tax credit for businesses existing in a designated urban job tax credit area that have at least 5 more qualified employees than they had one year prior to their date of application.

Notwithstanding the uniformity of the tax credits, the bill provides that a business eligible for a specific value of tax credit (i.e., $1,500 per job) on or before June 30, 2006, shall retain the right to that value of credit through June 30, 2012, provided it complies with job creation requirements.

Law Conformity

The bill amends chapters 212 (sales and use tax), 220 (corporate income tax), and 288 (commercial developments and capital improvements), F.S., to reflect that the "Urban High-Crime Area Job Tax Credit Program" is renamed as the "Designated Urban Job Tax Credit Area Program."

Enterprise Zone Designation

This bill authorizes Charlotte County or Charlotte County and the City of Punta Gorda to apply to the Office of Tourism, Trade, and Economic Development for designation as an enterprise zone. The application must comply with the requirements enumerated under s. 290.0055, F.S., regarding local enterprise zone nominating procedures, with the exception of s. 290.0055(4)(c), F.S., relating to the pervasive poverty qualifications. Charlotte County or Charlotte County and the City of Punta Gorda must submit their application by December 31, 2006.

C. SECTION DIRECTORY:

Section 1. Amends s. 212.08(5)(o), F.S., relating to sales tax exemptions, to reflect that the Urban High-Crime Area Job Tax Credit Program is renamed as the Designated Urban Job Tax Credit Area Program.

Section 2. Amends s. 212.097, F.S., to rename the Urban High-Crime Area Job Tax Credit Program to the Designated Urban Job Tax Credit Area Program; expanding "eligible businesses"; increasing time between designations; changing designation criteria; providing definitions; changing tax credit amounts.

Section 3. Amends s. 220.1895, F.S., relating to corporate income taxes, to conform name changes in the Designated Urban Job Tax Credit Area Program.

Section 4. Amends s. 288.99(2) and (3)(j), F.S., relating to the Certified Capital Company Act, to conform name changes in the Designated Urban Job Tax Credit Area Program.

Section 5. Creates s. 290.0078, F.S., authorizing OTTED to designate an enterprise zone.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The Revenue Estimating Conference has determined that the Designated Urban Job Tax Credit Area Program portion of the bill will result in the following:

	2006-07	2007-08
General Revenue	($0.3)m	($2.2)m
State Trust Fund	(Insignificant)	(Insignificant)
Total	($0.3)m	($2.2)m

The Revenue Estimating Conference has not determined the fiscal impact of the designation of a Charlotte County enterprise zone to date.

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The Revenue Estimating Conference has determined that the Designated Urban Job Tax Credit Area Program portion of the bill will result in the following:

	2006-07	2007-08
Revenue Sharing	(Insignificant)	($0.1)m
Local Government Half Cent	(Insignificant)	($0.2)m
Local Option	(Insignificant)	($0.2)m
Total	(Insignificant)	($0.5)m

The Revenue Estimating Conference has not determined the fiscal impact of the designation of a Charlotte County enterprise zone to date.

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

This bill expands the numbers of businesses that are eligible to participate in the program (from 15 to 30), but does not change the $5 million cap on the credits that can be approved during a calendar year. Although this bill is expected to have a fiscal impact, it is not beyond the $5 million cap already included in current law.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill reduces the authority that municipalities and counties have to raise revenue through local option sales taxes. However, the reduction in authority is insignificant. Therefore, the bill is not a mandate.

2. Other:

None

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 26, 2006, the Economic Development, Trade & Banking Committee adopted an amendment to the bill. The amendment reduced the term of the grandfather clause allowing previously designated areas to maintain designation. The clause is reduced from seven to six years.

On April 4, 2006, the Finance and Tax Committee adopted a strike-all amendment. The strike-all reorganized and simplified sections of the bill to complement the provisions of the urban job tax credit area program. It also authorized Charlotte County or Charlotte County and the City of Punta Gorda to apply to OTTED for designation as an enterprise zone.

This analysis is drawn to the committee substitute.

CHAMBER ACTION

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1 The Finance & Tax Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to economic development; amending s.
7 212.08, F.S.; conforming provisions to the revision
8 creating designated urban job tax credit areas; amending
9 s. 212.097, F.S.; revising provisions providing for an
10 urban job tax credit program to apply to designated urban
11 job tax credit areas rather than high-crime areas;
12 revising and providing definitions, eligibility criteria,
13 application procedures and requirements, area
14 characteristics and criteria, and area designation
15 limitations; providing for tax credits to certain
16 businesses; providing procedures and requirements for and
17 limitations on tax credits; providing duties and
18 responsibilities of the Office of Tourism, Trade, and
19 Economic Development; providing for liability and a
20 criminal penalty for fraudulent claim of the credit;
21 providing limitations on corporations claiming the credit
22 against certain taxes; authorizing the Department of
23 Revenue to adopt rules and establish guidelines; providing

24 for retention of the program and tax credit eligibility
25 and amount by certain businesses for a certain time;
26 providing for future repeal; amending ss. 220.1895 and
27 288.99, F.S.; conforming provisions to the revision
28 creating designated urban job tax credit areas; creating
29 s. 290.0078, F.S.; authorizing Charlotte County or
30 Charlotte County and the City of Punta Gorda to apply to
31 the Office of Tourism, Trade, and Economic Development for
32 designation of an enterprise zone; providing requirements;
33 authorizing the office to designate an enterprise zone;
34 providing an effective date.
35
36 Be It Enacted by the Legislature of the State of Florida:
37
38 Section 1. Paragraph (o) of subsection (5) of section
39 212.08, Florida Statutes, is amended to read:
40 212.08 Sales, rental, use, consumption, distribution, and
41 storage tax; specified exemptions.--The sale at retail, the
42 rental, the use, the consumption, the distribution, and the
43 storage to be used or consumed in this state of the following
44 are hereby specifically exempt from the tax imposed by this
45 chapter.
46 (5) EXEMPTIONS; ACCOUNT OF USE.--
47 (o) Building materials in redevelopment projects.--
48 1. As used in this paragraph, the term:
49 a. "Building materials" means tangible personal property
50 that becomes a component part of a housing project or a mixed-
51 use project.

52 b. "Housing project" means the conversion of an existing
53 manufacturing or industrial building to housing units in a
54 designated ~~an~~ urban job tax credit ~~high-crime~~ area, enterprise
55 zone, empowerment zone, Front Porch Community, designated
56 brownfield area, or urban infill area and in which the developer
57 agrees to set aside at least 20 percent of the housing units in
58 the project for low-income and moderate-income persons or the
59 construction in a designated brownfield area of affordable
60 housing for persons described in s. 420.0004(9), (10), or (14),
61 or in s. 159.603(7).
62 c. "Mixed-use project" means the conversion of an existing
63 manufacturing or industrial building to mixed-use units that
64 include artists' studios, art and entertainment services, or
65 other compatible uses. A mixed-use project must be located in a
66 designated ~~an~~ urban job tax credit ~~high-crime~~ area, enterprise
67 zone, empowerment zone, Front Porch Community, designated
68 brownfield area, or urban infill area, and the developer must
69 agree to set aside at least 20 percent of the square footage of
70 the project for low-income and moderate-income housing.
71 d. "Substantially completed" has the same meaning as
72 provided in s. 192.042(1).
73 2. Building materials used in the construction of a
74 housing project or mixed-use project are exempt from the tax
75 imposed by this chapter upon an affirmative showing to the
76 satisfaction of the department that the requirements of this
77 paragraph have been met. This exemption inures to the owner
78 through a refund of previously paid taxes. To receive this

79 refund, the owner must file an application under oath with the
80 department which includes:
81 a. The name and address of the owner.
82 b. The address and assessment roll parcel number of the
83 project for which a refund is sought.
84 c. A copy of the building permit issued for the project.
85 d. A certification by the local building code inspector
86 that the project is substantially completed.
87 e. A sworn statement, under penalty of perjury, from the
88 general contractor licensed in this state with whom the owner
89 contracted to construct the project, which statement lists the
90 building materials used in the construction of the project and
91 the actual cost thereof, and the amount of sales tax paid on
92 these materials. If a general contractor was not used, the owner
93 shall provide this information in a sworn statement, under
94 penalty of perjury. Copies of invoices evidencing payment of
95 sales tax must be attached to the sworn statement.
96 3. An application for a refund under this paragraph must
97 be submitted to the department within 6 months after the date
98 the project is deemed to be substantially completed by the local
99 building code inspector. Within 30 working days after receipt of
100 the application, the department shall determine if it meets the
101 requirements of this paragraph. A refund approved pursuant to
102 this paragraph shall be made within 30 days after formal
103 approval of the application by the department. The provisions of
104 s. 212.095 do not apply to any refund application made under
105 this paragraph.

106 4. The department shall establish by rule an application
107 form and criteria for establishing eligibility for exemption
108 under this paragraph.
109 5. The exemption shall apply to purchases of materials on
110 or after July 1, 2000.
111 Section 2. Section 212.097, Florida Statutes, is amended
112 to read:
113 (Substantial rewording of section. See
114 s. 212.097, F.S., for current text.)
115 212.097 Designated Urban Job Tax Credit Area Program.--
116 (1) As used in this section, the term:
117 (a) "Designated urban job tax credit area" means an area
118 designated by the Office of Tourism, Trade, and Economic
119 Development pursuant to subsection (5). Such an area includes an
120 area designated as a federal empowerment zone pursuant to the
121 Taxpayer Relief Act of 1997 or the Community Tax Relief Act of
122 2000. A designated urban job tax credit area shall retain its
123 designation for a period of 5 years after the date of
124 designation.
125 (b) "Eligible business" means any business entity located
126 in a designated urban job tax credit area that is predominantly
127 engaged in, or is headquarters for a business predominantly
128 engaged in, activities usually provided for consideration by
129 firms classified within the following standard industrial
130 classifications: SIC 01-SIC 09 (agriculture, forestry, and
131 fishing); SIC 20-SIC 39 (manufacturing); SIC 52-SIC 57 and SIC
132 59 (retail); SIC 422 (public warehousing and storage); SIC 70
133 (hotels and other lodging places); SIC 7391 (research and

134 development); SIC 781 (motion picture production and allied
135 services); SIC 7992 (public golf courses); SIC 7996 (amusement
136 parks); and a targeted industry eligible for the qualified
137 target industry business tax refund under s. 288.106. A call
138 center or similar customer service operation that services a
139 multistate market or international market is also an eligible
140 business. Excluded from eligible receipts are receipts from
141 retail sales, except such receipts for hotels (retail)
142 classified in SIC 52-SIC 57 and SIC 59 and other lodging places
143 classified in SIC 70, public golf courses classified in SIC
144 7992, and amusement parks classified in SIC 7996. For purposes
145 of this paragraph, the term "predominantly" means that more than
146 50 percent of the business's gross receipts from all sources is
147 generated by those activities usually provided for consideration
148 by firms in the specified standard industrial classification.
149 The determination of whether the business is located in a
150 designated urban job tax credit area must be based on the date
151 of application for the credit under this section. Commonly owned
152 and controlled entities are to be considered a single business
153 entity.
154 (c) "Existing business" means any eligible business that
155 does not meet the criteria for a new business.
156 (d) "New business" means any eligible business first
157 beginning operation on a site in a designated urban job tax
158 credit area and clearly separate from any other commercial or
159 business operation of the business entity within a designated
160 urban job tax credit area. A business entity that operated an
161 eligible business within a designated urban job tax credit area

162 within the 48 months before the period provided for application
163 by subsection (2) is not considered a new business.
164 (e) "Office" means the Office of Tourism, Trade, and
165 Economic Development.
166 (f) "Qualified employee" means any employee of an eligible
167 business who performs duties in connection with the operations
168 of the business on a regular, full-time basis for an average of
169 at least 36 hours per week for at least 3 months within the
170 designated urban job tax credit area in which the eligible
171 business is located. An owner or partner of the eligible
172 business is not a qualified employee. The term also includes an
173 employee leased from an employee leasing company licensed under
174 chapter 468 if such employee has been continuously leased to the
175 employer for an average of at least 36 hours per week for more
176 than 6 months.
177 (g) "Urban infill and redevelopment area" means an area or
178 areas designated by a local government in which:
179 1. Public services such as water and wastewater,
180 transportation, schools, and recreation are already available or
181 are scheduled to be provided in an adopted 5-year schedule of
182 capital improvements.
183 2. The area, or one or more neighborhoods within the area,
184 suffers from pervasive poverty, unemployment, and general
185 distress as described in s. 290.0058.
186 3. The area exhibits a proportion of properties that are
187 substandard, overcrowded, dilapidated, vacant or abandoned, or
188 functionally obsolete which is higher than the average for the
189 local government.

190 4. More than 50 percent of the area is within 1/4 mile of
191 a transit stop, or a sufficient number of such transit stops
192 will be made available concurrent with the designation.
193 5. The area includes or is adjacent to community
194 redevelopment areas, brownfields, enterprise zones, or Main
195 Street programs or has been designated by the state or Federal
196 Government as an urban redevelopment, revitalization, or infill
197 area under empowerment zone, enterprise community, or brownfield
198 showcase community programs or similar programs.
199 (2) A county or municipality, or a county and one or more
200 municipalities together, may apply to the office for the
201 designation of an area as a designated urban job tax credit area
202 in accordance with subsection (3). Applications must be received
203 by the office no later than April 30, 2007, and every 5 years
204 thereafter.
205 (3) In order for an area to qualify as a designated urban
206 job tax credit area, the following requirements must be met:
207 (a) The local government seeking designation must adopt a
208 resolution prior to the date of application for designation
209 that:
210 1. Finds that an urban area exists in such county or
211 municipality, or in both the county and one or more
212 municipalities, that chronically exhibits extreme and
213 unacceptable levels of poverty, unemployment, physical
214 deterioration, and economic disinvestment.
215 2. Determines that the rehabilitation, conservation, or
216 redevelopment, or a combination of rehabilitation, conservation,
217 or redevelopment, of such an urban area is necessary in the

218 interest of the health, safety, and welfare of the residents of
219 such county or municipality, or such county and one or more
220 municipalities.
221 3. Determines that the revitalization of such an urban
222 area can occur if the public sector or private sector can be
223 induced to invest resources in productive enterprises that build
224 or rebuild the economic viability of the area.
225 (b) The local government seeking designation demonstrates
226 to the office that the area:
227 1.a. Has at least 40 percent of its residents earning
228 wages on an annual basis that are equal to or less than the
229 annual wage of a person who is earning minimum wage; or
230 b. Has more than 20 percent of its residents or families
231 living below the federal standard of poverty for individuals or
232 a family of four.
233 2. Has an unemployment rate at least 3 percentage points
234 higher than the state's unemployment rate.
235 3. Has an arrest rate higher than the state's average rate
236 for such crimes as drug sale, drug possession, prostitution,
237 vandalism, and civil disturbances, as recorded by the total
238 crime index of the Department of Law Enforcement.
239 4.a. Has 50 percent or more of its residents who rent;
240 b. Has property values that are within the lower 50
241 percent of the county's assessed property values;
242 c. Has more than 5 percent of its commercial buildings
243 currently vacant or condemned within the previous 24 months; or

244 d. With respect to at least 25 percent of tax or special
245 assessment delinquencies, the amount of the delinquency exceeds
246 the fair value of the land.
247 (c) The selected area has a continuous boundary or
248 consists of not more than three noncontiguous parcels.
249 (d) The selected area does not exceed the following
250 mileage limitation:
251 1. For areas having a total population of 150,000 persons
252 or more, the selected area does not exceed 20 square miles and
253 is within 10 miles of the urban infill and redevelopment area of
254 a city.
255 2. For areas having a total population of 50,000 persons
256 or more but fewer than 150,000 persons, the selected area does
257 not exceed 10 square miles and is within 7.5 miles of the urban
258 infill and redevelopment area of a city.
259 3. For areas having a total population of 20,000 persons
260 or more but fewer than 50,000 persons, the selected area does
261 not exceed 5 square miles and is within 5 miles of the urban
262 infill and redevelopment area of a city.
263 4. For areas having a total population of fewer than
264 20,000 persons, the selected area does not exceed 3 square miles
265 and is within 3 miles of the urban infill and redevelopment area
266 of a city.
267 (4) A municipality, or a county and one or more
268 municipalities together, may not nominate more than one urban
269 area. However, any county as defined in s. 125.011(1) may not
270 nominate more than three urban areas.

271 (5) On June 30, 2007, and every 5 years thereafter, the
272 office may designate no more than 30 areas that meet the
273 requirements of subsection (3). If there are more than 30
274 applications in any year, the office shall rank the areas by
275 level of distress and designate the 30 areas with the most need.
276 (6) A new eligible business may apply for a tax credit
277 under this subsection once at any time during its first year of
278 operation. A new eligible business in a designated urban job tax
279 credit area that has at least 10 qualified employees on the date
280 of application shall receive a $1,000 tax credit for each such
281 employee.
282 (7) An existing eligible business may apply for a tax
283 credit under this subsection at any time and is entitled to such
284 credit except as restricted by this subsection. An existing
285 eligible business in a designated urban job tax credit area that
286 on the date of application has at least five more qualified
287 employees than the business had 1 year prior to the business's
288 date of application shall receive a $1,000 credit for each such
289 additional employee. An existing eligible business may apply for
290 the credit under this subsection no more than once in any 12-
291 month period. Any existing eligible business that received a
292 credit under subsection (6) may not apply for the credit under
293 this subsection sooner than 12 months after the application date
294 for the credit under subsection (6). To be eligible for a tax
295 credit under this subsection, the number of qualified employees
296 employed 1 year prior to the application date must be no lower
297 than the number of qualified employees on the application date

298 on which a credit under this section was based for any previous
299 application, including an application under subsection (6).
300 (8) For any new eligible business receiving a credit
301 pursuant to subsection (6) or any existing eligible business
302 receiving a credit pursuant to subsection (7), an additional
303 $500 credit shall be provided for any qualified employee who is
304 a welfare transition program participant. Such employee must be
305 employed on the credit application date and must have been
306 employed less than 1 year. This credit shall be in addition to
307 other credits pursuant to this section. Appropriate
308 documentation concerning the eligibility of an employee for the
309 additional credit under this subsection must be submitted as
310 determined by the department.
311 (9)(a) In order to claim the credit provided by this
312 section, an eligible business must file under oath with the
313 office a statement that includes the name and address of the
314 eligible business and any other information that is required to
315 process the application.
316 (b) Within 30 working days after receipt of an application
317 for the credit, the office shall review the application to
318 determine whether it contains all the information required by
319 this subsection and meets the criteria specified in this
320 section. Subject to the provisions of paragraph (c), the office
321 shall approve all applications that contain the information
322 required by this subsection and meet the criteria specified in
323 this section as eligible to receive the credit.
324 (c) The maximum credit amount that may be approved during
325 any calendar year is $5 million. The Department of Revenue, in

326 conjunction with the office, shall notify the governing bodies
327 in areas designated under this section when the $5 million
328 maximum amount has been reached. Applications must be considered
329 for approval in the order in which they are received without
330 regard to whether the credit is for a new or existing business.
331 This limitation applies to the value of the credit as contained
332 in approved applications. Approved credits may be taken in the
333 time and manner allowed pursuant to this section.
334 (10) If the application is insufficient to support the
335 credit authorized in this section, the office shall deny the
336 credit and notify the business of the denial. The business may
337 reapply for the credit within 3 months after such notification.
338 (11) If the credit provided under this section is greater
339 than can be taken on a single tax return, excess amounts may be
340 taken as credits on any tax return submitted within 12 months
341 after the approval of the application by the department.
342 (12) It is the responsibility of each business to
343 affirmatively demonstrate to the satisfaction of the Department
344 of Revenue that the business meets the requirements of this
345 section.
346 (13) Any person who fraudulently claims the credit
347 provided by this section is liable for repayment of the credit
348 plus a mandatory penalty of 100 percent of the credit and
349 commits a misdemeanor of the second degree, punishable as
350 provided in s. 775.082 or s. 775.083.
351 (14) A corporation may take the credit under this section
352 against its corporate income tax liability as provided in s.
353 220.1895. However, a corporation that applies its job tax credit

354 against the tax imposed by chapter 220 may not receive the
355 credit provided for in this section. A credit may be taken
356 against only one tax.
357 (15) The department shall adopt rules pursuant to ss.
358 120.536(1) and 120.54 governing the manner and form of
359 applications for credit and may establish guidelines concerning
360 the requisites for an affirmative showing of qualification for
361 the credit under this section.
362 (16) Notwithstanding subsections (6), (7), and (8), an
363 eligible business located in an area designated under this
364 section as of June 30, 2006, shall retain its program and tax
365 credit eligibility and amount through June 30, 2012, if the
366 business complies with the job creation requirements of this
367 section in effect on that date. This subsection is repealed July
368 1, 2012.
369 Section 3. Section 220.1895, Florida Statutes, is amended
370 to read:
371 220.1895 Rural Job Tax Credit and Designated Urban ~~High-~~
372 ~~Crime Area~~ Job Tax Credit.--There shall be allowed a credit
373 against the tax imposed by this chapter amounts approved by the
374 Office of Tourism, Trade, and Economic Development pursuant to
375 the Rural Job Tax Credit Program in s. 212.098 and the
376 Designated Urban ~~High-Crime Area~~ Job Tax Credit Area Program in
377 s. 212.097. A corporation that uses its credit against the tax
378 imposed by this chapter may not take the credit against the tax
379 imposed by chapter 212. If any credit granted under this section
380 is not fully used in the first year for which it becomes
381 available, the unused amount may be carried forward for a period

382 not to exceed 5 years. The carryover may be used in a subsequent
383 year when the tax imposed by this chapter for such year exceeds
384 the credit for such year under this section after applying the
385 other credits and unused credit carryovers in the order provided
386 in s. 220.02(8).
387 Section 4. Subsection (2) and paragraph (j) of subsection
388 (3) of section 288.99, Florida Statutes, are amended to read:
389 288.99 Certified Capital Company Act.--
390 (2) PURPOSE.--The primary purpose of this act is to
391 stimulate a substantial increase in venture capital investments
392 in this state by providing an incentive for insurance companies
393 to invest in certified capital companies in this state which, in
394 turn, will make investments in new businesses or in expanding
395 businesses, including minority-owned or minority-operated
396 businesses and businesses located in a designated Front Porch
397 community, enterprise zone, designated urban job tax credit
398 ~~high-crime~~ area, rural job tax credit county, or nationally
399 recognized historic district. The increase in investment capital
400 flowing into new or expanding businesses is intended to
401 contribute to employment growth, create jobs which exceed the
402 average wage for the county in which the jobs are created, and
403 expand or diversify the economic base of this state.
404 (3) DEFINITIONS.--As used in this section, the term:
405 (j) "Qualified business" means the Digital Divide Trust
406 Fund established under the State of Florida Technology Office or
407 a business that meets the following conditions as evidenced by
408 documentation required by commission rule:

409 1. The business is headquartered in this state and its
410 principal business operations are located in this state or at
411 least 75 percent of the employees are employed in the state.
412 2. At the time a certified capital company makes an
413 initial investment in a business, the business would qualify for
414 investment under 13 C.F.R. s. 121.301(c), which is involved in
415 manufacturing, processing or assembling products, conducting
416 research and development, or providing services.
417 3. At the time a certified capital company makes an
418 initial investment in a business, the business certifies in an
419 affidavit that:
420 a. The business is unable to obtain conventional
421 financing, which means that the business has failed in an
422 attempt to obtain funding for a loan from a bank or other
423 commercial lender or that the business cannot reasonably be
424 expected to qualify for such financing under the standards of
425 commercial lending;
426 b. The business plan for the business projects that the
427 business is reasonably expected to achieve in excess of $25
428 million in sales revenue within 5 years after the initial
429 investment, or the business is located in a designated Front
430 Porch community, enterprise zone, designated urban job tax
431 credit ~~high crime~~ area, rural job tax credit county, or
432 nationally recognized historic district;
433 c. The business will maintain its headquarters in this
434 state for the next 10 years and any new manufacturing facility
435 financed by a qualified investment will remain in this state for
436 the next 10 years, or the business is located in a designated

437 Front Porch community, enterprise zone, designated urban job tax
438 credit ~~high crime~~ area, rural job tax credit county, or
439 nationally recognized historic district; and
440 d. The business has fewer than 200 employees and at least
441 75 percent of the employees are employed in this state. For
442 purposes of this subsection, the term also includes the Florida
443 Black Business Investment Board, any entity majority owned by
444 the Florida Black Business Investment Board, or any entity in
445 which the Florida Black Business Investment Board holds a
446 majority voting interest on the board of directors.
447 4. The term does not include:
448 a. Any business predominantly engaged in retail sales,
449 real estate development, insurance, banking, lending, or oil and
450 gas exploration.
451 b. Any business predominantly engaged in professional
452 services provided by accountants, lawyers, or physicians.
453 c. Any company that has no historical revenues and either
454 has no specific business plan or purpose or has indicated that
455 its business plan is solely to engage in a merger or acquisition
456 with any unidentified company or other entity.
457 d. Any company that has a strategic plan to grow through
458 the acquisition of firms with substantially similar business
459 which would result in the planned net loss of Florida-based jobs
460 over a 12-month period after the acquisition as determined by
461 the office.
462 Section 5. Section 290.0078, Florida Statutes, is created
463 to read:

464 290.0078 Enterprise zone designation for Charlotte County
465 or Charlotte County and the City of Punta Gorda.--Charlotte
466 County or Charlotte County and the City of Punta Gorda may apply
467 to the Office of Tourism, Trade, and Economic Development for
468 designation of one enterprise zone encompassing an area not to
469 exceed 20 square miles. The application must be submitted by
470 December 31, 2006, and must comply with the requirements of s.
471 290.0055, with the exception of s. 290.0055(4)(c).
472 Notwithstanding the provisions of s. 290.0065 limiting the total
473 number of enterprise zones designated and the number of
474 enterprise zones within a population category, the Office of
475 Tourism, Trade, and Economic Development may designate one
476 enterprise zone under this section. The Office of Tourism,
477 Trade, and Economic Development shall establish the initial
478 effective date of the enterprise zone designated pursuant to
479 this section.
480 Section 6. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (1)

Bill No. **HB 449 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

OK
MWC

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1 Council/Committee hearing bill: Commerce Council
2 Representative(s) Grant offered the following:
3
4 **Amendment**
5 Remove line(s) 464-479 and insert:
6 290.78 Enterprise zone designation for Charlotte County or
7 Charlotte County and Punta Gorda.-- Charlotte County or
8 Charlotte County and the City of Punta Gorda may apply to the
9 Office of Tourism, Trade, and Economic Development for
10 designation of one enterprise zone encompassing an area not to
11 exceed 10 square miles. The enterprise zone shall be located in
12 an area encompassing the Charlotte County Airport Authority
13 property and bounded by U.S. Highway 17 to the north and Jones
14 Loop Road to the south. The application must be submitted by
15 December 31, 2006, and must comply with the requirements of s.
16 290.0055, with the exception of s. 290.0055 (4) (c).
17 Notwithstanding the provisions of s. 290.0065 limiting the total
18 number of enterprise zones designated and the number of
19 enterprise zones within a population category, the Office of
20 Tourism, Trade, and Economic Development may designate one
21 enterprise zone under this section. The Office of Tourism,
000000

22 Trade, and Economic Development shall establish the initial
23 effective date of the enterprise zone designated pursuant to
24 this section.
25
26

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 161 CS Building Assessment and Remediation
SPONSOR(S): Domino and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1046

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Business Regulation Committee	15 Y, 1 N, w/CS	Livingston	Liepshutz
2) Insurance Committee	19 Y, 0 N, w/CS	Cooper	Cooper
3) State Administration Appropriations Committee	9 Y, 0 N	Rayman	Belcher
4) Commerce Council		Livingston	Randle
5)			

SUMMARY ANALYSIS

Currently, there are numerous companies in Florida that hold themselves out to be **mold assessors or mold remediators** or conduct mold related services. There are no licensure or regulatory requirements to be a mold assessor or mold remediator.

This bill provides education guidelines and certification for those who engage in business as a mold assessor or mold remediator. By January 1, 2007, the bill requires an assessor "to maintain general liability and errors and omissions insurance coverage of not less than $250,000." It requires a remediator "to maintain a general liability insurance policy of not less than $500,000 with specific coverage for mold related claims." The bill does not require disclosure to the customer of compliance with the statutorily specified credentials to become a mold assessor or mold remediator. The bill requires that a contract to perform mold assessment or mold remediation must be signed or otherwise authenticated by the parties.

The bill provides various exemptions from the guidelines and operating requirements. Civil and criminal penalties are provided for violations. The bill has a "grandfather clause" to allow current operators to continue until July 1, 2008, without complying with the guidelines and operating requirements.

Currently, **home inspectors** are not regulated. "Home inspection" means a limited visual examination of systems and components for the purpose of providing a written professional opinion of the condition of a home.

The bill states that a person may not work as a home inspector unless that person "has successfully completed a course of study of not less than 80 hours which requires a passing score on a psychometrically valid examination in home inspections." The course of study "must be accredited by a nationally recognized third-party independent accrediting entity."

The bill requires written disclosures be provided to customers. The statements must identify that the home inspector meets education and examination requirements and maintains commercial general liability insurance [$300,000], as well as, the scope of the home inspection and the approximate number of inspections conducted for a fee or the number of years of experience as a home inspector.

The bill will not have a significant fiscal impact on state or local governments.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government - The bill creates statutory certification and operational requirements for those who engage in the businesses of mold assessment, mold remediation, or home inspection.

Ensure lower taxes - Civil and criminal penalties are provided for violations of the guidelines. Persons who engage in business with a focus on mold assessment or mold remediation or operate as a home inspector will incur the costs of education, insurance, certification, and operation requirements, as specified by the bill.

B. EFFECT OF PROPOSED CHANGES:

Background—Mold

Molds can be found anywhere indoors and outdoors and they can grow on virtually any substance when moisture is present. The Center for Disease Control has reported that people who are exposed to mold may experience a variety of illnesses. Individuals exposed to mold commonly report problems such as: allergy symptoms, nasal and sinus congestion, cough, breathing difficulties, sore throat, skin and eye irritation, and upper respiratory infections.

There are no federal or state standards for acceptable mold levels in buildings or homes and no pure scientific evidence that mold poses a lethal health threat. However, possible health-related illnesses and property damage due to mold exposure have caused a significant increase in the number of lawsuits filed throughout the country, sometimes resulting in multi-million dollar damage awards.

In Florida, there have been many lawsuits based on mold-related illnesses and alleged sick buildings. Responsibility for mold-related claims can include almost anyone involved in the construction and maintenance of a building, as well as real estate agents, prior owners, and management companies. Recovery of damages caused from mold depends on proof of actual damages and a determination of the cause of the mold contamination.

Currently, there are companies in Florida that hold themselves out to be mold assessors or mold remediators or conduct mold related services. However, there are no state guidelines or educational requirements to be a mold assessor or mold remediator. However, certain mold-related activities are regulated when those activities require that person to act in the capacity of a licensed contractor. In Florida, contractors are licensed by the Construction Industry Licensing Board (CILB) of the Department of Business and Professional Regulation (DBPR) under chapter 489, F.S.

Effect of Proposed Changes

This bill creates part XV of chapter 468, F.S., to provide guidelines for those who engage in business as a mold assessor or mold remediator.

This bill defines mold to mean "an organism of the class fungi that causes disintegration of organic matter and produces spores and includes any spores, hyphae, and mycotoxins produced by mold."

The bill defines "mold assessment" as the collection or analysis of a mold sample; the development of a mold-management plan or mold-remediation protocol; or an investigation or survey of a dwelling or other structure to provide the owner or occupant with information regarding the presence, identification, or evaluation of mold.

"Mold remediation" is defined as the removal, cleaning, sanitizing, demolition, or other treatment, of mold or mold-contaminated matter.

This bill provides education guidelines and certification for those who engage in business as a mold assessor or mold remediator. A person operating as a mold assessor or mold remediator must have evidence of specified credentials or conduct business under the supervision of a person who has evidence of at least a 2-year degree in microbiology, engineering, architecture, industrial hygiene, or a related field of science from an accredited institution, **and**

- evidence of a minimum of 1 year of experience in conducting microbial sampling or investigations [for a mold remediator the experience must be related to mold remediation], **or**

- evidence of a high school diploma, a GED, or the equivalent

  with a minimum of 2 years of documented field experience in conducting microbial sampling or investigations [for a mold remediator the experience must be related to mold remediation].

The supervisor, or operator, must also show evidence of certification. The certification may come from "a not-for-profit industry association, society or [other] certification body or by a college or university that offers mold assessment training or education."

The bill states that "qualified certification programs" shall be accredited "by a nationally recognized independent accrediting entity that sets programs and standards that comply with American Society for Testing and Materials Standard E1929-98, Standard Practice for Assessment of Certification Programs for Environmental Professionals: Accreditation Criteria, or the equivalent."

The bill requires an assessor to "maintain general liability and errors and emissions insurance of not less than $250,000." It requires a remediator to "maintain [a] general liability insurance policy of not less than $500,000 with specific coverage for mold related claims."

The bill provides various exemptions from the guidelines and operating requirements. The bill provides exemptions to these requirements if the person performing the assessment or remediation satisfies one of the following criteria: a residential property owner working on his or her own property; an owner, tenant, managing agent, or employee that works on owned or leased property; employee working for and supervised by the certified person; certain licensed professionals, such as contractors or engineers; those working on behalf of an insurer; individuals in the manufactured housing industry; or an employee of a governmental entity or school, who does not engage in mold assessment or remediation.

A disclosure to the customer of compliance with the statutorily specified credentials to become an assessor or remediator is not required by the bill. The bill does require a contract to perform mold assessment or mold remediation to be signed or otherwise authenticated by the parties and authorizes electronic contracts as well as hard copies.

The bill prohibits mold assessors from performing mold remediation or holding an interest in a mold remediation company, and vice versa. It provides criminal and civil penalties for violations

of the guidelines. The bill has a "grandfather clause" to allow current operators to continue until July 1, 2008, when compliance with the guidelines is required.

Background—Home Inspections

Currently, home inspectors are not regulated. Although home inspectors are not regulated by any statute or agency, several professions dealing with construction are regulated. Regulated professions include construction contractors, architects, engineers, building code administrators, plans examiners, building code inspectors, and appraisers, among others.

A building inspection is often confused with a home inspection. A building inspection is a legally required act, performed by a local governmental entity for the purpose of determining whether a structure complies with the appropriate building code at the time of construction. By contrast, a home inspection is a discretionary endeavor, often contracted for after construction is complete. A home inspection is typically contracted for by a potential purchaser of a home, although home inspections are sometimes contracted for by the current owner of a home to determine its condition, by a homeowner about to sell a home who wishes to avoid potential problems, or by a purchaser of a new home who wants to ensure that the house was constructed properly. A home inspection is performed by private industry, rather than by local government.

Effect of Proposed Changes

The bill creates part XVI of chapter 468, F.S. The bill defines various terms, including:

- "Home" means any residential real property, or manufactured or modular home, that is a single-family dwelling, duplex, triplex, quadruplex, condominium unit, or cooperative unit. The term does not include the common areas of condominiums or cooperatives.

- "Home inspector" means any person who provides or offers to provide a home inspection for a fee or other compensation.

- "Home inspection" means a limited visual examination of one or more of the readily accessible installed systems and components of a home, including the structure, electrical system, HVAC system, roof covering, plumbing system, interior components, exterior components, and site conditions that affect the structure, for the purposes of providing a written professional opinion of the condition of the home.

The bill states that "a person may not work as a home inspector unless that person has successfully completed a course of study of not less than 80 hours and passes a psychometrically valid examination in home inspections." The course of study "must be accredited by a nationally recognized third-party independent accrediting entity."

The bill requires written disclosures to be provided to customers prior to contracting for or commencing a home inspection. The statements must identify that: the home inspector meets the education and examination requirements of the bill; the home inspector maintains the commercial general liability insurance policy required by the bill; the scope or parameters of the home inspection; and identify the approximate number of home inspections the home inspector has performed for a fee or the number of years of experience as a home inspector.

A business entity may not provide home inspection services or use the title of home inspector(s) unless each of the home inspectors employed by the business satisfies the requirements of the bill.

The bill specifies numerous exemptions from the requirements being imposed. These include,

1. A construction contractor licensed under chapter 489;
2. An architect licensed under chapter 481;
3. An engineer licensed under chapter 471;
4. A building code administrator, plans examiner, or building code inspector licensed under part XII of chapter 468;
5. A certified real estate appraiser, licensed real estate appraiser, or registered real estate appraiser licensed under part II of chapter 475;
6. An inspector whose report is being provided to, and is solely for the benefit of, the Federal Housing Administration or the Veterans Administration;
7. An inspector conducting inspections for wood-destroying organisms on behalf of a licensee under chapter 482;
8. A fire safety inspector certified under s. 633.081;
9. An insurance adjuster licensed under part VI of chapter 626;
10. An officer appointed by the court;
11. A master septic tank contractor licensed under part III of chapter 489;
12. A certified energy auditor performing an energy audit of any home or building conducted under chapter 366 or rules adopted by the Public Service Commission; and
13. Individuals in the manufactured housing industry.

The bill further specifies that a home inspector must maintain a commercial general liability insurance policy in an amount of not less than $300,000. The bill allows a home inspector to provide estimates related to the cost of repair of an inspected property.

The bill prohibits various actions by a home inspector, including: any repairs to a home on which the inspector or the inspector's company has prepared a home inspection report; inspect for a fee any property in which the inspector or the inspector's company has any financial interest; pay for the referral of any business to the inspector or the inspection company; and make an omission or prepare a report in which the inspection or the fee is contingent upon either the conclusions in the report, pre-established findings, or the close of escrow.

It provides criminal and civil penalties for violations. The bill has a "grandfather clause" to allow current home inspectors to continue to operate until January 1, 2008, if the inspector:

- has successfully completed high school or its equivalent or has been in the business of home inspection services for at least 5 years;
- has been engaged in the practice of home inspection for compensation for at least 3 years prior to January 1, 2007; and
- has performed not fewer than 250 home inspections for compensation.

The bill specifies that compliance with the new statutory guidelines is required as of January 1, 2008.

The effective date of the bill, except as otherwise provided, is July 1, 2006.

C. SECTION DIRECTORY:

Section 1. Creates part XV of chapter 468, F.S., and provides statutory requirements to operate as a mold assessor or mold remediator.

Section 2. Creates part XVI of chapter 468, F.S., and provides statutory requirements to operate as a home inspector.

Section 3. Provides an effective date of July 1, 2006, although some provisions of the bill have a different effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None anticipated.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None anticipated.

2. Expenditures:

   None anticipated.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Persons who engage in business with a focus on mold assessment or mold remediation or operate as a home inspector will incur the costs of education, certification, insurance, and operation requirements, as specified by the bill. These costs are unknown at this time.

D. FISCAL COMMENTS:

It is not anticipated that the bill would have a significant fiscal impact on state or local governments.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not seem to require counties or municipalities to spend funds or to take action requiring the expenditure of funds. The bill does not seem to reduce the percentage of a state tax shared with counties or municipalities. The bill does not seem to reduce the authority that municipalities have to raise revenue.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

During the 2005 Regular Session, HB 315 was adopted to provide for certification of mold assessors and mold remediators, as well as, home inspectors. It also provided for statutory operational requirements, for insurance requirements, and authorized civil penalties under the Florida Deceptive and Unfair Trade Practices Act. Governor Bush vetoed HB 315.

The Governor stated his concern that the bill would have unintended consequences, including putting some legitimate and responsible employees out of business. Since the bill grandfathered some home inspectors but did not provide for the grandfathering of responsible and experienced mold assessors and remediators, the Governor stated that this will likely put employees and companies that cannot complete the bill's education and training requirements by January 1, 2006, out of business.

The Governor also stated that the bill was somewhat ambiguous and lacked clear guidance to the industry in some areas including, a lack of clear educational and examination requirements. While the bill required training, the Governor stated that there were no specifics regarding the kind of curriculum or standards necessary for home inspectors, mold assessors, or mold remediators. The Governor further stated that the bill appears to arbitrarily require high school and college degrees while presenting no clear reasons for the requirements.

Another question raised by the Governor was whether the mold-specific insurance policy required for mold assessors and a general liability insurance policy with a mold insurance pollution rider required for non-contracting mold remediators, both in an amount not less than $1 million, would be available by the required date of October 1, 2005. The Governor stated that there was a further concern that this could have the unintended effect of allowing insurers to deny payments for mold claims under a homeowner policy if work on a home has been performed by a mold assessor or remediator.

Finally, the Governor indicated that he agreed with the bill's sponsors that additional consumer protection is warranted in these fields. He directed the Secretary of the Department of Business and Professional Regulation to work with the various stakeholders during the interim to develop proposed legislation. The department conducted workshops on mold assessment and remediation and a workshop on home inspections. The workshops culminated in a report issued on February 2, 2006, which highlighted the workshop discussions.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 23, 2006, the Business Regulation Committee adopted a strike all amendment which modified the bill in the following manner and reported the bill favorably with committee substitute.

Includes home inspectors in the bill with similar credential requirements as the mold provisions;

Requires successful completion of a course of study of not less than 80 hours and passage of a psychometrically valid examination in home inspections; requires disclosures of credentials as a home inspector to the customer.

Provides for a breach of contract penalty rather than an Unfair and Deceptive Practice Act violation for mold operators;

Removes provisions relating to construction contractors conducting mold assessment and noncontracting mold remediators.

Reduces insurance coverage for mold assessors from $1 million to $250,000 and requires remediator coverage of $500,000.

At its April 5, 2006 meeting, the House Insurance Committee adopted several amendments to the bill. The major changes in the amendments include:

- Separating the education requirements for mold assessors from the requirements for mold remediators and specifying different requirements for each profession;
- Requiring mold assessors and remediators to purchase the required liability and errors and omissions insurance by January 1, 2007;
- Authorizing electronic and hard copies of contracts from mold assessors and remediators; and
- Changing the effective date from January 1, 2008, to July 1, 2006, except as otherwise provided in the bill.

This analysis has been updated to reflect the changes made by the amendments adopted by the Insurance Committee.

CHAMBER ACTION

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1 The Insurance Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to building assessment and remediation;
7 creating pt. XV of ch. 468, F.S., relating to regulation
8 of mold assessment and mold remediation; providing
9 legislative intent; providing definitions; providing
10 requirements for practice of mold assessment or mold
11 remediation; providing exemptions; providing for
12 prohibited acts and penalties; providing insurance
13 requirements; providing for contracts to perform mold
14 assessment or mold remediation; providing a statute of
15 limitations; providing a grandfather clause; creating pt.
16 XVI of ch. 468, F.S., relating to regulation of home
17 inspection services; providing definitions; providing
18 requirements for practice; providing exemptions; providing
19 prohibited acts and penalties; requiring liability
20 insurance; exempting certain persons from duty to provide
21 repair cost estimates; providing a statute of limitations;
22 providing a grandfather clause; providing an effective
23 date.

24
25 Be It Enacted by the Legislature of the State of Florida:
26
27 Section 1. Part XV of chapter 468, Florida Statutes,
28 consisting of sections 468.83, 468.831, 468.832, 468.833,
29 468.834, 468.835, 468.836, 468.837, and 468.838, is created to
30 read:
31 468.83 Legislative intent.--It is the intent of the
32 Legislature pursuant to s. 11.62 that professions and
33 occupations covered by this part be regulated in a manner that
34 does not unnecessarily restrict entry into such professions or
35 occupations. The Legislature finds that this part provides a
36 measure of protection for homeowners by providing education,
37 experience, and testing requirements for persons in such
38 professions or occupations necessary to protect homeowners'
39 investments in their homes.
40 468.831 Definitions.--As used in this part, the term:
41 (1) "Mold" means an organism of the class fungi that
42 causes disintegration of organic matter and produces spores, and
43 includes any spores, hyphae, and mycotoxins produced by mold.
44 (2) "Mold assessment" means:
45 (a) An investigation or survey of a dwelling or other
46 structure to provide the owner or occupant with information
47 regarding the presence, identification, or evaluation of mold;
48 (b) The development of a mold-management plan or mold-
49 remediation protocol; or
50 (c) The collection or analysis of a mold sample.

51 (3) "Mold assessor" means any person who performs or
52 directly supervises a mold assessment.
53 (4) "Mold remediation" means the removal, cleaning,
54 sanitizing, demolition, or other treatment, including preventive
55 activities, of mold or mold-contaminated matter that was not
56 purposely grown at that location; however, such removal,
57 cleaning, sanitizing, demolition, or other treatment, including
58 preventive activities, may not be work that requires a license
59 under chapter 489 unless performed by a person who is licensed
60 under that chapter or the work complies with that chapter.
61 (5) "Mold remediator" means any person who performs mold
62 remediation. A mold remediator may not perform any work that
63 requires a license under chapter 489 unless the mold remediator
64 is also licensed under that chapter or complies with that
65 chapter.
66 468.832 Requirements for practice.--
67 (1) A person shall not work as a mold assessor or mold
68 remediator unless he or she has evidence of, or works under the
69 direct supervision of a person who has evidence of, the
70 following:
71 (a)1. For a mold remediator, at least a 2-year degree in
72 microbiology, engineering, architecture, industrial hygiene, or
73 a related field of science from an accredited institution, along
74 with a minimum of 1 year of documented field experience in a
75 field related to mold remediation, or a high school diploma, a
76 GED, or the equivalent with a minimum of 2 years of documented
77 field experience in a field related to mold remediation.

78 2. For a mold assessor, at least a 2-year degree in
79 microbiology, engineering, architecture, industrial hygiene, or
80 a related field of science from an accredited institution, along
81 with a minimum of 1 year of documented field experience in
82 conducting microbial sampling or investigations, or a high
83 school diploma, a GED, or the equivalent with a minimum of 2
84 years of documented field experience in conducting microbial
85 sampling or investigations.
86 (b) A certification related to performing mold assessment
87 or mold remediation, respectively. Such certification may be
88 issued by a not-for-profit industry association, society, or
89 certification body or by a college or university that offers
90 mold assessment training or education. Qualified certification
91 programs shall be accredited by a nationally recognized
92 independent accrediting entity that sets programs and standards
93 that comply with American Society for Testing and Materials
94 Standard E1929-98, Standard Practice for Assessment of
95 Certification Programs for Environmental Professionals:
96 Accreditation Criteria, or the equivalent.
97 (2) A business entity may not provide or offer to provide
98 mold assessment or mold remediation services unless the business
99 entity satisfies all of the requirements of this part.
100 468.833 Exemptions.--
101 (1) The following persons are not required to comply with
102 this part with regard to any mold assessment:
103 (a) A residential property owner who performs mold
104 assessment on his or her own property.

105 (b) An owner or tenant, or a managing agent or employee of
106 an owner or tenant, who performs mold assessment on property
107 owned or leased by the owner or tenant. This exemption does not
108 apply if the managing agent or employee engages in the business
109 of performing mold assessment for the public.
110 (c) An employee of a licensee who performs mold assessment
111 while directly supervised by the mold assessor.
112 (d) Individuals or business organizations that are not
113 specifically engaged in mold assessment but are acting within
114 the scope of the respective licenses required under chapter 471,
115 part I of chapter 481, chapter 482, or chapter 489, are acting
116 on behalf of an insurer under part VI of chapter 626, or are
117 individuals in the manufactured housing industry who are
118 licensed under chapter 320.
119 (e) An authorized employee of the United States, this
120 state, or any municipality, county, or other political
121 subdivision, or public or private school, who meets the
122 requirements of s. 468.832 and who is conducting mold assessment
123 within the scope of that employment, as long as the employee
124 does not hold out for hire or otherwise engage in mold
125 assessment.
126 (2) The following persons are not required to comply with
127 this part with regard to any mold remediation:
128 (a) A residential property owner who performs mold
129 remediation on his or her own property.
130 (b) An owner or tenant, or a managing agent or employee of
131 an owner or tenant, who performs mold remediation on property
132 owned or leased by the owner or tenant so long as such

133 remediation is within the routine maintenance of a building
134 structure. This exemption does not apply if the managing agent
135 or employee engages in the business of performing mold
136 remediation for the public.
137 (c) An employee of a mold remediator while directly
138 supervised by the mold remediator.
139 (d) Individuals or business organizations that are not
140 specifically engaged in mold remediation but that are acting
141 within the scope of the respective licenses required under
142 chapter 471, part I of chapter 481, chapter 482, or chapter 489,
143 are acting on behalf of an insurer under part VI of chapter 626,
144 or are individuals in the manufactured housing industry who are
145 licensed under chapter 320.
146 (e) An authorized employee of the United States, this
147 state, or any municipality, county, or other political
148 subdivision, or public or private school, who meets the
149 requirements of s. 468.832 and who is conducting mold
150 remediation within the scope of that employment, as long as the
151 employee does not hold out for hire or otherwise engage in mold
152 remediation.
153 468.834 Prohibited acts; penalties.--
154 (1) A mold assessor, a company that employs a mold
155 assessor, or a company that is controlled by a company that also
156 has a financial interest in a company employing a mold assessor
157 may not:
158 (a) Perform or offer to perform any mold assessment
159 without complying with the requirements of this part.

160 (b) Perform or offer to perform any mold remediation to a
161 structure on which the mold assessor or the mold assessor's
162 company provided a mold assessment within the last 12 months.
163 (c) Inspect for a fee any property in which the assessor
164 or the assessor's company has any financial or transfer
165 interest.
166 (d) Accept any compensation, inducement, or reward from a
167 mold remediator or mold remediator's company for the referral of
168 any business to the mold remediator or the mold remediator's
169 company.
170 (e) Offer any compensation, inducement, or reward to a
171 mold remediator or mold remediator's company for the referral of
172 any business from the mold remediator or the mold remediator's
173 company.
174 (f) Accept an engagement to make an omission of the
175 assessment or conduct an assessment in which the assessment
176 itself, or the fee payable for the assessment, is contingent
177 upon the conclusions of the assessment.
178 (2) A mold remediator, a company that employs a mold
179 remediator, or a company that is controlled by a company that
180 also has a financial interest in a company employing a mold
181 remediator may not:
182 (a) Perform or offer to perform any mold remediation
183 without complying with the requirements of this part.
184 (b) Perform or offer to perform any mold assessment as
185 defined in s. 468.831.

186 (c) Remediate for a fee any property in which the mold
187 remediator or the mold remediator's company has any financial or
188 transfer interest.
189 (d) Accept any compensation, inducement, or reward from a
190 mold assessor or mold assessor's company for the referral of any
191 business from the mold assessor or the mold assessor's company.
192 (e) Offer any compensation, inducement, or reward to a
193 mold assessor or mold assessor's company for the referral of any
194 business from the mold assessor or the mold assessor's company.
195 (3) Any person who violates any provision of this section
196 commits:
197 (a) A misdemeanor of the second degree for a first
198 violation, punishable as provided in s. 775.082 or s. 775.083.
199 (b) A misdemeanor of the first degree for a second
200 violation, punishable as provided in s. 775.082 or s. 775.083.
201 (c) A felony of the third degree for a third or subsequent
202 violation, punishable as provided in s. 775.082, s. 775.083, or
203 s. 775.084.
204 468.835 Insurance.--
205 (1) Effective January 1, 2007, a mold assessor must
206 maintain general liability and errors and omissions insurance
207 coverage in an amount of not less than $250,000.
208 (2) Effective January 1, 2007, a mold remediator must
209 maintain general liability insurance policy in an amount of not
210 less than $500,000 that includes specific coverage for mold
211 related claims.
212 468.836 Contracts.--A contract to perform mold assessment
213 or mold remediation must be in a document or electronic record,

214 signed or otherwise authenticated by the parties. A mold
215 assessment contract is not required to provide estimates related
216 to the cost of repair of an assessed property. A mold assessment
217 contract is not required to provide estimates.
218 468.837 Statute of limitations.--Chapter 95 governs the
219 time at which an action to enforce an obligation, a duty, or a
220 right arising under this part must be commenced.
221 468.838 Grandfather clause.--The provisions of this part
222 shall become effective upon becoming law and shall allow for a
223 period of 2 years after enactment in which persons currently
224 performing mold assessment or mold remediation as described
225 under this part have to complete the requirements of this part.
226 Section 2. Part XVI of chapter 468, Florida Statutes,
227 consisting of sections 468.841, 468.842, 468.843, 468.844,
228 468.845, 468.846, 468.847, and 468.848, is created to read:
229 468.841 Definitions.--As used in this part, the term:
230 (1) "Home" means any residential real property, or
231 manufactured or modular home, that is a single-family dwelling,
232 duplex, triplex, quadruplex, condominium unit, or cooperative
233 unit. The term does not include the common areas of condominiums
234 or cooperatives.
235 (2) "Home inspector" means any person who provides or
236 offers to provide a home inspection for a fee or other
237 compensation.
238 (3) "Home inspection" means a limited visual examination
239 of one or more of the readily accessible installed systems and
240 components of a home, including, but not limited to, the
241 structure, electrical system, HVAC system, roof covering,

242 plumbing system, interior components, exterior components, and
243 site conditions that affect the structure, for the purpose of
244 providing a written professional opinion of the condition of the
245 home.
246 468.842 Requirements for practice.--
247 (1) A person may not work as a home inspector unless he or
248 she:
249 (a) Has successfully completed a course of study of not
250 less than 80 hours, which requires a passing score on a
251 psychometrically valid examination in home inspections, and
252 which includes, but is not limited to, each of the following
253 components of a home: structure; electrical system; roof
254 covering; plumbing system; interior components; exterior
255 components; and site conditions that affect the structure, and
256 heating, ventilation, and cooling systems. Courses of study
257 prescribed under this section must be accredited by a nationally
258 recognized third-party independent accrediting entity that sets
259 programs and standards that ensure certificant competence.
260 (b) Annually completes 8 hours of continuing education
261 related to home inspections.
262 (c) Discloses to the consumer in writing prior to
263 contracting for or commencing a home inspection:
264 1. That the home inspector meets the education and
265 examination requirements of this section.
266 2. That the home inspector maintains the commercial
267 general liability insurance policy as required by this part.
268 3. The scope and any exclusions of the home inspection.

269 4. A statement of experience that includes either the
270 approximate number of home inspections the home inspector has
271 performed for a fee or the number of years of experience as a
272 home inspector.
273 (2) A business entity may not provide or offer to provide
274 home inspection services unless each of the home inspectors
275 employed by the business entity satisfies all the requirements
276 of this part.
277 (3) A business entity may not use, in connection with the
278 name or signature of the business entity, the title "home
279 inspectors" to describe the business entity's services unless
280 each of the home inspectors employed by the business entity
281 satisfies all the requirements of this part.
282 468.843 Exemptions.--The following persons are not
283 required to comply with this part when acting within the scope
284 of practice authorized by such license, except when such persons
285 are conducting, producing, disseminating, or charging a fee for
286 a home inspection or otherwise operating within the scope of
287 this part:
288 (1) A construction contractor licensed under chapter 489.
289 (2) An architect licensed under chapter 481.
290 (3) An engineer licensed under chapter 471.
291 (4) A building code administrator, plans examiner, or
292 building code inspector licensed under part XII of chapter 468.
293 (5) A certified real estate appraiser, licensed real
294 estate appraiser, or registered real estate appraiser licensed
295 under part II of chapter 475.

296 (6) An inspector whose report is being provided to, and is
297 solely for the benefit of, the Federal Housing Administration or
298 the Veterans Administration.
299 (7) An inspector conducting inspections for wood-
300 destroying organisms on behalf of a licensee under chapter 482.
301 (8) A firesafety inspector certified under s. 633.081.
302 (9) An insurance adjuster licensed under part VI of
303 chapter 626.
304 (10) An officer appointed by the court.
305 (11) A master septic tank contractor licensed under part
306 III of chapter 489.
307 (12) A certified energy auditor performing an energy audit
308 of any home or building conducted under chapter 366 or rules
309 adopted by the Public Service Commission.
310 (13) A mobile home manufacturer, dealer, or installer
311 regulated or licensed under chapter 320 and any employees or
312 agents of the manufacturer, dealer, or installer.
313 468.844 Prohibited acts; penalties.--
314 (1) A home inspector, a company that employs a home
315 inspector, or a company that is controlled by a company that has
316 a financial interest in a company employing a home inspector may
317 not:
318 (a) Perform or offer to perform, prior to closing, for any
319 additional fee, any repairs to a home on which the inspector or
320 the inspector's company has prepared a home inspection report.
321 This paragraph does not apply to a home warranty company that is
322 affiliated with or retains a home inspector to perform repairs
323 pursuant to a claim made under a home warranty contract.

324 (b) Inspect for a fee any property in which the inspector
325 or the inspector's company has any financial or transfer
326 interest.
327 (c) Offer or deliver any compensation, inducement, or
328 reward to the owner of the inspected property, or any broker or
329 agent therefor, for the referral of any business to the
330 inspector or the inspector's company.
331 (d) Accept an engagement to make an omission or prepare a
332 report in which the inspection itself, or the fee payable for
333 the inspection, is contingent upon the conclusions in the
334 report, the preestablished findings, or the close of escrow.
335 (2) Any person who violates any provision of this section
336 commits:
337 (a) A misdemeanor of the second degree for a first
338 violation, punishable as provided in s. 775.082 or s. 775.083.
339 (b) A misdemeanor of the first degree for a second
340 violation, punishable as provided in s. 775.082 or s. 775.083.
341 (c) A felony of the third degree for a third or subsequent
342 violation, punishable as provided in s. 775.082, s. 775.083, or
343 s. 775.084.
344 468.845 Insurance.--A home inspector must maintain a
345 commercial general liability insurance policy in an amount of
346 not less that $300,000.
347 468.846 Repair cost estimates.--Home inspectors are not
348 required to provide estimates related to the cost of repair of
349 an inspected property.

350 468.847 Statute of limitations.--Chapter 95 governs when
351 an action to enforce an obligation, duty, or right arising under
352 this part must be commenced.
353 468.848 Grandfather clause.--Until January 1, 2008,
354 notwithstanding any other provision of this part, a person who
355 meets the following criteria may work as a home inspector:
356 (1) Has successfully completed high school or its
357 equivalent or has been in the business of home inspection
358 services for at least 5 years.
359 (2) Has been engaged in the practice of home inspection
360 for compensation for at least 3 years prior to January 1, 2007.
361 (3) Has performed of not fewer than 250 home inspections
362 for compensation.
363 Section 3. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

1

Amendment No. 1

Bill No. **HB 161 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

Council/Committee hearing bill: Commerce Council

Representative(s) Domino offered the following:

Amendment

Remove line(s) 105-109, and insert:

(b) A person who performs mold assessment on property owned or leased by that person, his or her employer, or an entity affiliated with that employer through common ownership, or on property operated or managed by that person's employer or an entity affiliated with that employer through common ownership. This exemption does not apply if the person, employer, or affiliated entity engages in the business of performing mold assessment for the public.

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HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

2

Amendment No. 2

Bill No. **HB 161 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Commerce Council
2 Representative(s) Domino offered the following:
3
4 **Amendment**
5 Remove line(s) 130-136, and insert:
6 (b) A person who performs mold remediation on property
7 owned or leased by that person, his or her employer, or an
8 entity affiliated with that employer through common ownership,
9 or on property operated or managed by that person's employer or
10 an entity affiliated with that employer through common
11 ownership. This exemption does not apply if the person,
12 employer, or affiliated entity engages in the business of
13 performing mold remediation for the public.
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Amendment No. 3

Bill No. **HB 161 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	_____	

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1 Council/Committee hearing bill: Commerce Council
2 Representative(s) Domino offered the following:
3
4 **Amendment**
5 Remove line 90, and insert:
6 mold assessment or mold remediation training or education
7 respectively. Qualified certification
8
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HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

4

Amendment No. 4

Bill No. **HB 161 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Commerce Council
2 Representative(s) Domino offered the following:
3
4 **Amendment**
5 Remove line(s) 110-111, and insert:
6 (c) An employee of a mold assessor while directly
7 supervised by the mold assessor.
8
9

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HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES 5

Amendment No. 5

Bill No. **HB 161 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Commerce Council
2 Representative(s) Attkisson offered the following:
3
4 **Amendment**
5 Remove line 72 and insert:
6 microbiology, engineering, architecture, industrial hygiene,
7 safety, or
8
9

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

6

Amendment No. 6

Bill No. **HB 161 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Commerce Council
2 Representative(s) Attkisson offered the following:
3
4 **Amendment**
5 Remove line 79 and insert:
6 microbiology, engineering, architecture, industrial hygiene,
7 safety, or
8
9

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HB 173 CS / Ross

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 173 CS Construction Contracts
SPONSOR(S): Ross and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 682

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Insurance Committee	19 Y, 0 N, w/CS	Callaway	Cooper
2) Business Regulation Committee	9 Y, 8 N, w/CS	Livingston	Liepshutz
3) Civil Justice Committee	7 Y, 0 N, w/CS	Blalock	Bond
4) Commerce Council		Callaway	Randle
5)			

SUMMARY ANALYSIS

There are currently no specific statutory provisions relating to insurance provisions in construction contracts. This bill addresses the issue of a subcontractor's failure to obtain the insurance coverage required by a construction contract between a contractor and a sub-contractor, and the general contractor's failure to compensate the sub-contractor for past work that the subcontractor accomplished while the general contractor reviewed the sub-contractor's insurance coverage.

This bill gives a general contractor 30 business days for commercial construction projects and 7 business days for residential construction projects in which to reject a certificate of insurance given to the general contractor by a subcontractor. If a general contractor does not reject the certificate of insurance within the applicable 30 day or 7 day time period, then the general contractor is deemed to accept it, except under specified circumstances. The general contractor can still reject the certificate of insurance at a later date as long as the rejection is in writing.

This bill also requires general contractors who accept a subcontractor's certificate of insurance, or who have been deemed in acceptance of it, to pay the subcontractor for the work done, except under specified circumstances.

A general contractor will not be required to follow the provisions of this bill if the general contractor provides a sample of a certificate of insurance that reflects all of the insurance requirements that a subcontractor must have coverage for, and the insurance provided by the subcontractor does not comply with the construction contract.

This bill's provisions also apply to certificates of insurance required by construction contracts between general contractors, subcontractors, sub-subcontractors, and materialmen.

This bill will only be applied to contracts entered into on or after July 1, 2006.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill creates statutory provisions governing the actions of contractors who are parties to a construction contract relating to acceptance or rejection of certificates of insurance and the resulting payment for work done or materials supplied. There are currently no specific statutory provisions relating to this issue.

Safeguard Individual Liberty -- This bill restricts when a general contractor can reject work done by a subcontractor or withhold payment for work done by a subcontractor due to the subcontractor not having insurance coverage required in the construction contract. The bill also provides a time limit when a general contractor must reject a certificate of insurance from a subcontractor. Noncompliance with the time limit provided results in a general contractor's deemed acceptance of the certificate of insurance.

B. EFFECT OF PROPOSED CHANGES:

Background

Most property owners, general contractors, and subcontractors carry numerous kinds of insurance, such as workers' compensation[1] and commercial liability. Insurance costs are factored into the contractors' bids on a construction project. Insurance requirements for a particular construction project are included in the resulting construction contracts between the owner and general contractor, the general contractor and subcontractor, and/or subcontractor and sub-subcontractor or materialman. For purposes of brevity, this analysis refers to the working relationship between a general contractor and a subcontractor. The same practices can occur when general contractors or subcontractors contract with sub-subcontractors or with materialmen and the sub-subcontractor or materialmen are required to provide policies or certificates of insurance as proof of insurance coverage.

Although there are no laws specifically addressing the practice, a general contractor or subcontractor may require, as a part of the construction contract, a certificate of insurance or an insurance policy to be submitted by a subcontractor as a condition of work. The certificate of insurance is evidence of insurance in lieu of an actual copy of an insurance policy. At some point upon signing a construction contract, sometimes before the work begins and sometimes after, the subcontractor provides a certificate of insurance to the general contractor listing the insurance provided by the subcontractor. Most times the general contractor reviews all documents required to be submitted under the construction contract, including the certificate of insurance, prior to paying the first invoice for each subcontractor. If an insurance policy or certificate of insurance is not submitted or if it does not meet the standards of the general contractor requiring the policy under the contract, the contractor may prohibit the other party from working on the construction project or may withhold payment for work already done until the proper insurance is obtained and proof is submitted.

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[1] Employers in the construction industry with one or more employee must provide workers' compensation coverage for its' employees. s. 440.02(17)(b)2., F.S. (2005). If a subcontractor does not have workers' compensation coverage, the general contractor must provide workers' compensation benefits for any injured employee of the subcontractor. This is true even if the subcontractor lied to the general contractor about his or her workers' compensation insurance coverage or gave the general contractor a fraudulent certificate of workers' compensation insurance coverage. John J. Dubreuil, *Florida Workers' Compensation Handbook*, 3-43 (2003 Edition, 2003).

According to proponents of the bill, a practice of misuse of certificates of insurance by general contractors has emerged that is of serious concern to the subcontractors and their insurance agents.[2] This practice involves a general contractor demanding their subcontractors supply them with certificates of insurance containing non-standard and sometimes unavailable coverage provisions, such as hold harmless agreements or waiver of subrogation rights.

Specifically, the subcontractor is told by the general contractor that in order to work on the construction project, the subcontractor must supply evidence of a liability policy with certain provisions. The subcontractor purchases an insurance policy and receives a certificate of insurance from his or her insurance agent which contains information about what type of insurance coverage the policyholder/subcontractor has in force. The subcontractor usually gives the certificate of insurance to the general contractor before starting work on the construction project. However, circumstances do exist where the documentation may be submitted after commencement of the subcontractors' portion of the project.

According to the bill's proponents, once the subcontractor's work is complete, the general contractor often refuses payment to the subcontractor for work completed because the subcontractor did not carry insurance containing the general contractor's required specifications, even though the general contractor had the certificate of insurance from the outset of the subcontractor's work. The general contractor refuses payment to the subcontractor until the subcontractor provides the general contractor with a certificate of insurance meeting the general contractor's specifications.

The problem is further complicated when the subcontractor asks his or her insurance agent to give him or her a new certificate of insurance with the appropriate specifications, to provide him or her with a retroactive insurance policy with corresponding certificate of insurance meeting the specifications, or to alter his or her existing certificate of insurance to reflect the appropriate specifications. Most agents refuse to alter the certificates of insurance as doing so potentially subjects them to license discipline and administrative fines.[3] Also, an agent doing so may incur an "errors and omission" problem.[4]

If an agent refuses to alter a certificate of insurance, the general contractor may ask the agent to issue a personal guarantee of the changes to the certificate of insurance the general contractor requires.[5] A personal guarantee by the agent may expose him or her to suit if the insurer will not honor the changes required by the general contractor and personally guaranteed by the agent.

Effect of Bill

This bill is designed to resolve the problem relating to certificates of insurance between contractors alleged by the bill's proponents. In that regard, the bill creates statutory provisions allowing a general contractor 30 business days for commercial construction projects and 7 business days for residential construction projects in which to reject a certificate of insurance given to the general contractor by a subcontractor. This bill's provisions also apply to certificates of insurance required by construction contracts between general contractors, subcontractors, sub-subcontractors, and materialmen. The rejection must be in writing and must specify the reason(s) for rejection. This bill does not require the general contractor to allow the subcontractor time to cure any deficiency in the certificate of insurance causing rejection of it by the general contractor.

If a general contractor does not reject the certificate of insurance within the applicable 7 day or 30 day time period, then the general contractor automatically accepts it (i.e. deemed acceptance). The general

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[2] Florida Association of Insurance Agents, *300 Words (more or less) about Certificates of Insurance* (2006) (on file with the Insurance Committee).
[3] s. 626.9541(1)(a)1., F.S. (2005); s. 626.9521, F.S. (2005); Informational Memorandum OIR-03-003M, issued by the Office of Insurance Regulation on February 21, 2003 (on file with the Insurance Committee).
[4] Florida Association of Insurance Agents, *300 Words (more or less) about Certificates of Insurance* (2006) (on file with the Insurance Committee).
[5] Id.

contractor is still able to reject a certificate of insurance at a later date (after acceptance or automatic acceptance) as long as the rejection is in writing and specifies the reason(s) for rejection. However, the general contractor must pay the subcontractor for work done by the subcontractor up to the date of written rejection of the certificate of insurance by the general contractor.

This bill outlines circumstances where a general contractor can withhold payment or reject work that has been completed by a subcontractor despite the general contractor's acceptance or automatic acceptance of the certificate of insurance. These circumstances are:

- If the certificate of insurance does not comply with the insurance coverage limits specified in the construction contract;
- If the certificate of insurance was knowingly and fraudulently altered or reflects coverages not in the insurance policy; or
- If the insurance policy is cancelled, nonrenewed, or materially and adversely altered during the term of the construction contract.

This bill also requires general contractors who voluntarily accept a subcontractor's certificate of insurance at the outset, or who automatically accept it by operation of law after the 7 day or 30 day window, to pay the subcontractor for work completed up to the time the general contractor rejects the insurance policy on the basis that it is nonconforming.

This bill outlines circumstances where a general contractor cannot be caused to automatically accept a certificate of insurance even if he or she does not reject during the 7 day or 30 day rejection window. These circumstances are:

- if the certificate of insurance does not comply with the insurance coverage limits specified in the construction contract,
- if the certificate of insurance was knowingly and fraudulently altered, or
- if the certificate of insurance reflects coverages not in the insurance policy

The provisions of this bill will not apply if the general contractor provides a sample of a certificate of insurance that reflects all of the insurance requirements that a subcontractor must have coverage, and the insurance provided by the subcontractor does not comply with the construction contract.

The provisions of this bill will only be applicable to contracts entered into on or after July 1, 2006.

C. SECTION DIRECTORY:

Section 1 creates s. 627.442, F.S. providing provisions regarding acceptance and/or rejection of certificates of insurance by parties to a construction contract and payment on construction contracts.

Section 2 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:

None.

D. FISCAL COMMENTS:

None.

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, nor reduce the percentage of state tax shared with counties or municipalities

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 26, 2006, the Insurance Committee considered the bill, adopted a strike-all amendment, and reported the bill favorably with CS. The strike-all amendment made the following changes to the original text of the bill:

- Specified the general contractor has 3 business days to reject a certificate of insurance, rather than 3 days as provided in the original bill text

- Clarified that a subcontractor will be paid for work done before the certificate of insurance is accepted or deemed to be accepted

- Clarified that a general contractor can reject a certificate of insurance even after he originally accepted it or was deemed to have accepted it

- Created exceptions to the provision relating to deemed acceptance of a certificate of insurance by a general contractor. The exceptions are a policy or certificate "that does not comply with the insurance coverage limits specified in the construction contract, that was knowingly and fraudulently altered, or that reflects coverages or conditions that are not contained in the underlying policy."

- Created exceptions to the provision requiring a general contractor to pay a subcontractor for work performed. The exceptions allow a general contractor to withhold payment or reject work completed by a subcontractor if the policy or certificate: "(a) Does not comply with the insurance coverage limits specified in the construction contract; (b) Was knowingly and fraudulently altered or reflects coverages or conditions that are not contained in the underlying policy; or (c) Is cancelled, nonrenewed, or materially and adversely altered during the term of the construction contract."

- Deleted the provision in the original bill making the construction contract provision requiring insurance unenforceable if the certificate of insurance is rejected.

On February 21, 2006, the Committee on Business Regulation considered the bill, adopted one amendment, and reported the bill favorably with CS. The CS includes a provision that specifies a contractor may not reject an insurance policy based on the fact that the insurer is not rated by a national rating service.

On April 4, 2006, the Civil Justice Committee adopted two amendments to this bill. The amendments provided that:

- A general contractor is allowed 30 business days for commercial construction projects and 7 business days for residential construction projects in which to reject a certificate of insurance given to him by a subcontractor.
- The above provisions will not apply if the general contractor provides a sample of a certificate of insurance that reflects all of the insurance requirements that a subcontractor must have coverage, and the insurance provided by the subcontractor does not comply with the construction contract.
- The bill is only applicable to contracts entered into on or after July 1, 2006.

The bill was then reported favorably with a committee substitute.

CHAMBER ACTION

The Civil Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to construction contracts; creating s. 627.442, F.S.; specifying acceptance of certain insurance provisions of a construction contract under certain circumstances; providing exceptions; prohibiting certain actions after acceptance of such provisions; providing an exception authorizing such actions under certain circumstances; authorizing contractors or subcontractors to reject certain accepted construction contract insurance provisions as nonconforming under certain circumstances; authorizing such contractors and subcontractors to withhold payment for work performed or materials supplied under certain circumstances; prohibiting rejecting certain policies of insurance on certain grounds; specifying nonapplication of construction contract insurance provisions under certain circumstances; providing construction; providing for application to certain contracts; providing an effective date.

24 Be It Enacted by the Legislature of the State of Florida:
25
26 Section 1. Section 627.442, Florida Statutes, is created
27 to read:
28 627.442 Construction contract insurance provisions;
29 acceptance, rejection, or application.--
30 (1) If a written construction contract requires a
31 subcontractor, sub-subcontractor, or materialman to provide an
32 insurance policy or certificate of insurance to the general
33 contractor or another subcontractor for work performed or
34 materials provided, which extends coverage rights to an
35 additional insured, the general contractor or subcontractor is
36 deemed to have accepted the insurance policy or certificate of
37 insurance as conforming to the written construction contract
38 unless the general contractor or subcontractor rejects the
39 insurance policy or certificate of insurance in writing within
40 30 business days for commercial construction projects and 7
41 business days for residential construction projects after
42 receipt of the insurance policy or certificate of insurance. The
43 written rejection must specify the reason for rejection.
44 However, the general contractor or subcontractor may not be
45 deemed to have accepted an insurance policy or certificate of
46 insurance that does not comply with the insurance coverage
47 limits specified in the construction contract, that was
48 knowingly and fraudulently altered, or that reflects coverages
49 or conditions that are not contained in the underlying policy.
50 (2) After a general contractor or subcontractor accepts an
51 insurance policy or certificate of insurance or is deemed to

52 have accepted the insurance policy or certificate of insurance,
53 a general contractor or subcontractor may not use the lack of
54 conforming insurance as a reason to reject work previously
55 completed by a subcontractor or sub-subcontractor, reject
56 materials previously supplied by a materialman, or withhold
57 payment for work previously completed or materials previously
58 supplied. However, the general contractor or subcontractor may
59 reject work previously completed or materials previously
60 supplied or withhold payment for such work or materials if the
61 policy or certificate provided by the subcontractor, sub-
62 subcontractor, or materialman:
63 (a) Does not comply with the insurance coverage limits
64 specified in the construction contract;
65 (b) Was knowingly and fraudulently altered or reflects
66 coverages or conditions that are not contained in the underlying
67 policy; or
68 (c) Is canceled, nonrenewed, or materially and adversely
69 altered during the term of the construction contract.
70 (3) Subsection (1) does not preclude a general contractor
71 or subcontractor from rejecting as nonconforming an insurance
72 policy or certificate of insurance previously accepted or deemed
73 to have been accepted; however, such a rejection shall be in
74 writing and shall specify the reason for rejection. A general
75 contractor or subcontractor who rejects in writing an insurance
76 policy or certificate of insurance as nonconforming and states
77 the specific reason for such rejection may withhold payment for
78 the work performed or materials supplied after the date of the
79 rejection of the policy or certificate.

80 (4) A policy of insurance issued by an authorized insurer
81 or self-insurance fund that is subject to ss. 631.901-631.932
82 may not be rejected as nonconforming by a general contactor on
83 the grounds that such authorized insurer or self-insurance fund
84 is rated or not rated by a nationally recognized insurance
85 rating service.
86 (5) This section shall not apply if at the time of the
87 request for proposals or bids, or prior to the subcontractor,
88 sub-subcontractor, or materialman commencing work or supplying
89 materials under the construction contract, the general
90 contractor or subcontractor provides a sample of an acceptable
91 certificate of insurance or a one-page schedule accurately
92 reflecting all insurance requirements which extend coverage
93 rights to an additional insured for that contract to the
94 subcontractor, sub-subcontractor, or materialman and the
95 insurance provided by the subcontractor, sub-subcontractor, or
96 materialman does not comply with the construction contract. A
97 schedule or sample certificate of insurance issued under this
98 subsection shall not be deemed to amend or modify the contract
99 between the parties in any way or to waive any requirement of
100 the contract unless the schedule or certificate expressly states
101 that such an amendment, modification, or waiver is intended.
102 (6) This section shall apply to contracts entered into on
103 or after July 1, 2006.
104 Section 2. This act shall take effect July 1, 2006.

HB 1113 CS /
Lopez-Cantera

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1113 CS Insurance Agents
SPONSOR(S): Lopez-Cantera and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 2526

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Insurance Committee	18 Y, 0 N, w/CS	Callaway	Cooper
2) State Administration Appropriations Committee	8 Y, 0 N, w/CS	Rayman	Belcher
3) Commerce Council		Tinney	Randle
4)			
5)			

SUMMARY ANALYSIS

Under current law, applicants for licensure by the Department of Financial Services (DFS) as an insurance agent, customer representative, service representative, managing general agent, or reinsurance intermediary must submit fingerprints as a condition of licensure. Fingerprints are taken by a law enforcement agency or by other entities approved by DFS. The law requires applicants to submit fingerprints in order to search the criminal history records of federal, state, and local law enforcement agencies as part of the DFS investigation of an applicant's qualifications for licensure. Currently, DFS provides sites for applicants to have fingerprints made in 68 locations throughout the state. Among the 68 locations, 64 are located in county public school administrative offices, while the locations in Duval, Dade, Broward, and Palm Beach counties are at other county facilities (rather than school administrative offices). In addition, a DFS applicant may present the fingerprint card at any law enforcement agency in the state and request the agency take the applicant's fingerprints. Applicants for licensure must pay a fee sufficient to "cover fingerprint processing" which is currently $64 per applicant, set by department rule.

The bill requires the DFS to offer fingerprinting services to licensure applicants at each of its testing centers. The department currently has 19 testing centers located throughout Florida. Currently, fingerprinting services are not available at the testing centers.

The law requires most license applicants to pass an examination as part of the licensing process. The bill authorizes an applicant to take the license examination before his or her license application is submitted or approved and requires the applicant to take a prelicensing course before taking the license examination. The bill requires DFS to collect self-reported race/ethnicity and gender information from testing examinees and to use the information to prepare and publish reports on testing results, separated by race/ethnicity and gender.

There is an appropriation of $158,995 per year for 3 new FTEs to implement the bill. In addition, the bill appropriates $120,069 in FY 2006-07 from the DFS Insurance Regulatory Trust Fund to implement the bill.

Except as otherwise expressly provided, the bill takes effect July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill requires DFS to provide fingerprinting services for license applicants at 19 new locations. The bill also requires DFS to collect demographic information from testing examinees and to compile and publish testing results.

Safeguard Individual Liberty: A license applicant will have 19 new locations to provide the fingerprints required by law for submission with an applicant's license application. The bill also requires license applicants to take a prelicensing course before taking the licensing examination.

Promote Personal Responsibility: The bill exempts adjusters with a specified adjusting designation from taking the adjuster licensing test.

B. EFFECT OF PROPOSED CHANGES:

Licensure of Insurance Agents in Florida

Florida law recognizes several types of insurance representatives, including agents, customer representatives, service representatives, and adjusters, among others. In general, insurance agents transact insurance on behalf of an insurer or insurers.

Agents must be licensed by the Department of Financial Services (DFS or department) to act as an agent for an insurer, and be appointed (i.e., given the authority by an insurance company to transact business on its behalf) by at least one insurer to act as the agent for that particular appointing insurer or insurers.[1] Requirements for insurance agents vary by line, or type of insurance, and based upon resident or nonresident license type.

"Managing general agents" are persons managing all or part of the insurance business of an insurer.[2] A managing general agent is authorized to adjust and pay claims and negotiate reinsurance on behalf of the insurer.[3]

"Customer representatives" are persons appointed by a general lines agent or agency to assist that agent or agency in transacting the business of insurance from the office of that agent or agency.[4]

"Adjusters" include public adjusters, independent adjusters, or company employee adjusters.[5] Generally, a public adjuster is any person, other than a licensed attorney, who prepares, completes, or files an insurance claim for a policyholder or who negotiates or settles an insurance claim on behalf of an insured.[6] An independent adjuster is one who is self-employed or employed by an independent adjusting firm and who works for an insurer to ascertain and determine the amount of an insurance claim, loss, or damage or to settle an insurance claim under an insurance policy.[7] A company adjuster is a person employed in-house by an insurer who ascertains and determines the amount of an insurance claim, loss, or damage or settles an insurance claim under an insurance policy.[8]

"Service representatives" are employees of an insurer or managing general agent who assist a general lines agent in negotiating and implementing an insurance policy.[9]

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1 s. 626.112, F.S. (2005).
2 s. 626.015(14), F.S. (2005).
3 *Id.*
4 s. 626.015(4), F.S. (2005).
5 s. 626.015(1), F.S. (2005).
6 s. 626.854, F.S. (2005).
7 s. 626.855, F.S. (2005).
8 s. 626.856, F.S. (2005).
9 s. 626.015(17), F.S. (2005).

A "reinsurance intermediary" includes reinsurance intermediary brokers and reinsurance intermediary managers.[10] A reinsurance intermediary broker is any person who solicits, negotiates, or places reinsurance cessions or retrocessions on behalf of a ceding insurer without the power to bind reinsurance on behalf of the ceding insurer.[11] A reinsurance intermediary manager is any person who has authority to bind the assumed reinsurance business of a reinsurer or who manages the reinsurance business of a reinsurer and acts as an agent of the reinsurer.[12]

Licensing Requirements

All of the previously described insurance representatives are required to be licensed by DFS. Although licensing requirements vary by the type of license and line of authority, general requirements for licensure include submitting an application; paying required fees; satisfying pre-licensing examination requirements, when applicable; complying with requirements as to knowledge, experience, or instruction; and submitting fingerprints.

Fingerprinting Requirement

The fingerprint requirement in current law (s. 626.171(4), F.S.) requires the agent, customer representative, adjuster, service representative, managing general agent, or reinsurance intermediary applicant's application for licensure to be accompanied by a set of the applicant's fingerprints. If the applicant is not an individual (i.e. a sole proprietorship, partnership, or corporation), fingerprints must be provided by the sole proprietor, majority owner, partners, officers, and directors, whichever is applicable. If an insurance representative entity licensed by DFS changes ownership or if new partners, officers, or directors of the entity are employed or appointed, the new owners, partners, officers, or directors must submit fingerprints to DFS within 30 days after the change.

The applicant's fingerprints must be taken by a law enforcement agency or other entity approved by DFS. The department then uses the fingerprints as part of its investigation into an applicant's qualifications under s. 626.201, F.S. The same law requires DFS to submit an applicant's fingerprints to the Florida Department of Law Enforcement (FDLE) and the Federal Bureau of Investigation (FBI) to determine whether the applicant has a federal, state, or local criminal record. Section 624.34, F.S., outlines the process for FDLE in accepting and processing an applicant's fingerprints.

Any state or local law enforcement agency is authorized to fingerprint a candidate for a DFS license. A license applicant also may be fingerprinted at 64 county public school administrative offices in the state. However, in Duval, Dade, Broward, and Palm Beach counties,[13] fingerprinting for DFS license applicants is provided at county government locations, rather than at the school administrative offices.

The department provides fingerprinting services at the school administrative offices under a memorandum of understanding between DFS and the Department of Education (DOE). By law, DOE is required to provide fingerprinting of numerous school personnel, particularly after the recent passage of the Jessica Lunsford Act (Ch. 2005-28, L.O.F.) The Department of Education contracts with a private vendor to provide fingerprinting services at the county school offices. The memorandum of understanding between DFS and DOE allows DFS to provide fingerprinting for its license applicants under the DOE contract with the private vendor. The school district offices offer fingerprinting during normal business hours.

According to DFS, the fingerprinting fee for fingerprints taken at most school district locations is $61, although the specific fee for fingerprinting varies by district. The Department of Financial Services has set the fingerprinting fee for its license applicants at $64 by administrative rule.[14] The applicant typically pays the fingerprint vendor on-line by debit or credit card; however, the vendor also accepts money orders at the fingerprinting site. The vendor then pays FDLE and the FBI for processing the fingerprints and the vendor electronically transmits the fingerprints to FDLE for processing in accordance with law.

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[10] s. 626.7492(2)(e), F.S. (2005).
[11] s. 626.7492(2)(f), F.S. (2005).
[12] s. 626.7492(2)(g), F.S. (2005).
[13] Fingerprint locations are in Jacksonville, Miami, Ft. Lauderdale, and West Palm Beach.
[14] Rule 69B-211.005, F.A.C. Additionally, $47 of the fingerprinting fee is paid by the vendor to FDLE and the FBI, with the remainder retained by the vendor.

The Department of Financial Services contracts with a different vendor to provided fingerprinting services at the fingerprinting locations in Duval, Dade, Broward, and Palm Beach counties. This vendor charges license applicants $64 for fingerprinting and is paid directly by the applicant. DFS does not pay any money for fingerprinting services and processing directly to DOE, the school boards, or to the fingerprinting vendor at the four county locations. Rather, the entire fee is borne by the applicant.

In most cases, if an applicant submits his or her fingerprints prior to the licensure examination, DFS receives the results of the applicant's criminal background check prior to the examination date. If the applicant has a criminal history that precludes licensure, DFS notifies the applicant before he or she takes the licensure examination and must pay the examination fee of $56.[15]

The Department of Financial Services contracts with one private vendor to administer its licensure examinations in 19 cities[16] in Florida. Licensure examinations are given frequently, based on the demand for testing due to the applications received. The testing vendor leases permanent space to conduct the testing and does not own any testing locations itself. The examinations are offered Monday through Friday from 8:00 am until 9:30 pm, and on Saturday from 8:00 am until 5:00 pm.[17]

Proposed Changes Relating to Fingerprinting Requirement

The bill requires DFS to provide fingerprinting at all of its examination centers during the examination times. The department currently has 19 examination centers in Florida and contracts with a private vendor to administer the examinations on behalf of the department. Examination times are not set by statute or administrative rule; rather the tests are offered based on demand. According to proponents of the bill, permitting fingerprinting at testing locations will allow license applicants to be fingerprinted at the examination centers rather than requiring the license applicants to leave work to be fingerprinted at the current fingerprinting locations.

Section 624.501, F.S., authorizes DFS to charge a fee for fingerprinting. The fee is not set by statute; rather the law allows DFS to charge an amount sufficient "to cover fingerprint processing." By administrative rule, the department established the fee at $64 and the fingerprint processing fees are paid directly by the applicant to the fingerprint vendor.

Fingerprinting equipment is estimated to cost $15,000 per machine; the machines are similar in size and appearance to a copier with scanning capabilities. In its initial discussion with the vendor who examines license applicants, DFS indicates it appears the vendor has the capability to offer fingerprint services at the current examination facilities. This means DFS does not anticipate increasing either the current examination or fingerprinting fee under the provisions of the bill.[18]

If an applicant submits his or her fingerprints at the testing site, DFS will be unable to review the fingerprint results prior to the applicant taking the license examination. This could lead to applicants paying for and sitting for the examination, then being told by DFS that they are not qualified for a license due to a criminal background. Currently, DFS receives the fingerprint results prior to an applicant taking the license examination, thus enabling the department to notify the applicant he or she is not qualified for a license based on the background check. This prevents the applicant from incurring the examination fee unnecessarily.

The department indicates all of its testing centers are rented or leased by the examination vendor. If the testing centers are not large enough to accommodate fingerprinting equipment and any traffic flow associated with the fingerprinting, then the examination vendor may need new or additional testing space. Any increased cost in testing space rental or lease cannot be passed on to the policyholder as the testing fee is set by administrative rule. Thus, DFS reports it may be forced to bear any increase in cost, although the DFS vendor has not yet notified DFS regarding any increase in costs.

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[15] Rule 69B-211.005, F.A.C. sets the examination fee at $56 per examination.

[16] Examination centers are located in Boyton Beach, Coral Gables, Fort Lauderdale, Ft. Myers (2 locations), Gainesville, Hollywood, Jacksonville, Lake Mary, Lakeland, Melbourne, Miami, Orlando, Ormond Beach, Pensacola, Sarasota, St. Petersburg, Tallahassee, and Tampa.

[17] Personal communication from a representative of the DFS, on file with the Insurance Committee.

[18] *Id.*,April 19, 2006.

License Application Requirement

Section 626.171, F.S., provides application requirements for licenses as an agent, customer representative, adjuster, service representative, managing general agent, and reinsurance intermediary. The bill provides additional requirements for applications for certain licenses; requiring applicants to submit fingerprints and pay a processing fee; provides for fingerprints to be taken by a designated examination center; requires DFS to specify designated examination centers to have fingerprinting equipment and take fingerprints; and prohibits the department from approving licensure applications without submitted fingerprints.

Section 626.211, F.S., currently requires DFS to approve a license application prior to applicant's taking the licensure examination if the department believes the applicant meets the license qualifications and the applicant's application is complete. Once the applicant's application is complete, the department must notify the applicant of the examination date and time. If the applicant takes the licensure examination and passes it, DFS issues the appropriate license to the applicant.

The bill amends current law to allow a license applicant to take the licensure examination at the location designated by DFS before submitting their license application and before obtaining approval of their license application. If the applicant takes the licensing test before applying for the license, the department is required to promptly issue the license after it approves the license application. If an applicant chooses to take the licensure examination first, the applicant will receive their test results before investing moneys ($114 maximum for the application submission and fingerprinting) in the application process. The bill's proponents believe allowing license applicants to take the licensure examination before submitting their licensure application or obtaining approval of it will streamline the licensing process to help increase the number of insurance representatives, especially increasing the number of insurance representatives serving minority communities.

Examination Requirement: Exemptions

Section 626.221, F.S., sets forth the examination requirements and exemptions for insurance agent, adjuster, and customer representative licenses. At least 13 exemptions from the examination requirement are provided in the statute. If an applicant for licensure as an agent, adjuster, or customer representative meets one of the exemptions, he or she is not required to take the examination associated with the license. One of the exemptions from the adjuster examination is for applicants who have the designation of Accredited Claims Adjuster (ACA) from a regionally accredited postsecondary institution in Florida or the designation of Professional Claims Adjuster (PCA) from the Professional Career Institute. Exemptions are provided for these designated adjusters because DFS approves the curriculum of the educational institutions and ensures the curriculum covers a comprehensive analysis of insurance and included testing at least equal to testing given by the DFS for the all-lines adjuster license.

The bill includes a new adjuster designation in the adjuster examination exemption. Adjusters designated as a Certified Claims Adjuster (CCA) from the Association of Property and Casualty Claims Professionals are exempted by the bill from adjuster license examinations.

Section 626.241, F.S., provides for application of certain examination provisions to certain persons. The bill clarifies that this section applies to any person who submits an application for license and to any person who submits an application for examination prior to filing an application for license.

Prelicensing Requirements and Courses

Current law, section 626.171, F.S., prohibits DFS from issuing a license as agent, customer representative, adjuster, service representative, managing general agent, or reinsurance intermediary to any person who does not meet the application requirements outlined in the same law. For example, one condition for licensure is proof the applicant has completed or is in the process of completing any required prelicensing course. Under the bill, s. 626.231, F.S., is amended to authorize an applicant either to submit an application for licensure or an application for the examination before sitting for the examination. An applicant is authorized by the bill to submit an application for examination through the DFS internet website.

In the application, the bill requires an applicant to include his or her name; business, personal, and mailing address; social security number; the type of license the applicant seeks; the name of any required prelicensing course he or she has completed or is in the process of completing; and the method by which the applicant intends to qualify for the type of license if other than by completing a prelicensing course.

Additionally, the bill authorizes DFS to ask license applicants their gender, native language, highest level of education, and ethnicity, however, DFS is required to notify applicants that providing such demographic information is voluntary. The bill also requires DFS to notify license applicants they will not be penalized if they do not provide the demographic information and to specify that such information only will be used for research and statistical purposes to enable DFS to improve the quality and fairness of its licensure examinations.

Testing Information and Results

The bill creates s. 626.2415 F.S., relating to an annual report DFS is required to produce on the results of life insurance agent license examinations. The bill requires DFS to request license examinees to voluntarily self-report race/ethnicity and gender information. Based on the race/ethnicity and gender information collected, the department is required to prepare, publicly announce, and publish an Examination Report for each examination administered in the year. The Examination Report is due on May 1st and contains pass/fail information and test score information for each examination given on a race/ethnicity and gender basis. The bill also requires DFS to publish a separate "operational item report" annually by the department. This report is also due on May 1st and is required to contain statistical information relating to each operational item on each life insurance test form administered in the prior year, separated by race/ethnicity, the correct-answer rates, and the correlations.

License examination retention requirements are also added by the bill. The bill specifies a period of validity for a passing examination grade and prohibits the department from issuing a license based on an examination taken more than 1 year prior to filing an application.

The bill provides recurring and non-recurring appropriations. DFS also is authorized by the bill to hire 3 FTEs to implement the provisions of the bill.

C. SECTION DIRECTORY:

Section 1: Amends s. 626.171, F.S., providing additional requirements for applications for certain licenses; providing for license examinees to voluntarily report race or ethnicity or gender information; requiring applicants to submit fingerprints and pay a processing fee; providing for fingerprints to be taken by a designated examination center; requiring DFS to provide fingerprinting services in designated examination centers; prohibiting the department from approving licensure applications without submitted fingerprints.

Section 2: Amends s. 626.211, F.S., deleting a prohibition against the department denying, delaying, or withholding approval of applications lacking a criminal history report; revising circumstances under which the department must notify an applicant about license examinations.

Section 3: Amends s. 626.221, F.S., expanding the authorized adjuster designations for exemptions from adjuster license examinations.

Section 4: Amends s. 626.231, F.S., providing authorization and procedures for applying on the DFS internet website to take a licensure examination prior to applying for licensure; specifying required application information; providing for license examinees to voluntarily report race or ethnicity or gender information; requiring an application disclosure statement; requiring payment of an examination fee with an application.

Section 5: Amends s. 626.241, F.S., providing for application of certain examination provisions to certain persons.

Section 6. Creates s. 626.2415 F.S., requiring the department to annually prepare and publish a report that summarizes statistical information relating to life insurance agent examinations administered during the preceding calendar year. The bill specifies the information to be included in the annual report.

Section 7. Amends s. 626.251, F.S., requiring the department to provide certain information to examination applicants.

Section 8. Amends s. 626.261, F.S., specifying required conduct for examination applicants, requiring an applicant for license or examination must appear in person and personally take the examination for license.

Section 9: Amends 626.291, F.S., requiring DFS to promptly issue a license for examination applicants as soon as the department approves the application; specifying a period of validity of a passing examination grade; prohibiting the department from issuing a license based on an examination taken more than 1 year prior to filing an application.

Section 10. Provides appropriations; authorizes additional positions.

Section 11. Except as otherwise expressly provided, provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

	FY 2006–07	FY 2007-08
1. Revenues:		
None.		
2. Expenditures:		
Recurring		
Salaries and Benefits (3 FTE) (Salary rate 103,285)	$ 138,607	$ 138,607
Expenses	19,209	19,209
Human Resources Services	1,179	1,179
Total – recurring	$ 158,995	$ 158,995
Non-Recurring		
OPS	$ 104,340	
Expenses	$ 10,029	
Operating Capital Outlay	5,700	
Total – non-recurring	$ 120,069	
Total Expenditures:		
Insurance Regulatory Trust Fund	$ 279,064	$ 158,995

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Affording DFS license applicants the ability to be fingerprinted at examination sites will allow applicants to complete more application requirements at one location. It is unlikely, however, that fingerprints taken at the examination center can be processed and the results furnished to DFS before the examination, as is the current process. Thus, applicants may incur an examination fee and then be disqualified for a license based on the criminal background check. Having the criminal background check completed before the examination allows the department to notify applicants disqualified for a license due to a criminal history before the applicant incurs the examination fee.

Allowing license applicants to take the license examination before submitting their license application will save applicants money ($114 maximum for the application submission and fingerprinting).

Requiring license applicants to take a prelicensing course will cost applicants money if the course is not free.

Providing a new exemption from the adjuster examination for adjusters having a CCA designation will save money for those adjusters having the designation as they will no longer incur the testing fee of $56.

If a testing vendor is required to lease additional testing space or secure new space to accommodate fingerprinting at the testing centers, the vendor may have to break an existing lease, incurring a fee for such, or may have increased costs associated with renting additional space.

D. FISCAL COMMENTS:

DFS provided the following fiscal information relating to the bill:[19]

According to DFS, it will need two new Regulatory Consultant positions to comply with the bill's provision allowing license testing before the license application is approved. The change in processing applications to allow testing prior to qualifying for a license will require applications to be processed at least twice. It is estimated that this change will increase the workload of the department's Division of Agent and Agency Services by at least 20,000 applications the first year and then continue to increase in subsequent years.

In addition, one new Examination Development Specialist (psychometrician) position is needed due to the bill's provisions relating to preparing and publishing information on license testing results. Although the department's testing vendor provides psychometric services for test development, DFS must hire an employee with testing expertise to analyze the data of the reports required in this bill and translate and report that information. It is essential that the department has staff with the knowledge of testing and psychometric science to work with the vendor in the development and revision of test items and forms that will better serve the citizens of Florida. Without this level of testing expertise in DFS, the results of the statistics may not properly impact the testing program as required by this bill.

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[19] Fiscal Analysis by the DFS dated April 4, 2006.

The OPS non-recurring funding is needed for changes in contracts to enhance the department's technology systems and the contractor's cost of implementing this legislative change.

Enhancements to Agents Licensing Insurance System (ALIS)	$ 75,300
Enhancements to Agents and Agencies Licensing Functionality (AALF)	$ 29,040
Expense/Capital Equipment – non recurring	$ 15,729
Total Appropriation Required	**$120,069**

Enhancements are to modify contractors' programs to change the systems to allow for examination prior to qualification and provide statistical data on examinations. These enhancements have been identified as areas that would change the department's technology systems and the current agreement of services with Promissor, the testing vendor. To implement the provisions of the bill the department and its vendors will need at least 6 months for design, development and implementation.

Examination Administrator Vendor (Promissor)	
Examination Statistical Reports	$ 92,000
Enhancements to technology systems	$ 21,640

In order to pay for the expenses incurred by Promissor to make technological changes, the exam fees will remain at $56 per exam, rather than be reduced to $50 per exam (which had been anticipated through a rule change).

If the testing vendor has to acquire additional testing space to accommodate fingerprinting at the testing locations, it may incur additional rental fees. In such a case the testing vendor may pass the increased fees to the department because it cannot pass them to the applicant due to the testing fee being set by administrative rule.

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.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 30, 2006, the Insurance Committee considered the bill, adopted a strike-all amendment, and reported it favorably. The strike-all reworded the fingerprinting requirement in the original bill and added several provisions regarding license examinations and reporting. The added provisions:

- Allow an insurance license applicant to take their licensure exam prior to submitting their license application.
- Require license applicants to complete a pre-licensing course before taking a license exam. Current law does not require a pre-licensing course.
- Require the DFS to make demographic data available to the public via reports identifying the number of examinees, the pass/fail data of examinees, the average scores of examinees, reported by ethnicity and gender.
- Require the DFS to reasonably accommodate any disabled examinees.
- Require the DFS to issue a license within 15 days of the DFS's approval of an application if the applicant took the licensing exam prior to submitting his or her application.
- Allow an adjuster to be exempt from taking the adjuster license examination if he or she has the specified adjuster designation from the Association of Property and Casualty Claims Professionals. Current law allows an exemption from the license examination for adjusters with a different designation.

According to the department, implementation of the strike-all amendment will require 3 new FTEs and a recurring appropriation from trust fund moneys of $158,995 associated with the new FTEs. In addition, the department believes $233,709 in nonrecurring trust fund moneys will have to be spent in FY 2006-07 on technology improvements needed to implement the bill and on the examination contractor's cost of implementing the bill.

The staff analysis was updated to reflect the changes made to the bill by the strike-all amendment.

On April 11, 2006, the State Administration Appropriations Committee considered the bill, adopted a strike-all amendment, and reported it favorably. The strike-all incorporates technical changes to conform department goals to current DFS licensing systems. The policy requirements of the bill have not changed. The added provisions:

- Require DFS to make applicant fingerprinting available at all designated examination centers.
- Allow an applicant to take the required licensure exam prior to the submittal or the approval of their application.
- Require DFS to make demographic data available through reports identifying the pass/fail data of applicants reported by category of ethnicity and gender compared to all applicants who sat for a particular exam.
- Add adjuster license applicants who have the designation of Certified Claims Adjuster to the list of claims-adjusting professionals to be exempted from taking an examination for licensure.
- Remove the requirement for DFS to reasonably accommodate any disabled examinees.
- Specify that a person required to take an examination for a license may be permitted to take an examination prior to submitting an application for licensure pursuant to s. 626.171, F.S., by submitting an application for examination through the department's Internet website.
- Clarify license examination retention requirements in the bill, specifying a period of validity of a passing examination grade; prohibit DFS from issuing a license based on an examination taken more than 1 year prior to filing an application.
- Provide appropriations and authorizes additional positions.

This staff analysis has been updated to reflect the changes adopted in the strike-all amendment as amended on 4/11/06.

CHAMBER ACTION

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1 The State Administration Appropriations Committee recommends the
2 following:
3
4 **Council/Committee Substitute**
5 Remove the entire bill and insert:
6 A bill to be entitled
7 An act relating to insurance agents; amending s. 626.171,
8 F.S.; providing additional requirements for applications
9 for certain licenses; requiring applicants to submit
10 fingerprints and pay a processing fee; providing for
11 fingerprints to be taken by a designated examination
12 center; requiring the Department of Financial Services to
13 require designated examination centers to have
14 fingerprinting equipment and take fingerprints;
15 prohibiting the department from approving licensure
16 applications without submitted fingerprints; amending s.
17 626.211, F.S.; deleting a prohibition against the
18 department denying, delaying, or withholding approval of
19 applications lacking a criminal history report; revising
20 circumstances under which the department must notify an
21 applicant about examinations; amending s. 626.221, F.S.;
22 expanding the authorized adjuster designations for
23 exemptions from adjuster license examinations; amending s.

24 626.231, F.S.; providing authorization and procedures for
25 applying on the department's Internet website to take a
26 licensure examination prior to applying for licensure;
27 specifying required application information; requiring an
28 application disclosure statement; requiring payment of an
29 examination fee with an application; amending s. 626.241,
30 F.S.; providing for application of certain examination
31 provisions to certain persons; creating s. 626.2415, F.S.;
32 requiring the department to annually prepare, publicly
33 announce, and publish reports of certain examination
34 statistical information; providing report requirements;
35 authorizing the department to provide certain contracted
36 testing service providers with certain demographic
37 application information under certain circumstances;
38 amending s. 626.251, F.S.; requiring the department to
39 provide certain information to examination applicants;
40 amending s. 626.261, F.S.; specifying required conduct for
41 examination applicants; amending s. 626.281, F.S.;
42 applying reexamination provisions to examination
43 applicants; amending s. 626.291, F.S.; requiring the
44 department to issue a license for certain applicants after
45 the department approves the application; specifying a
46 period of validity of a passing examination grade;
47 prohibiting the department from issuing a license based on
48 an examination taken more than 1 year prior to filing an
49 application; providing appropriations; authorizing
50 additional positions; providing effective dates.
51

52 Be It Enacted by the Legislature of the State of Florida:
53
54 Section 1. Effective January 1, 2007, subsections (2) and
55 (4) of section 626.171, Florida Statutes, are amended to read:
56 626.171 Application for license as an agent, customer
57 representative, adjuster, service representative, managing
58 general agent, or reinsurance intermediary.--
59 (2) In the application, the applicant shall set forth:
60 (a) His or her full name, age, social security number,
61 residence address, business address, and mailing address.
62 (b) Proof that he or she has completed or is in the
63 process of completing any required prelicensing course.
64 (c) Whether he or she has been refused or has voluntarily
65 surrendered or has had suspended or revoked a license to solicit
66 insurance by the department or by the supervising officials of
67 any state.
68 (d) Whether any insurer or any managing general agent
69 claims the applicant is indebted under any agency contract or
70 otherwise and, if so, the name of the claimant, the nature of
71 the claim, and the applicant's defense thereto, if any.
72 (e) Proof that the applicant meets the requirements for
73 the type of license for which he or she is applying.
74 (f) The applicant's gender (male or female).
75 (g) The applicant's native language.
76 (h) The highest level of education achieved by the
77 applicant.
78 (i) The applicant's race or ethnicity (African American,
79 white, American Indian, Asian, Hispanic, or other).

80 (j) ~~(f)~~ Such other or additional information as the
81 department may deem proper to enable it to determine the
82 character, experience, ability, and other qualifications of the
83 applicant to hold himself or herself out to the public as an
84 insurance representative.
85
86 However, the application must contain a statement that an
87 applicant is not required to disclose his or her race or
88 ethnicity, gender, or native language, that he or she will not
89 be penalized for not doing so, and that the department will use
90 this information exclusively for research and statistical
91 purposes and to improve the quality and fairness of the
92 examinations.
93 (4) An applicant ~~application~~ for a license as an agent,
94 customer representative, adjuster, service representative,
95 managing general agent, or reinsurance intermediary must submit
96 ~~be accompanied by~~ a set of the individual applicant's
97 fingerprints, or, if the applicant is not an individual, by a
98 set of the fingerprints of the sole proprietor, majority owner,
99 partners, officers, and directors, to the department and must
100 pay ~~on a form adopted by rule of the department and accompanied~~
101 ~~by~~ the fingerprint processing fee set forth in s. 624.501.
102 Fingerprints shall be used to investigate the applicant's
103 qualifications pursuant to s. 626.201. The fingerprints shall be
104 taken by a law enforcement agency, designated examination
105 center, or other department-approved entity. The department
106 shall require all designated examination centers to have
107 fingerprinting equipment and to take fingerprints from any

108 applicant or prospective applicant who pays the applicable fee.
109 The department may not approve an application for licensure as
110 an agent, customer service representative, adjuster, service
111 representative, managing general agent, or reinsurance
112 intermediary if fingerprints have not been submitted.
113 Section 2. Effective January 1, 2007, subsections (1) and
114 (2) of section 626.211, Florida Statutes, are amended to read:
115 626.211 Approval, disapproval of application.--
116 (1) If upon the basis of a completed application for
117 license and such further inquiry or investigation as the
118 department may make concerning an applicant the department is
119 satisfied that, subject to any examination required to be taken
120 and passed by the applicant for a license, the applicant is
121 qualified for the license applied for and that all pertinent
122 fees have been paid, it shall approve the application. ~~The~~
123 ~~department shall not deny, delay, or withhold approval of an~~
124 ~~application due to the fact that it has not received a criminal~~
125 ~~history report based on the applicant's fingerprints.~~
126 (2) Upon approval of an applicant for license as agent,
127 customer representative, or adjuster who is subject to written
128 examination, the department shall notify the applicant when and
129 where he or she may take the required examination unless the
130 applicant has taken and passed the examination within the 1-year
131 period prior to the date of filing the application.
132 Section 3. Paragraph (k) of subsection (2) of section
133 626.221, Florida Statutes, is amended to read:
134 626.221 Examination requirement; exemptions.--

135 (2) However, no such examination shall be necessary in any
136 of the following cases:
137 (k) An applicant for license as an adjuster who has the
138 designation of Accredited Claims Adjuster (ACA) from a
139 regionally accredited postsecondary institution in this state,
140 ~~or the designation of~~ Professional Claims Adjuster (PCA) from
141 the Professional Career Institute, or Certified Claims Adjuster
142 (CCA) from the Association of Property and Casualty Claims
143 Professionals whose curriculum has been approved by the
144 department and whose curriculum includes comprehensive analysis
145 of basic property and casualty lines of insurance and testing at
146 least equal to that of standard department testing for the all-
147 lines adjuster license. The department shall adopt rules
148 establishing standards for the approval of curriculum.
149 Section 4. Effective January 1, 2007, section 626.231,
150 Florida Statutes, is amended to read:
151 626.231 Eligibility; application for examination.--
152 (1) No person shall be permitted to take an examination
153 for license until his or her application for examination or
154 application for the license has been approved and the required
155 fees have been received by the department or a person designated
156 by the department to administer the examination.
157 (2) A person required to take an examination for a license
158 may be permitted to take an examination prior to submitting an
159 application for licensure pursuant to s. 626.171 by submitting
160 an application for examination through the department's Internet
161 website. In the application, the applicant shall set forth:

162 (a) His or her full name, age, social security number,
163 residence address, business address, and mailing address.
164 (b) The type of license that the applicant intends to
165 apply for.
166 (c) The name of any required prelicensing course he or she
167 has completed or is in the process of completing.
168 (d) The method by which the applicant intends to qualify
169 for the type of license if other than by completing a
170 prelicensing course.
171 (e) The applicant's gender (male or female).
172 (f) The applicant's native language.
173 (g) The highest level of education achieved by the
174 applicant.
175 (h) The applicant's race or ethnicity (African American,
176 white, American Indian, Asian, Hispanic, or other).
177
178 However, the application must contain a statement that an
179 applicant is not required to disclose his or her race or
180 ethnicity, gender, or native language, that he or she will not
181 be penalized for not doing so, and that the department will use
182 this information exclusively for research and statistical
183 purposes and to improve the quality and fairness of the
184 examinations.
185 (3) Each application shall be accompanied by payment of
186 the applicable examination fee.
187 Section 5. Subsection (9) is added to section 626.241,
188 Florida Statutes, to read:
189 626.241 Scope of examination.--

190 (9) This section applies to any person who submits an
191 application for license and to any person who submits an
192 application for examination prior to filing an application for
193 license.
194 Section 6. Section 626.2415, Florida Statutes, is created
195 to read:
196 626.2415 Annual report of results of life insurance
197 examinations.--
198 (1) No later than May 1 of each year, the department or a
199 person designated by the department shall prepare, publicly
200 announce, and publish a report that summarizes statistical
201 information relating to life insurance agent examinations
202 administered during the preceding calendar year. Each report
203 shall include the following information, for all examinees
204 combined and separately by race or ethnicity, gender, race or
205 ethnicity within gender, education level, and native language:
206 (a) The total number of examinees.
207 (b) The percentage and number of examinees who passed the
208 examination.
209 (c) The mean scaled scores on the examination.
210 (d) Standard deviation of scaled scores on the
211 examination.
212 (2) No later than May 1 of each year, the department or a
213 person designated by the department shall prepare and make
214 available upon request a report of summary statistical
215 information relating to each operational item on each life
216 insurance test form administered during the preceding calendar
217 year. The report shall show, for each operational item, for all

218 examinees combined and separately for African-American
219 examinees, white examinees, American Indian examinees, Asian
220 examinees, Hispanic examinees, and other examinees, the correct-
221 answer rates and correlations.
222 (3) The department may provide a testing service provider,
223 under contract with the department, demographic information
224 received by the department on applications relating to
225 examinations taken to qualify for an insurance agent license if
226 the department requires the provider to review and analyze
227 examination results in conjunction with the race or ethnicity,
228 gender, education level, and native language of examinees.
229 Section 7. Subsection (1) of section 626.251, Florida
230 Statutes, is amended to read:
231 626.251 Time and place of examination; notice.--
232 (1) The department or a person designated by the
233 department shall mail written notice of the time and place of
234 the examination to each applicant for examination and each
235 applicant for license required to take an examination who will
236 be eligible to take the examination as of the examination date.
237 The notice shall be so mailed, postage prepaid, and addressed to
238 the applicant at his or her address shown on the application for
239 license or at such other address as requested by the applicant
240 in writing filed with the department prior to the mailing of the
241 notice. Notice shall be deemed given when so mailed.
242 Section 8. Effective January 1, 2007, subsection (1) of
243 section 626.261, Florida Statutes, is amended to read:
244 626.261 Conduct of examination.--

245 (1) The applicant for license or the applicant for
246 examination shall appear in person and personally take the
247 examination for license at the time and place specified by the
248 department or by a person designated by the department.
249 Section 9. Subsection (1) of section 626.281, Florida
250 Statutes, is amended to read:
251 626.281 Reexamination.--
252 (1) Any applicant for license or applicant for examination
253 who has either:
254 (a) Taken an examination and failed to make a passing
255 grade, or
256 (b) Failed to appear for the examination or to take or
257 complete the examination at the time and place specified in the
258 notice of the department,
259
260 may take additional examinations, after filing with the
261 department an application for reexamination together with
262 applicable fees. The failure of an applicant to pass an
263 examination or the failure to appear for the examination or to
264 take or complete the examination does not preclude the applicant
265 from taking subsequent examinations.
266 Section 10. Effective January 1, 2007, subsections (1) and
267 (3) of section 626.291, Florida Statutes, are amended to read:
268 626.291 Examination results; denial, issuance of
269 license.--
270 (1) Within 30 days after the applicant has completed any
271 examination required under s. 626.221, the department or its
272 designee shall provide a score report; and, if it finds that the

273 applicant has received a passing grade, the department shall
274 within such period notify the applicant and issue and transmit
275 the license to which such examination related. If it finds that
276 the applicant did not make a passing grade on the examination
277 for a particular license, the department or its designee shall
278 within this period provide notice to the applicant to that
279 effect and of its denial of the license. For those applicants
280 who have completed the examination and received a passing grade
281 prior to submitting the license application, the department
282 shall promptly issue the license applied for as soon as the
283 department approves the application.
284 (3) A passing grade on an examination is valid for a
285 period of 1 year. The department shall not issue a license to an
286 applicant based on an examination taken more than 1 year prior
287 to the date that an application for license is filed. ~~The~~
288 ~~department shall not deny, delay, or withhold issuance of a~~
289 ~~license due to the fact that it has not received a criminal~~
290 ~~history report based on the applicant's fingerprints.~~
291 Section 11. The sums of $158,995 in recurring funds and
292 $120,069 in nonrecurring funds are appropriated from the
293 Insurance Regulatory Trust Fund in the Department of Financial
294 Services for the 2006-2007 fiscal year for the purposes of
295 funding the provisions of this act, and three full-time
296 equivalent positions with 103,285 in associated salary rate are
297 authorized.
298 Section 12. Except as otherwise expressly provided in this
299 act, this act shall take effect July 1, 2006.

HB 7107 CS /
EDTB Comm.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7107 CS PCB EDTB 06-04 Registration & Protection of Trademarks Act
SPONSOR(S): Economic Development, Trade & Banking Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Economic Development, Trade & Banking Committee	12 Y, 0 N	Carlson	Carlson
1) Transportation & Economic Development Appropriations Committee	18 Y, 0 N, w/CS	McAuliffe	Gordon
2) Commerce Council		Carlson MWC	Randle
3)			
4)			
5)			

SUMMARY ANALYSIS

Florida's trademark law[1] was enacted in 1967.[2] The law is based on the International Trademark Association's ("INTA") 1964 Model State Trademark Bill ("MSTB"), as amended and updated.

This bill is based upon the MSTB with input from the Intellectual Property Committee of the Business Law Section of the Florida Bar and the Department of State, Division of Corporations. The bill modernizes and harmonizes Florida's trademark law consistent with federal law and the revised MSTB where appropriate.

In particular, the bill:

- Provides a popular name;
- Clarifies definitions consistent with federal law;
- Creates an application review process and provides a right to administrative hearing for affected parties;
- Reduces the duration of a registered mark from 10 to 5 years;
- Allows a person to file a change of name with the Department of State and clarifies that security interests in a mark may be created and perfected under the Uniform Commercial Code;
- Conforms the Florida classification system for goods and services to the International Trademark Classification System;
- Authorizes an award of attorney's fees to a prevailing party according to the circumstances of a case;
- Revises provisions allowing the owner of a famous mark to prevent the dilution of the mark by enjoining the use of the mark by another person or seek additional remedies in the case of willful use of the mark by another person; and
- Locates all fees applicable to trademark registrations and related activities in one section of law.

The bill appears not to have a fiscal impact. See Part II, Fiscal Analysis and Economic Impact Statement.

The bill has an effective date of January 1, 2007.

[1] ss. 495.011-495.181, F.S.
[2] s. 1, ch. 67-58, L.O.F.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Background

Florida's trademark law[3] was enacted in 1967.[4] The law is based on the International Trademark Association's ("INTA") 1964 Model State Trademark Bill ("MSTB"). The law was last amended substantively in 1990, when the Legislature added a name reservation provision to the law.[5]

In September 1992, INTA's Board of Directors approved a proposal revising the 1964 MSTB to reflect what the organization felt were the "current needs of intrastate and regional commerce while harmonizing state trademark practices with recent changes in federal trademark law." INTA subsequently amended the dilution provision of the MSTB to make it consistent with the Federal Trademark Dilution Act of 1996. INTA reports that the MSTB has been adopted in 26 states.

In early 2005, Senator Campbell and Representative Galvano introduced SB 678 and HB 845, which incorporated the MSTB in most respects. On March 9, 2005, a subcommittee of the Florida Bar Business Law Section, Intellectual Property Law Committee provided Senator Campbell and Representative Galvano with a Technical Input Memorandum, highlighting many issues that the committee felt warranted attention before adopting the bills as law. This bill is based on federal law, the revised MSTB, the comments contained in the Technical Input Memorandum and input from the Department of State, Division of Corporations.

Effect of Proposed Changes

Popular Name The bill titles chapter 495 as the "Registration and Protection of Trademarks Act."

Definitions The bill revises many of the definitions in the present statute to conform to the definitions contained in the Federal Trademark Act (the "Lanham Act").[6] In contrast to the MSTB, which does not provide for the protection of collective and certification marks, the proposed bill retains the definitions for such marks. The bill also follows the federal standard for determining abandonment, namely nonuse for three consecutive years as opposed to two years, as provided for in the MSTB. The bill creates or substantially revises the following terms:

- The bill defines "abandoned" as applying to a mark when its use has been discontinued with intent not to resume such use and when any course of conduct of the owner cause the mark to lose its significance as a mark. The bill provides that intent may be inferred from circumstances. It also provides that nonuse for three consecutive years is prima facie evidence of abandonment.

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[3] ss. 495.011-495.181, F.S.
[4] s. 1, ch. 67-58, L.O.F.
[5] s. 3, ch. 90-220, L.O.F.
[6] 15 U.S.C. ss. 1051 et seq.

- The bill defines "department" to mean the Department of State.
- The bill defines "dilution" to mean the lessening of the capacity of a mark to identify and distinguish goods or services, regardless of the presence or the absence of: (a) competition between the owner of the mark and other parties and (b) likelihood of confusion, mistake or deception.
- The bill defines the term "mark" to mean any trademark, service mark, certification mark, or collective mark entitled to registration under ch. 495, whether or not registered.
- The bill clarifies that the term "person" to include a juristic person, such as a firm, partnership, corporation, union, association, or other entity capable of suing and being sued in a court of law, as well as a natural person.
- The bill defines the term "service mark" to mean any word, name, symbol, or device, or any combination thereof, used by a person to identify and distinguish the services of such person, including a unique service, from the services of others, and to indicate the source of the services, even if that source is unknown. It provides that titles, character names and other distinctive features of radio or television programs may be registered as service marks notwithstanding that the person or the programs may advertise the goods of the sponsor.
- The bill defines the term "trade name" to mean any name used by a person to identify a business or vocation of such person.
- The bill defines the term "trademark" to mean any word, name, symbol, or device, or any combination thereof, used by a person to identify and distinguish the goods of such person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown.

Registrability The bill revises the registrability provisions of the statute to be more consistent with the Lanham Act. It includes among the marks that may not be registered those that consist of or comprises a name, signature or portrait identifying a particular living individual, except by his or her written consent, and includes the name, signature or portrait of a deceased President of the United States during the lifetime of his widow or her widower, if any, except by the written consent of the widow or widower. It clarifies that the exclusion from registration for marks used on or in connection with the goods of the applicant applies when the mark is merely descriptive or deceptively misdescriptive; primarily geographically descriptive or misdescriptive; or comprises a matter that is functional. It also excludes marks that are primarily geographically misdescriptive of goods or that are functional from the exemption from the exclusion from registration for marks that have become distinctive of goods or services.

Reservation The bill deletes the name reservation provision contained in the current statute. This provision was an attempt to provide protection similar to the protection afforded under the federal intent-to-use law, except that the state provision did not offer substantive rights. As a result, certain practitioners feel that the provision may create more of a burden than a benefit, and accordingly the act repeals it.

Application for Registration The bill clarifies that an application for registration of a mark must be filed with the department in a manner and form complying with the requirements of the department. It also clarifies that if the applicant is a business entity, it must identify the place of incorporation or organization. It requires that the applicant state that it is the owner of the mark, that the mark is in use, and that to the best of the applicant's knowledge, no other person except a related company has registered the mark in Florida that has a right to use an identical mark or one that, as applied to the goods or services of another person, would be likely to cause confusion, mistake or to deceive. The bill authorizes the department to demand a drawing of a collective mark, and requires an applicant to provide three specimens of the mark as actually used.

Filing of Applications The bill creates a process for review of applications by the department, allows for amendments to be made to applications, and the disclaimer of unregistrable components of a mark by an applicant. The bill provides for a three month period in which an applicant whose application has been denied to reply to the department or amend its application. It allows the department to extend

this period of time for good cause shown. It provides a right to an administrative hearing under ss. 120.569 and 120.57, F.S., for applicants whose applications have been denied by the department. Finally, it provides that the department will review applications in the order of receipt.

Use By Related Companies The bill revises the provision of the statute regarding use of a mark by related companies to be consistent with Section 5 of the Lanham Act, 15 U.S.C. s. 1055. The bill provides that first use of a mark inures to the benefit of the registrant or applicant for registration if the registrant or applicant controls the first use of the mark by another person.

Certificates of Registration The bill makes conforming changes regarding the identification of a business entity and requires a description of the goods or services to be shown on a certificate. It also deletes the provision applicable to the name reservation section, which is repealed.

Duration and Renewal Consistent with the MSTB, the bill shortens the renewal period of a registration from 10 years to 5 years. The purpose of this change is to "reduce the number of 'deadwood' registrations." It also clarifies that the application for registration must be in a manner and form complying with the requirements of the department. It allows a registration in effect on January 1, 2007, to remain in effect for the unexpired term and requires that any renewal of such a registration be applied for and the fee paid for within six months of the expiration of the registration. It also requires a renewal application to include a verified statement that the mark is still in use in Florida and include a specimen showing actual use.

Assignments; Change of Name; Security Interests The bill provides that a photocopy of an assignment will be accepted for recording if certified by any of the parties to the assignment or their successors as being a true and correct copy. It allows a registrant or applicant to record a certificate of change of name with the department upon payment of a fee of $50.00 and provides that the failure to record a name change will not affect a person's substantive rights in the mark or registration. It also provides that acknowledgement will be prima facie evidence of the execution of a document and when recorded, the record will be prima facie evidence of execution. Finally, the bill clarifies that security interests in a mark shall be created and perfected according to chapter 679, Florida Statutes, the Uniform Commercial Code.

Records The bill requires the department to keep for public inspection the assignment and change of name records filed with it under s. 495.181, F.S.

Cancellation The bill makes technical changes to the provisions of s. 495.101, F.S., regarding the basis for cancellation of a registration consistent with the Lanham Act. It removes the definition of "abandoned" to conform with the revised definition in s. 495.011, F.S. It requires the department to cancel a mark that has become the generic name for goods or services, or a portion thereof, for which the mark has been registered. It also clarifies that a registrant may use a certification mark in advertising or promoting recognition of the certification program or of goods or services meeting the certification standards of the registrant even if the mark is cancelled.

Classification The bill expressly adopts the updated International Trademark Classification System. It also adopts the United States Patent and Trademark Office's system for classifying certification and collective membership marks.

Infringement The bill conforms the infringement provisions of the law to the Lanham Act and clarifies that the basis for infringement is use of a mark or an imitation or copy of a mark, without the consent of the registrant, in a manner that is likely to cause confusion, to cause a mistake or to deceive.

Remedies The bill adds a prevailing party attorney's fee provision which would give the court discretion to award attorney's fees to the prevailing party "according to the circumstances of the case."

Forum for Actions Regarding Registrations The bill creates a new provision specifying the venue for cancellation actions in any court of competent jurisdiction in Florida and clarifying that the Department of State cannot be made a party to such actions. This provision is intended to clear up confusion among applicants and practitioners concerning the procedure in cancellation proceedings.

Dilution The bill creates a new standard for actions seeking to prevent the dilution of a registered mark. It allows the owner of a mark that is "famous" in the state to seek to enjoin or obtain other relief against a person's commercial use of a mark or trade name if such use begins after the mark has become famous and is likely to cause dilution of the mark. The bill sets, without limitation, some criteria that a court may use in determining whether a mark has become distinctive and famous, which include:

- The degree of inherent or acquired distinctiveness of the mark in Florida;
- The duration and extent of use of the mark in connection with the goods and services with which the mark is used;
- The duration and extent of advertising and publicity of the mark in Florida;
- The geographical extent of the trading area in which the mark is used;
- The channels of trade for the goods or services with which the mark is used;
- The degree of recognition of the mark in the trading areas and channels of trade in this state used by the mark's owner and the person against whom the injunction is sought;
- The nature and extent of the use of the same or similar mark by third parties; and
- Whether the mark is subject to a state registration in Florida or federal registration under a federal trademark act.

The bill limits relief to an injunction unless the person against whom the injunction is sought willfully intended to trade on the owner's reputation or to cause dilution of the famous mark. In the case where willful intent is proven and the affected mark is registered in Florida, the owner of the mark will be entitled to damages and attorney's fees as provided in s. 495.141, F.S.

Effective Date; Repeal of Prior Acts The bill would expressly repeal ss. 506.06 – 506.13, F.S., the remaining provisions of Florida's Stamped or Marked Containers and Baskets Law on the effective date of the law, January 1, 2007, and provides that the law will not affect actions or proceedings pending on that date.

Construction of chapter The bill notes that since the intent of the chapter is to provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection, construction given the federal act should be examined as persuasive authority for interpreting and construing this chapter.

Fees The bill locates all applicable trademark filing fees in one section. Such fees would remain at their current level. The fees are:

- Application filing fee: $87.50 per class.
- Renewal application fee: $87.50 per class.
- Assignment filing fee: $50.00 per class.
- Certificate of name change filing fee: $50.00.
- Voluntary cancellation filing fee: $50.00.
- Certificate of registration under seal: $8.75.
- Certified copy of application file: $52.50.

C. SECTION DIRECTORY:

Section 1. Creates s. 495.001, F.S.; providing a popular name.
Section 2. Amends s. 495.011, F.S.; providing definitions.
Section 3. Amends s. 495.021, F.S.; relating to the registrability of a mark.
Section 4. Repeals s. 495.027, F.S.; relating to the reservation of a mark.

Section 5. Amends s. 495.031, F.S.; relating to applications for registration.
Section 6. Creates s. 495.035, F.S.; providing for the filing of applications for registration.
Section 7. Amends s. 495.041, F.S.; relating to use of a mark by related companies.
Section 8. Amends s. 495.061, F.S.; relating to certificates of registration.
Section 9. Amends s. 495.071, F.S.; relating to the duration of a registered mark and renewal.
Section 10. Amends s. 495.081, F.S.; relating to assignments, changes of name and security interests.
Section 11. Amends s. 495.091, F.S.; relating to records retention by the Department.
Section 12. Amends s. 495.101, F.S.; relating to the cancellation of a mark.
Section 13. Amends s. 495.111, F.S.; relating to the classification of goods and services.
Section 14. Amends s. 495.131, F.S.; relating to liability for the infringement of a registered mark.
Section 15. Amends s. 495.141, F.S.; providing remedies for violation of the trademark law.
Section 16. Creates s. 495.145, F.S.; providing a forum for actions regarding registrations.
Section 17. Amends s. 495.151, F.S.; relating to the dilution of a mark.
Section 18. Amends s. 495.161, F.S.; relating to common-law rights.
Section 19. Amends s. 495.171, F.S.; relating to the effective date of the act and repeal of conflicting provisions.
Section 20. Amends s. 495.181, F.S.; providing for construction of the trademark law consistent with the federal trademark law.
Section 21. Creates s. 495.191, F.S.; providing for fees relating to applications and other documents.
Section 22. Repeals ss. 506.06-506.13, F.S.
Section 23. Provides an effective date of January 1, 2007.

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 Department of State, Division of Corporations, which oversees the trademark law, the primary effect of the bill will be to require approximately 500 persons or entities to pay the $50 fee each year for renewal of a registered mark, roughly doubling the number of renewal applications because of the shortened term of registration. However, the experience of the Division is that most marks have a life span of approximately three years, so the fiscal impact of the renewals required by the shortened term of registration will be insignificant.

The Division also reports that records maintenance will be significantly improved, since records will be purged on a five-year cycle, not a ten-year cycle. This will result in more up-to-date records in the trademark and service mark database, benefiting consumers who search it.

The bill also maintains fees applicable to trademark registrations and related activities at their current level.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not require a municipality or county to expend funds or to take any action requiring the expenditure of funds. The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate. The bill does not reduce the percentage of state tax shared with municipalities or counties.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

At the April 11, 2006 meeting, the Transportation and Economic Development Appropriations Committee approved HB 7107 with nine amendments. Amendments number one through five and amendment number nine were technical amendments. Amendments number six and seven clarified that the applicant for registration of a mark must be entitled to use the mark and that no other person can use the mark in a way that may cause confusion, to cause a mistake, or to decieve. Amendment number eight allows for the use of facsimiles of specimens in an application for registration of a mark.

CHAMBER ACTION

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1 The Transportation & Economic Development Appropriations
2 Committee recommends the following:
3
4 **Council/Committee Substitute**
5 Remove the entire bill and insert:
6 A bill to be entitled
7 An act relating to trademarks; creating s. 495.001, F.S.;
8 providing a short title; amending s. 495.011, F.S.;
9 providing definitions; amending s. 495.021, F.S.;
10 precluding registration of certain marks; repealing s.
11 495.027, F.S., relating to reservation of a mark; amending
12 s. 495.031, F.S.; providing requirements for information
13 to be contained in an application for registration of a
14 mark; authorizing the Department of State to require
15 certain information in an application; requiring that the
16 application be signed and verified by any of certain
17 persons; requiring that the application be accompanied by
18 three specimens or facsimiles showing the mark; requiring
19 that the application be accompanied by a fee; creating s.
20 495.035, F.S.; providing filing guidelines for
21 applications; providing for disclaimers of unregistrable
22 components; providing for amendment and judicial review;
23 providing for priority of registrations; amending s.

24 495.041, F.S.; providing that first use shall inure to the
25 benefit of the registrant or applicant under certain
26 circumstances; amending s. 495.061, F.S.; providing for
27 the issuance of a certificate of registration by the
28 department; removing a provision relating to reservation
29 of a mark; amending s. 495.071, F.S.; providing guidelines
30 for the renewal of marks; revising duration of
31 effectiveness of a registration; amending s. 495.081,
32 F.S.; providing for the assignability of marks;
33 authorizing a photocopy of an assignment to be acceptable
34 for recording; providing for change of name certificates
35 for registrants; authorizing recordation of certain
36 instruments; providing acknowledgment of recording as
37 prima facie evidence of the execution of an assignment or
38 other instrument; specifying requirements for creation and
39 perfection of security interests in marks; amending s.
40 495.091, F.S.; requiring the department to record all
41 marks registered with the state; amending s. 495.101,
42 F.S.; requiring the department to cancel certain marks;
43 amending s. 495.111, F.S., which establishes a
44 classification of goods and services; providing that a
45 single application for registration of a mark may include
46 any or all goods upon which, or services with which, the
47 mark is actually being used comprised in one or more of
48 the classes listed; amending s. 495.131, F.S.; revising
49 infringement provisions to include an element of lack of
50 consent by the registrant; conforming language; amending
51 s. 495.141, F.S.; providing additional remedies for the

52 unauthorized use of a mark; creating s. 495.145, F.S.;
53 providing a forum for actions regarding registration;
54 providing for service of process on nonresident
55 registrants; amending s. 495.151, F.S.; providing for an
56 injunction in cases of dilution of a famous mark;
57 providing factors to be considered in determining that a
58 mark is famous; providing damages in certain circumstances
59 of dilution; amending s. 495.161, F.S.; deleting language
60 relating to the diminishing of certain common law rights;
61 amending s. 495.171, F.S.; providing effective date of
62 changes to ch. 495, F.S., as amended by the act; providing
63 for repeal of conflicting acts; providing application to
64 pending actions; amending s. 495.181, F.S.; providing
65 construction and legislative intent; creating s. 495.191,
66 F.S.; providing certain fees; repealing s. 506.06, F.S.,
67 relating to unlawful to counterfeit trademark, to conform;
68 repealing s. 506.07, F.S., relating to filing of trademark
69 or other form of advertisement for record with Department
70 of State, to conform; repealing s. 506.08, F.S., relating
71 to fee for filing, to conform; repealing s. 506.09, F.S.,
72 relating to civil remedies, to conform; repealing s.
73 506.11, F.S., relating to unlawful use of trademark, to
74 conform; repealing s. 506.12, F.S., relating to procuring
75 the filing of trademark or other form of advertisement by
76 fraudulent representations, to conform; repealing s.
77 506.13, F.S., relating to using the name or seal of
78 another, to conform; providing an effective date.
79

80 Be It Enacted by the Legislature of the State of Florida:
81
82 Section 1. Section 495.001, Florida Statutes, is created
83 to read:
84 495.001 Short title.--This chapter may be cited as the
85 "Registration and Protection of Trademarks Act."
86 Section 2. Section 495.011, Florida Statutes, is amended
87 to read:
88 (Substantial rewording of section. See
89 s. 495.011, F.S., for present text.)
90 495.011 Definitions.--As used in this chapter:
91 (1) "Abandoned" applies to a mark when either of the
92 following occurs:
93 (a) When its use has been discontinued with intent not to
94 resume such use. Intent not to resume use may be inferred from
95 circumstances. Nonuse for 3 consecutive years shall constitute
96 prima facie evidence of abandonment.
97 (b) When any course of conduct of the owner, including
98 acts of omission or commission, causes the mark to lose its
99 significance as a mark.
100 (2) "Applicant" means the person filing an application for
101 registration of a mark under this chapter and the legal
102 representatives, successors, or assigns of such person.
103 (3) "Certification mark" means any word, name, symbol, or
104 device, or any combination thereof, used by a person other than
105 the owner of the mark to certify regional or other origin,
106 material, mode of manufacture, quality, accuracy, or other
107 characteristics of such person's goods or services or that the

108 work or labor on the goods or services was performed by members
109 of a union or other organization.
110 (4) "Collective mark" means a trademark or service mark
111 used by the members of a cooperative, an association, or other
112 collective group or organization, and includes marks used to
113 indicate membership in a union, an association, or other
114 organization.
115 (5) "Department" means the Florida Department of State or
116 its designee charged with the administration of this chapter.
117 (6) "Dilution" means the lessening of the capacity of a
118 mark to identify and distinguish goods or services, regardless
119 of the presence or absence of:
120 (a) Competition between the owner of the mark and other
121 parties.
122 (b) Likelihood of confusion, mistake, or deception.
123 (7) "Mark" includes any trademark, service mark,
124 certification mark, or collective mark entitled to registration
125 under this chapter, whether or not registered.
126 (8) "Person," and any other word or term used to designate
127 the applicant or other party entitled to a benefit or privilege
128 or rendered liable under the provisions of this chapter, means a
129 juristic person as well as a natural person. "Juristic person"
130 includes a firm, partnership, corporation, union, association,
131 or other organization capable of suing and being sued in a court
132 of law.
133 (9) "Registrant" means the person to whom the registration
134 of a mark under this chapter is issued and the legal
135 representatives, successors, or assigns of such person.

136 (10) "Related company" means any person whose use of a
137 mark is controlled by the owner of the mark with respect to the
138 nature and quality of the goods or services on or in connection
139 with which the mark is used.
140 (11) "Service mark" means any word, name, symbol, or
141 device, or any combination thereof, used by a person to identify
142 and distinguish the services of such person, including a unique
143 service, from the services of others, and to indicate the source
144 of the services, even if that source is unknown. Titles,
145 character names, and other distinctive features of radio or
146 television programs may be registered as service marks
147 notwithstanding that the person or the programs may advertise
148 the goods of the sponsor.
149 (12) "Trade name" means any name used by a person to
150 identify a business or vocation of such person.
151 (13) "Trademark" means any word, name, symbol, or device,
152 or any combination thereof, used by a person to identify and
153 distinguish the goods of such person, including a unique
154 product, from those manufactured or sold by others, and to
155 indicate the source of the goods, even if the source is unknown.
156 (14) "Use" means the bona fide use of a mark in the
157 ordinary course of trade and not used merely for the purpose of
158 reserving a right in a mark. For purposes of this chapter, a
159 mark is deemed to be in use:
160 (a) On goods when:
161 1. The mark is placed in any manner on the goods, their
162 containers or the displays associated therewith, or on the tags
163 or labels affixed thereto, or, if the nature of the goods makes

164 such placement impracticable, on documents associated with the
165 goods or their sale; and
166 2. The goods are sold or transported in this state.
167 (b) On services when the mark is used or displayed in the
168 sale or advertising of services and the services are rendered in
169 this state.
170 Section 3. Subsection (1) of section 495.021, Florida
171 Statutes, is amended to read:
172 495.021 Registrability.--
173 (1) A mark by which the goods or services of any applicant
174 for registration may be distinguished from the goods or services
175 of others shall not be registered if it:
176 (a) Consists of or~~,~~ comprises ~~or includes~~ immoral,
177 deceptive, or scandalous matter; ~~or~~
178 (b) Consists of or~~,~~ comprises ~~or includes~~ matter which may
179 disparage or falsely suggest a connection with persons, living
180 or dead, institutions, beliefs, or national symbols, or bring
181 them into contempt, or disrepute; ~~or~~
182 (c) Consists of or ~~,~~ comprises ~~or includes~~ the flag or
183 coat of arms or other insignia of the United States, or of any
184 state or municipality, or of any foreign nation, or any
185 simulation thereof; ~~or~~
186 (d) Consists of or ~~,~~ comprises a ~~or includes the~~ name,
187 signature, or portrait identifying a particular ~~of any~~ living
188 individual, except by ~~with~~ her or his written consent, or the
189 name, signature, or portrait of a deceased President of the
190 United States during the lifetime of his widow or her widower,

191 if any, except by the written consent of the widow or widower;
192 ~~or~~
193 (e) Consists of a mark which:
194 1. When used on or in connection with ~~applied to~~ the goods
195 or services of the applicant, is merely descriptive or
196 deceptively misdescriptive of them;~~,~~
197 2. When used on or in connection with ~~applied to~~ the goods
198 or services of the applicant, is primarily geographically
199 descriptive ~~or deceptively misdescriptive~~ of them; ~~or their~~
200 ~~source or origin, or~~
201 3. When used on or in connection with the goods or
202 services of the applicant, is primarily geographically
203 deceptively misdescriptive of them;
204 4.~~3.~~ Is primarily merely a surname; or~~,~~
205 5. Comprises any matter that, as a whole, is functional.
206
207 Except as expressly excluded in subparagraphs 3. and 5.,
208 ~~provided, however, that~~ nothing in this paragraph shall prevent
209 the registration of a mark used ~~in this state~~ by the applicant
210 which has become distinctive of the applicant's goods or
211 services ~~in this state or elsewhere~~. The department ~~of State~~ may
212 accept as prima facie evidence that the mark has become
213 distinctive, as used on or in connection with ~~applied to~~ the
214 applicant's goods or services, proof of substantially exclusive
215 and continuous use thereof as a mark by the applicant in this
216 state or elsewhere for the 5 years before ~~next preceding~~ the
217 date on which the claim of distinctiveness is made; or

218 (f) Consists of or comprises a mark which so resembles a
219 mark registered in this state or a mark or trade name previously
220 used in this state by another and not abandoned, as to be
221 likely, when applied to the goods or services of the applicant,
222 to cause confusion or mistake or to deceive. Registration shall
223 not be denied solely on the basis of reservation or registration
224 by another of a corporate name or fictitious name that is the
225 same or similar to the mark for which registration is sought.
226 Section 4. Section 495.027, Florida Statutes, is repealed.
227 Section 5. Section 495.031, Florida Statutes, is amended
228 to read:
229 495.031 Application for registration.--
230 (1) Subject to the limitations set forth in this chapter,
231 any person who ~~adopts and~~ uses a trademark or service mark in
232 this state may file with the department ~~of State~~, in a manner
233 and ~~on a~~ form complying with the requirements of ~~to be furnished~~
234 ~~by~~ the department, an application for registration of that
235 ~~trademark or service~~ mark setting forth, but not limited to, the
236 following information:
237 (a) The name and business address of the person applying
238 for such registration, and, if a business entity, the place
239 ~~corporation, the state~~ of incorporation or organization;
240 (b) The goods or services on or in connection with which
241 the mark is used and the mode or manner in which the mark is
242 used in connection with such goods or services and the class or
243 classes in which such goods or services fall;
244 (c) The date ~~when~~ the mark was first used anywhere and the
245 date ~~when~~ it was first used in this state by the applicant, the

246 applicant's ~~or her or his~~ predecessor in interest, ~~business~~ or a
247 related company of the applicant ~~or the applicant's predecessor~~;
248 and
249 (d) A statement that the applicant is the owner of the
250 mark, that the mark is in use, and that, to the best of the
251 applicant's knowledge, no other person except a related company
252 has registered such mark in this state, or has the right to use
253 such mark in this state, either in the identical form thereof or
254 in such near resemblance thereto as to be likely, when applied
255 to the goods or services of such other person, to cause
256 confusion, to cause mistake, or to deceive ~~or confuse or to be~~
257 ~~mistaken therefor~~.
258 (2) Every applicant for registration of a certification
259 mark in this state shall file with the department ~~of State~~, in a
260 manner and ~~on a~~ form complying with the requirements of ~~to be~~
261 ~~furnished by~~ the department, an application setting forth, but
262 not limited to, the following information:
263 (a) The information required by paragraph (1)(a);
264 (b) The date when the certification mark was first used
265 anywhere and the date when it was first used in this state under
266 the authority of the applicant;
267 (c) The manner in which and the conditions under which the
268 certification mark is used in this state; and
269 (d) A statement that the applicant is exercising control
270 over the use of the mark, that the applicant is not herself or
271 himself engaged in the production or marketing of the goods or
272 services to which the mark is applied, and that no person except
273 the applicant or persons authorized by the applicant, or related

274 companies thereof, has the right to use such mark in this state,
275 either in the identical form thereof or in such near resemblance
276 thereto as to be likely, when applied to the goods or services
277 of such other person, to cause confusion, to cause mistake, or
278 to deceive ~~or confuse or to be mistaken therefor~~.
279 (3) Every applicant for registration of a collective mark
280 in this state shall file with the department ~~of State~~, in a
281 manner and ~~on a~~ form complying with the requirements of ~~to be~~
282 ~~furnished by~~ the department, an application setting forth, but
283 not limited to, the following information:
284 (a) The information required by paragraphs (1)(a) and (b);
285 (b) The date when the collective mark was first used
286 anywhere and the date when it was first used in this state by
287 any member of the applicant or a related company of such member;
288 (c) The class of persons entitled to use the mark,
289 indicating their relationship to the applicant, and the nature
290 of the applicant's control over the use of the mark; and
291 (d) A statement that no person except the applicant or
292 members of the applicant, or related companies thereof, has the
293 right to use such mark in this state, either in the identical
294 form thereof or in such near resemblance thereto as to be
295 likely, when applied to the goods or services of such other
296 person, to cause confusion, to cause mistake, or to deceive ~~or~~
297 ~~confuse or to be mistaken therefor~~.
298 (4) The department may also require that a drawing of the
299 mark, complying with the requirements of the department,
300 accompany the application.

301 (5) ~~(4)~~ Every application under this section shall be
302 signed and verified by the applicant or by a member of the firm
303 or an officer or other authorized representative of the business
304 entity ~~of the corporation, association, union or other~~
305 ~~organization~~ applying.
306 (6) ~~(5)~~ Every application under this section shall be
307 accompanied by three specimens or facsimiles showing the mark as
308 actually used ~~a specimen or facsimile of such mark in~~
309 ~~triplicate~~.
310 (7) ~~(6)~~ Every application under this section shall be
311 accompanied by a filing fee ~~of $87.50,~~ payable to the department
312 in accordance with s. 495.191 ~~of State, for each class of goods~~
313 ~~or services as specified in s. 495.111, in connection with which~~
314 ~~the mark is used~~.
315 Section 6. Section 495.035, Florida Statutes, is created
316 to read:
317 495.035 Filing of applications.--
318 (1) Upon the receipt of an application for registration
319 and payment of the application fee, the department may cause the
320 application to be examined for conformity with this chapter.
321 (2) The applicant shall provide any additional pertinent
322 information requested by the department, including a description
323 of a design mark, and may make, or authorize the department to
324 make, such amendments to the application as may be reasonably
325 requested by the department or deemed by applicant to be
326 advisable to respond to any rejection or objection.
327 (3) The department may require the applicant to disclaim
328 an unregistrable component of a mark otherwise registrable, and

329 an applicant may voluntarily disclaim a component of a mark
330 sought to be registered. No disclaimer shall prejudice or affect
331 the applicant's or registrant's rights then existing or
332 thereafter arising in the disclaimed matter, or the applicant's
333 or registrant's rights of registration on another application,
334 if the disclaimed matter is or has become distinctive of the
335 applicant's or registrant's goods or services.
336 (4) Amendments may be made by the department upon the
337 application submitted by the applicant upon the applicant's
338 agreement, or a new application may be required to be submitted.
339 Amendments to an otherwise properly filed application shall not
340 affect the application filing date for purposes of determining
341 the applicant's or registrant's filing priority rights.
342 (5) If the applicant is found not to be entitled to
343 registration, the department shall advise the applicant of the
344 rejection and of the reasons for rejection. The applicant shall
345 have 3 months in which to reply or amend the application, in
346 which event the application shall be reexamined. This procedure
347 may be repeated until:
348 (a) The department makes final its refusal to register the
349 mark; or
350 (b) The applicant fails to reply or amend the application
351 within the specified period, whereupon the application shall be
352 abandoned.
353
354 For good cause shown, such as the pendency of litigation
355 involving the mark, the department may extend the period of time

356 in which to respond to the rejection or suspend examination of
357 the application.
358 (6) If the department makes final its refusal to register
359 the mark, the applicant may seek review of such decision in
360 accordance with ss. 120.569 and 120.57.
361 (7) In the event of multiple applications concurrently
362 being processed by the department which seek registration of the
363 same or confusingly similar marks for the same or related goods
364 or services, the department shall grant priority to the
365 applications in order of receipt. If a prior-received
366 application is granted a registration, the other application or
367 applications shall then be rejected. The applicant of a rejected
368 application may bring an action for cancellation of the
369 registration upon grounds of prior or superior rights to the
370 mark, in accordance with the provisions of s. 495.101(3).
371 Section 7. Section 495.041, Florida Statutes, is amended
372 to read:
373 495.041 Use by related companies.--Where a mark registered
374 or unregistered is or may be used legitimately by related
375 companies, such use shall inure to the benefit of the owner of
376 the mark, and such use shall not affect the validity of such
377 mark or of its registration, provided such mark is not used in
378 such manner as to deceive the public. If first use of a mark by
379 a person is controlled by the registrant or applicant for
380 registration of a mark with respect to the nature and quality of
381 the goods or services, such first use shall inure to the benefit
382 of that registrant or applicant, as the case may be.

383 Section 8. Section 495.061, Florida Statutes, is amended
384 to read:
385 495.061 Certificate of registration.--
386 (1) Upon compliance by the applicant with the requirements
387 of this chapter, the department ~~of State~~ shall cause a
388 certificate of registration to be issued and delivered to the
389 applicant. The certificate of registration shall be issued under
390 the signature of the Secretary of State and the seal of the
391 state, and it shall show the name and business address and, if a
392 business entity ~~corporation~~, the place ~~state~~ of incorporation or
393 organization, of the person claiming ownership of the mark in
394 this state, the date claimed for the first use of the mark
395 anywhere and the date claimed for the first use of the mark in
396 this state, the class or classes of goods or services and a
397 description of the goods or services on or in connection with ~~on~~
398 which the mark is used, a reproduction of the mark, the
399 registration date and the term of the registration.
400 (2) Any certificate of registration issued by the
401 department ~~of State~~ under the provisions hereof or a copy
402 thereof duly certified by the department ~~of State~~ shall be
403 admissible in evidence as competent and sufficient proof of the
404 registration of such mark in any action or judicial proceedings
405 in any court of this state, and shall be prima facie evidence of
406 the validity of the registration, registrant's ownership of the
407 mark, and of registrant's exclusive right to use the mark in
408 this state on or in connection with the goods or services
409 specified in the certificate, subject to any conditions and
410 limitations stated therein.

411 ~~(3) Contingent on the registration of a mark under this~~
412 ~~chapter, the reservation of such mark based on intent to use, as~~
413 ~~provided in this chapter, shall be prima facie evidence of~~
414 ~~priority of ownership of such mark within this state on or in~~
415 ~~connection with the goods or services specified in the~~
416 ~~reservation against any other person, except for a person whose~~
417 ~~mark has not been abandoned and who, prior to such reservation,~~
418 ~~has used the mark within this state on or in connection with~~
419 ~~such goods or services.~~
420 Section 9. Section 495.071, Florida Statutes, is amended
421 to read:
422 495.071 Duration and renewal.--
423 (1) Registration of a mark hereunder shall be effective
424 for a term of 5 ~~10~~ years from the date of registration and, upon
425 application filed within 6 months prior to the expiration of
426 such term, in a manner and form complying with the requirements
427 of ~~on a form to be furnished by~~ the department ~~of State~~, the
428 registration may be renewed for a like term beginning at the end
429 of the expiring term. Every application under this section shall
430 be accompanied by a filing fee ~~A renewal fee of $87.50 for each~~
431 ~~class of goods or services with respect to which such renewal is~~
432 ~~sought~~, payable to the department in accordance with s. 495.191
433 ~~of State, shall accompany the application for renewal of the~~
434 ~~registration~~.
435 (2) A ~~mark~~ registration may be renewed for successive
436 periods of 5 ~~10~~ years in like manner.
437 (3) Any registration in effect on January 1, 2007, shall
438 continue in effect for the unexpired term thereof and may be

439 renewed by filing an application for renewal with the department
440 in a manner and form complying with the requirements of the
441 department and paying the renewal fee therefor within 6 months
442 prior to the expiration of the registration. ~~The Department of~~
443 ~~State shall notify registrants of marks hereunder of the~~
444 ~~necessity of renewal within the year next preceding the~~
445 ~~expiration of the 10 years from the date of registration by~~
446 ~~writing to the last known address of the registrants. The~~
447 ~~department shall prescribe the forms on which to make the~~
448 ~~required notification and the renewal called for in subsection~~
449 ~~(1) and may substitute the uniform business report, pursuant to~~
450 ~~s. 606.06, as a means of satisfying the requirement of this~~
451 ~~part.~~
452 (4) All applications for renewal ~~renewals~~ under this
453 chapter, whether of registrations made under this act or of
454 registrations made under any prior acts, shall include a
455 verified statement that the mark is still in use in this state,
456 and shall include a specimen showing actual use of the mark on
457 or in connection with the goods or services subject to the
458 renewal application, or shall state that its nonuse is due to
459 special circumstances which excuse such nonuse and is not due to
460 any intention to abandon the mark.
461 Section 10. Section 495.081, Florida Statutes, is amended
462 to read:
463 495.081 Assignments; changes of name; security interests
464 ~~Assignment~~.--
465 (1) A registered mark or a mark for which an application
466 for registration has been filed ~~Any mark and its registration~~

467 ~~hereunder~~ shall be assignable with the goodwill ~~good will~~ of the
468 business in which the mark is used or with that part of the
469 goodwill ~~good will~~ of the business connected with the use of and
470 symbolized by the mark. Assignments ~~Assignment~~ shall be by an
471 instrument ~~instruments~~ in writing duly executed and may be
472 recorded with the department ~~of State~~ upon the payment of the
473 applicable ~~a~~ fee. A photocopy of an assignment shall be accepted
474 for recording if it is certified by any of the parties thereto,
475 or their successors, to be a true and correct copy of the
476 original. Upon recording of the assignment, ~~of $50, payable to~~
477 the department ~~of State~~ ~~which, upon recording of the assignment,~~
478 shall issue in the name of the assignee a new certificate for
479 the remainder of the term of the registration or of the last
480 renewal thereof.
481 (2) An assignment of any registration under this chapter
482 shall be void ~~as~~ against any subsequent purchaser for valuable
483 consideration without notice, unless such assignment is recorded
484 with the department ~~of State~~ within 3 months after the date of
485 the assignment or prior to the subsequent purchase ~~thereof or at~~
486 ~~any time after the expiration of such 3-month period, unless an~~
487 ~~assignment given in connection with any subsequent purchase is~~
488 ~~recorded with the Department of State prior to or within 10 days~~
489 ~~after such assignment is recorded~~.
490 (3) A registrant or applicant for registration effecting a
491 change of the name may record a certificate of change of name of
492 the registrant or applicant with the department upon the payment
493 of the recording fee payable to the department in accordance
494 with s. 495.191. In the case of a pending application for a mark

495 that becomes approved for registration, the department shall
496 issue a certificate of registration in the registrant's new
497 name. In the case of a registered mark, the department shall
498 issue a new certificate of registration in the registrant's new
499 name for the remainder of the term of the registration or last
500 renewal thereof. A person's failure to record a name change in
501 accordance with this subsection shall not affect the person's
502 substantive rights in the mark or its registration.
503 (4) Acknowledgment shall be prima facie evidence of the
504 execution of an assignment or other instrument and, when
505 recorded by the department, the record shall be prima facie
506 evidence of execution.
507 (5) Security interests in marks shall be created and
508 perfected in accordance with chapter 679.
509 Section 11. Section 495.091, Florida Statutes, is amended
510 to read:
511 495.091 Records.--The department ~~of State~~ shall keep for
512 public examination a record of all marks registered or renewed
513 under this chapter, including all documents recorded under s.
514 495.081.
515 Section 12. Section 495.101, Florida Statutes, is amended
516 to read:
517 495.101 Cancellation.--The department ~~of State~~ shall
518 cancel from the register:
519 ~~(1) After 1 year from the effective date of this chapter,~~
520 ~~all registrations under prior laws which are more than 10 years~~
521 ~~old and not renewed in accordance with this chapter.~~

522 (1) ~~(2)~~ Any registration for ~~concerning~~ which the
523 department ~~of State~~ has received ~~shall receive~~ a voluntary
524 request for cancellation by the registrant, which request shall
525 be in a manner and form complying with the requirements of the
526 department ~~thereof from the registrant~~.
527 (2) ~~(3)~~ All registrations granted under this chapter and
528 not renewed in accordance with the provisions hereof.
529 (3) ~~(4)~~ Any registration for ~~concerning~~ which a court of
530 competent jurisdiction finds ~~shall find~~ that:
531 (a) The registered mark has been abandoned. ~~A mark shall~~
532 ~~be deemed to be "abandoned" when either of the following occurs:~~
533 ~~1. When its use has been discontinued with intent not to~~
534 ~~resume such use. Intent not to resume may be inferred from~~
535 ~~circumstances. Nonuse for 2 consecutive years shall be prima~~
536 ~~facie evidence of abandonment.~~
537 ~~2. When any course of conduct of the owner, including acts~~
538 ~~of omission as well as commission, causes the mark to become the~~
539 ~~generic name for the goods or services on or in connection with~~
540 ~~which it is used, or otherwise to lose its significance as a~~
541 ~~mark. Purchaser motivation shall not be a test for determining~~
542 ~~abandonment under this paragraph.~~
543 (b) The registrant ~~of a trademark or service mark~~ is not
544 the owner of the mark.
545 (c) The registration was granted improperly.
546 (d) The registration was obtained fraudulently.
547 (e) The mark is or has become the generic name for the
548 goods or services, or a portion thereof, for which the mark has
549 been registered.

550 (f) ~~(e)~~ The registered mark is so similar, as to be likely
551 to cause confusion or mistake or to deceive, to a mark
552 registered by another person in the United States Patent and
553 Trademark Office, prior to the date of the filing of the
554 application for registration by the registrant hereunder, and
555 not abandoned; ~~provided,~~ however, ~~that~~ should the registrant
556 prove that the registrant ~~she or he~~ is the owner of a concurrent
557 registration of a ~~her or his~~ mark in the United States Patent
558 and Trademark Office covering an area including this state, the
559 registration hereunder shall not be canceled.
560 (g) ~~(f)~~ In the case of a certification mark, that the
561 registrant does not control or is not able to exercise control
562 over the use of such mark; or engages in the production or
563 marketing of any goods or services to which the certification
564 mark is applied; or the registrant permits the use of the
565 certification mark for purposes other than to certify; or the
566 registrant discriminately refuses ~~refused~~ to certify or ~~to~~
567 continue to certify the goods or services of any person who
568 maintains the standards or conditions which such mark certifies.
569 Nothing in this paragraph shall be deemed to prohibit the
570 registrant from using its certification mark in advertising or
571 promoting recognition of the certification program or of the
572 goods or services meeting the certification standards of the
573 registrant.
574 (4) ~~(5)~~ When a court of competent jurisdiction shall order
575 cancellation of a registration on any ground.
576 Section 13. Section 495.111, Florida Statutes, is amended
577 to read:

578 (Substantial rewording of section. See s. 495.111, F.S.,
579 for present text.)
580 495.111 Classification.--
581 (1) The following general classes of goods and services,
582 conforming to the classification adopted by the United States
583 Patent and Trademark Office, are established for convenience of
584 administration of this chapter:
585 (a) Goods:
586 1. Class 1 Chemicals used in industry, science, and
587 photography; agriculture, horticulture, and forestry;
588 unprocessed artificial resins and, unprocessed plastics;
589 manures; fire extinguishing compositions; tempering and
590 soldering preparations; chemical substances for preserving
591 foodstuffs; tanning substances; and adhesives used in industry.
592 2. Class 2 Paints, varnishes, lacquers; preservatives
593 against rust and against deterioration of wood; colorants;
594 mordants; raw natural resins; and metals in foil and powder form
595 for painters, decorators, printers, and artists.
596 3. Class 3 Bleaching preparations and other substances
597 for laundry use; cleaning, polishing, scouring, and abrasive
598 preparations; soaps; perfumery, essential oils, cosmetics, and
599 hair lotions; and dentifrices.
600 4. Class 4 Industrial oils and greases; lubricants; dust
601 absorbing, wetting, and binding compositions; fuels (including
602 motor spirit) and illuminants; and candles and wicks for
603 lighting.
604 5. Class 5 Pharmaceuticals and veterinary preparations;
605 sanitary preparations for medical purposes; dietetic substances

606 adapted for medical use and food for babies; plasters and
607 materials for dressings; material for stopping teeth and dental
608 wax; disinfectants; preparations for destroying vermin; and
609 fungicides and herbicides.
610 6. Class 6 Common metals and their alloys; metal building
611 materials; transportable buildings of metal; materials of metal
612 for railway tracks; nonelectric cables and wires of common
613 metal; ironmongery and small items of metal hardware; pipes and
614 tubes of metal; safes; goods of common metal not included in
615 other classes; and ores.
616 7. Class 7 Machines and machine tools; motors and engines
617 (except for land vehicles); machine coupling and transmission
618 components (except for land vehicles); agricultural implements
619 other than hand-operated; incubators for eggs.
620 8. Class 8 Hand tools and hand-operated implements;
621 cutlery; side arms; and razors.
622 9. Class 9 Scientific, nautical, surveying, photographic,
623 cinematographic, optical, weighing, measuring, signaling,
624 checking (supervision), and life-saving and teaching apparatus
625 and instruments; apparatus and instruments for conducting,
626 switching, transforming, accumulating, regulating, or
627 controlling electricity; apparatus for recording, transmission,
628 or reproduction of sound or images; magnetic data carriers and
629 recording discs; automatic vending machines and mechanisms for
630 coin-operated apparatus; cash registers, calculating machines,
631 and data processing equipment and computers; and fire-
632 extinguishing apparatus.

633 10. Class 10 Surgical, medical, dental, and veterinary
634 apparatus and instruments, artificial limbs, eyes, and teeth;
635 orthopedic articles; and suture materials.
636 11. Class 11 Apparatus for lighting, heating, steam
637 generating, cooking, refrigerating, drying, ventilating, water
638 supply, and sanitary purposes.
639 12. Class 12 Vehicles; apparatus for locomotion by land,
640 air, or water.
641 13. Class 13 Firearms; ammunition and projectiles;
642 explosives; and fireworks.
643 14. Class 14 Precious metals and their alloys and goods
644 in precious metals or coated therewith (not included in other
645 classes); jewelry and precious stones; and horological and
646 chronometric instruments.
647 15. Class 15 Musical instruments.
648 16. Class 16 Paper, cardboard, and goods made from these
649 materials (not included in other classes); printed matter;
650 bookbinding material; photographs; stationery; adhesives for
651 stationery or household purposes; artists' materials; paint
652 brushes; typewriters and office requisites (except furniture);
653 instructional and teaching material (except apparatus); plastic
654 materials for packaging (not included in other classes);
655 printers' type; and printing blocks.
656 17. Class 17 Rubber, gutta-percha, gum, asbestos, mica,
657 and goods made from these materials and not included in other
658 classes; plastics in extruded form for use in manufacture;
659 packing, stopping, and insulating materials; and flexible pipes
660 not of metal.

661 18. Class 18 Leather and imitations of leather and goods
662 made of these materials and not included in other classes;
663 animal skins and hides; trunks and traveling bags; umbrellas,
664 parasols, and walking sticks; and whips, harness, and saddlery.
665 19. Class 19 Building materials (nonmetallic);
666 nonmetallic rigid pipes for building; asphalt, pitch, and
667 bitumen; nonmetallic transportable buildings; monuments, not of
668 metal.
669 20. Class 20 Furniture, mirrors, and picture frames;
670 goods (not included in other classes) of wood, cork, reed, cane,
671 wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-
672 pearl, and meerschaum and substitutes for all these materials,
673 or of plastics.
674 21. Class 21 Household or kitchen utensils and containers
675 (not of precious metal or coated therewith); combs and sponges;
676 brushes (except paint brushes); brush-making materials; articles
677 for cleaning purposes; steel wool; unworked or semiworked glass
678 (except glass used in building); and glassware, porcelain, and
679 earthenware not included in other classes.
680 22. Class 22 Ropes, string, nets, tents, awnings,
681 tarpaulins, sails, sacks, and bags (not included in other
682 classes); padding and stuffing materials (except of rubber or
683 plastics); and raw fibrous textile materials.
684 23. Class 23 Yarns and threads for textile use.
685 24. Class 24 Textiles and textile goods not included in
686 other classes and bed and table covers.
687 25. Class 25 Clothing, footwear, and headgear.

688 26. Class 26 Lace and embroidery, ribbons, and braid;
689 buttons, hooks and eyes, pins, and needles; and artificial
690 flowers.
691 27. Class 27 Carpets, rugs, mats and matting, linoleum,
692 and other materials for covering existing floors; and wall
693 hangings (nontextile).
694 28. Class 28 Games and playthings; gymnastic and sporting
695 articles not included in other classes; and decorations for
696 Christmas trees.
697 29. Class 29 Meat, fish, poultry, and game; meat
698 extracts; preserved, dried, and cooked fruits and vegetables;
699 jellies, jams, and compotes; eggs, milk, and milk products; and
700 edible oils and fats.
701 30. Class 30 Coffee, tea, cocoa, sugar, rice, tapioca,
702 sago, and artificial coffee; flour and preparations made from
703 cereals, bread, pastry and confectionery, and ices; honey and
704 treacle; yeast, baking powder; salt, and mustard; vinegar and
705 sauces (condiments); spices; and ice.
706 31. Class 31 Agricultural, horticultural, and forestry
707 products and grains not included in other classes; live animals;
708 fresh fruits and vegetables; seeds, natural plants, and flowers;
709 foodstuffs for animals and malt.
710 32. Class 32 Beers; mineral and aerated waters and other
711 nonalcoholic drinks; fruit drinks and fruit juices; and syrups
712 and other preparations for making beverages.
713 33. Class 33 Alcoholic beverages except beers.
714 34. Class 34 Tobacco; smokers' articles; and matches.
715 (b) Services:

716 1. Class 35 Advertising; business management; business
717 administration; and office functions.
718 2. Class 36 Insurance; financial affairs; monetary
719 affairs; and real estate affairs.
720 3. Class 37 Building construction; repair; and
721 installation services.
722 4. Class 38 Telecommunications.
723 5. Class 39 Transport; packaging and storage of goods;
724 and travel arrangements.
725 6. Class 40 Treatment of materials.
726 7. Class 41 Education; providing of training;
727 entertainment; and sporting and cultural activities.
728 8. Class 42 Scientific and technological services and
729 research and design relating thereto; industrial analysis and
730 research services; design and development of computer hardware
731 and software; and legal services.
732 9. Class 43 Services for providing food and drink; and
733 temporary accommodation.
734 10. Class 44 Medical services; veterinary services;
735 hygienic and beauty care for human beings or animals; and
736 agriculture, horticulture, and forestry services.
737 11. Class 45 Personal and social services rendered by
738 others to meet the needs of individuals; and security services
739 for the protection of property and individuals.
740 (c) Certification and collective membership marks:
741 1. Class 200 Collective membership marks.
742 2. Class A Certification marks for goods.
743 3. Class B Certification marks for services.

744 (d) The goods and services recited in collective trademark
745 and collective service mark applications are assigned to the
746 same classes that are appropriate for those goods and services
747 in general.
748 (2) The establishment of the classes of goods and services
749 set forth in subsection (1) is not for the purpose of limiting
750 or extending the rights of the applicant or registrant. A single
751 application for registration of a mark may include any or all
752 goods upon which, or services with which, the mark is actually
753 being used comprised in one or more of the classes listed, but
754 in the event that a single application includes goods or
755 services in connection with which the mark is being used which
756 fall within different classes of goods or services, a fee
757 equaling the sum of the fees for registration in each class
758 shall be payable.
759 Section 14. Section 495.131, Florida Statutes, is amended
760 to read:
761 495.131 Infringement.--Subject to the provisions of s.
762 495.161, any person who shall, without the consent of the
763 registrant:
764 (1) Use~~, without the consent of the registrant,~~ any
765 reproduction, counterfeit, copy, or colorable imitation of a
766 mark registered under this chapter ~~on any goods or~~ in connection
767 with the sale, offering for sale, distribution, or advertising
768 of any goods or services on or in connection with which such use
769 is likely to cause confusion, ~~or~~ to cause mistake, or to deceive
770 ~~as to the source or origin of such goods or services~~; or

771 (2) Reproduce, counterfeit, copy, or colorably imitate a
772 ~~any such~~ mark registered under this chapter and apply such
773 reproduction, counterfeit, copy, or colorable imitation to
774 labels, signs, prints, packages, wrappers, receptacles, or
775 advertisements intended to be used upon or in connection
776 ~~conjunction~~ with the sale, ~~offering for sale,~~ distribution, or
777 advertising ~~in this state~~ of goods or services on or in
778 connection with which such use is likely to cause confusion, to
779 cause mistake, or to deceive;
780
781 shall be liable in a civil action by the owner of such
782 registered mark for any or all of the remedies provided in s.
783 495.141, except that under subsection (2) hereof the registrant
784 shall not be entitled to recover profits or damages unless the
785 acts have been committed with knowledge that such mark is
786 intended to be used to cause confusion or mistake or to deceive.
787 Section 15. Section 495.141, Florida Statutes, is amended
788 to read:
789 495.141 Remedies.--
790 (1) Any owner of a mark registered under this chapter may
791 proceed by suit to enjoin the manufacture, use, display, or sale
792 of any counterfeits or imitations thereof and any court of
793 competent jurisdiction may grant injunctions to restrain such
794 manufacture, use, display or sale as may be by the said court
795 deemed just and reasonable, and may require the defendants to
796 pay to such owner all profits derived from and/or all damages
797 suffered by reason of such wrongful manufacture, use, display,
798 or sale and to pay the costs of the action; and such court may

799 also order that any such counterfeits or imitations in the
800 possession or under the control of any defendant in such case be
801 delivered to an officer of the court, or to the complainant, to
802 be destroyed. In assessing profits the plaintiff shall be
803 required to prove defendant's sales only; defendant must prove
804 all elements of cost or deduction claimed. In assessing damages
805 the court may enter judgment, according to the circumstances of
806 the case, for any sum above the amount found as actual damages,
807 not exceeding three ~~3~~ times such amount. If the court shall find
808 that the amount of the recovery based on profits is either
809 inadequate or excessive the court may in its discretion enter
810 judgment for such sum as the court shall find to be just,
811 according to the circumstances of the case. Such sum in either
812 of the above circumstances shall constitute compensation and not
813 a penalty. The court may also award reasonable attorney's fees
814 to the prevailing party according to the circumstances of the
815 case.
816 (2) The enumeration of any right or remedy herein shall
817 not affect a registrant's right to prosecute under any penal law
818 of this state.
819 Section 16. Section 495.145, Florida Statutes, is created
820 to read:
821 495.145 Forum for actions regarding registration.--An
822 action seeking cancellation of a registration of a mark
823 registered under this chapter may be brought in any court of
824 competent jurisdiction in this state. Service of process on a
825 nonresident registrant may be made in accordance with s. 48.181.

826 The department shall not be made a party to cancellation
827 proceedings.
828 Section 17. Section 495.151, Florida Statutes, is amended
829 to read:
830 (Substantial rewording of section. See
831 s. 495.151, F.S., for present text.)
832 495.151 Dilution.--
833 (1) The owner of a mark that is famous in this state shall
834 be entitled, subject to the principles of equity and upon such
835 terms as the court deems reasonable, to an injunction and to
836 obtain such other relief against another person's commercial use
837 of a mark or trade name if such use begins after the mark has
838 become famous and is likely to cause dilution of the distinctive
839 quality of the famous mark, as provided in this section. In
840 determining whether a mark is distinctive and famous, a court
841 may consider factors, including, but not limited to:
842 (a) The degree of inherent or acquired distinctiveness of
843 the mark in this state.
844 (b) The duration and extent of use of the mark in
845 connection with the goods and services with which the mark is
846 used.
847 (c) The duration and extent of advertising and publicity
848 of the mark in this state.
849 (d) The geographical extent of the trading area in which
850 the mark is used.
851 (e) The channels of trade for the goods or services with
852 which the mark is used.

853 (f) The degree of recognition of the mark in the trading
854 areas and channels of trade in this state used by the mark's
855 owner and the person against whom the injunction is sought.
856 (g) The nature and extent of use of the same or similar
857 mark by third parties.
858 (h) Whether the mark is the subject of a state
859 registration in this state or a federal registration under the
860 Federal Trademark Act of March 3, 1881, or the Federal Trademark
861 Act of February 20, 1905, or a principal register registration
862 under the Federal Trademark Act of July 5, 1946.
863 (2) In an action brought under this section, the owner of
864 a famous mark shall be entitled only to injunctive relief in
865 this state unless the person against whom the injunctive relief
866 is sought willfully intended to trade on the owner's reputation
867 or to cause dilution of the famous mark. If such willful intent
868 is proven, and the mark is registered in this state, the owner
869 shall also be entitled to all remedies set forth in this
870 chapter, subject to the discretion of the court and the
871 principles of equity.
872 (3) The following shall not be actionable under this
873 section:
874 (a) Fair use of a famous mark by another person in
875 comparative commercial advertising or promotion to identify the
876 competing goods or services of the owner of the famous mark.
877 (b) Noncommercial use of the mark.
878 (c) All forms of news reporting and news commentary.
879 Section 18. Section 495.161, Florida Statutes, is amended
880 to read:

881 495.161 Common-law rights.--Nothing herein shall adversely
882 affect ~~or diminish~~ the rights or the enforcement of rights in
883 marks acquired in good faith at any time at common law.
884 Section 19. Section 495.171, Florida Statutes, is amended
885 to read:
886 495.171 Effective date; repeal of conflicting ~~prior~~
887 acts.--
888 (1) This chapter, as amended by this act, shall be in
889 force and take effect January ~~October~~ 1, 2007 ~~1967~~, ~~after its~~
890 ~~enactment,~~ but shall not affect any suit, proceeding, or appeal
891 then pending.
892 (2) Sections 506.06-506.13 ~~Former ss. 495.01-495.14~~ are
893 repealed on January 1, 2007 ~~the effective date of this act~~,
894 provided that as to any suit, proceeding or appeal, and for that
895 purpose only, pending at the time this chapter, as amended by
896 this act, takes effect such repeal shall be deemed not to be
897 effective until final determination of said pending suit,
898 proceeding or appeal.
899 Section 20. Section 495.181, Florida Statutes, is amended
900 to read:
901 (Substantial rewording of section. See
902 s. 495.181, F.S., for present text.)
903 495.181 Construction of chapter.--The intent of this
904 chapter is to provide a system of state trademark registration
905 and protection substantially consistent with the federal system
906 of trademark registration and protection under the Trademark Act
907 of 1946, as amended. To that end, the construction given the

908 federal act should be examined as persuasive authority for
909 interpreting and construing this chapter.
910 Section 21. Section 495.191, Florida Statutes, is created
911 to read:
912 495.191 Fees.--Filing and other applicable fees payable to
913 the department under this chapter shall be as follows:
914 (1) Application filing fee: $87.50 per class.
915 (2) Renewal application fee: $87.50 per class.
916 (3) Assignment filing fee: $50 per class.
917 (4) Certificate of name change filing fee: $50.
918 (5) Voluntary cancellation filing fee: $50.
919 (6) Certificate of registration under seal: $8.75.
920 (7) Certified copy of application file: $52.50.
921 Section 22. Sections 506.06, 506.07, 506.08, 506.09,
922 506.11, 506.12, and 506.13, Florida Statutes, are repealed.
923 Section 23. This act shall take effect January 1, 2007.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 771 CS Cosmetology
SPONSOR(S): Carroll
TIED BILLS: **IDEN./SIM. BILLS:** SB 1630

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Business Regulation Committee	17 Y, 0 N, w/CS	Livingston	Liepshutz
2) Community Colleges & Workforce Committee	7 Y, 0 N, w/CS	Thomas	Ashworth
3) State Administration Appropriations Committee	8 Y, 0 N, w/CS	Rayman	Belcher
4) Commerce Council		Livingston	Randle
5)			

SUMMARY ANALYSIS

Chapter 477, F.S., regulates the practice of cosmetology which is currently defined to include the mechanical or chemical treatment of the head, face, and scalp for aesthetic rather than medical purposes. Under this practice act, a person could also obtain a specialty registration for more narrow professional services, such as manicuring, pedicuring, or facials. Practitioners may also be registered to practice the occupation of hair braiding, hair wrapping, or body wrapping. Qualifications for licensure as a cosmetologist include 1,200 hours of training at a Florida approved school of instruction and successful completion of the licensure examination. Applicants for registration, as opposed to licensure, must also complete approved training courses relating to their specialty or specific practice.

The bill:

- redefines "cosmetology" to include hair technician services, esthetician services, and nail technician services;
- allows qualified individuals who are authorized to practice, to be licensed as a hair technician, esthetician, nail technician or cosmetologist;
- amends the hair braiding course content requirements and increases the educational hours;
- revises the qualifications for practice, including the allowance of a cosmetologist licensed before January 1, 2007, to perform all services of a licensed cosmetologist; allows a facial specialist registered or enrolled in a cosmetology school before January 1, 2007, to take the exam for an esthetician license; a manicure, pedicure, or nail extension specialist registered or enrolled in a cosmetology school before January 1, 2007, to take the exam for a nail technician license; and allows specialists registered before January 1, 2007, to continue to practice under their specialty registration without taking a licensure examination; provides for the renewal of current specialty registrations;
- revises the requirements for hair technician, esthetician, nail technician and cosmetology applicants and allows persons who were enrolled or began their education prior to January 1, 2007, to take the examination and be licensed as a cosmetologist upon completion of 1,200 educational hours; adds additional procedures for out-of-country and other state endorsement; and
- increases statutory fee caps; increases the required educational hours, set by the Board of Cosmetology, for cosmetologists from 1,200 to 1,800, estheticians from 260 to 600, nail specialists from 240 to 350, and hair braiders from 16 to 40.

The Department of Business and Professional Regulation indicates that the additional workload will be handled with existing staff.

The bill provides an effective date of January 1, 2007.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government - The bill requires more education and the development and administration of exams for a new category of licensure, hair technician, as well as more education and the development and administration of exams for an esthetician license and a nail technician license. It also increases the educational hours for a cosmetologist license.

Promote personal responsibility - The bill allows for licensees from another state or country to apply for endorsement rather than by the current requirement of licensure by examination.

The bill allows licensees to provide services at special events (i.e., weddings, proms, corporate events, etc.). Individuals performing the services must be employed by a licensed salon and the scheduling of the event must be made through a licensed salon.

The bill allows individuals who hold a valid cosmetology license in any state or who are authorized to practice in another country, to perform services in conjunction with a department store demonstration and without the requirement that services be performed in a licensed salon.

B. EFFECT OF PROPOSED CHANGES:

Present situation

The Board of Cosmetology (board) within the Department of Business and Professional Regulation (DBPR) is the agency responsible for the regulation of cosmetology under chapter 477, F.S. No person other than a duly licensed cosmetologist can practice cosmetology or use the name or title of a cosmetologist unless exempted under law.

Section 477.013(4), F.S., defines cosmetology to mean the mechanical or chemical treatment of the head, face, and scalp for aesthetic rather than medical purposes, including, but not limited to, hair shampooing, hair cutting, hair arranging, hair coloring, permanent waving, and hair relaxing for compensation. This term also includes performing hair removal, including wax treatments, manicures, pedicures, and skin care services.

In order to be licensed as a cosmetologist, a person must be at least 16 years of age or have received a high school diploma; must pay the required application fee; must satisfy an experience requirement by being authorized to practice cosmetology in another state or country for at least a year or an education requirement of 1,200 hours of training from a cosmetology program licensed pursuant to chapter 1005, F.S., a cosmetology program within the public school system, Cosmetology Division of the Florida School for the Deaf and the Blind, or a government-operated cosmetology program in the state. Finally, the person must pass the licensure examination.

Cosmetology salons and specialty salons are required to be licensed and cosmetology services can only be performed in a licensed salon unless specifically exempted.

Section 477.0135, F.S., exempts certain persons from the provisions of chapter 477, F.S., when practicing pursuant to their professional or occupational responsibilities and duties.

Section 477.0263(3), F.S., permits a person who holds a valid cosmetology license in any country, territory, or jurisdiction of the United States to perform cosmetology services in a location other than a licensed salon when the services are performed in connection with the motion picture, fashion

photography, theatrical, or television industry; a photograph studio salon; a manufacturer trade show demonstration; or an educational seminar.

Effect of proposed changes

Section 1. Amends 477.013, F.S., to address the definition of "cosmetology" and the services allowed under the "hair technician" license, the "esthetician" license, and the "nail technician" license; clarify that an esthetician can tint eyebrows or eyelashes, clarify that a hair technician can weave or braid a person's hair; and clarify that a nail technician can manipulate the superficial tissue of a person's forearms, hands or legs below the knee or feet; moves the body wrapping service into the esthetician license; define "salon" and strike the definition of "specialty salon"; amend the definition of shampooing to mean "cleansing" of the hair rather than just "washing" of the hair; clarify the definition of hair braiding to mean "the weaving or interweaving of a person's own natural hair" rather than "the weaving or interweaving of natural human hair."

Section 2. Creates 477.0131, F.S., to specify categories of licensure to include hair technicians, estheticians, nail technicians, and cosmetologists.

Section 3. Amends 477.0132, F.S., to require hair braiding providers to take and pass a course of at least 40 hours consisting of 4 hours of instruction on HIV/AIDS, 5 hours of instruction on sanitation and sterilization, 5 hours of instruction on diseases and disorders of the scalp, 2 hours of instruction on Florida laws and rules, and 24 hours of hands-on instruction in the application and removal of hair braiding; a person may be exempt from the 24 hours of instruction in the application and removal of hair braiding if they demonstrate skill in application and removal of hair braiding through a board-approved examination; body wrappers who hold registrations issued before January 1, 2007, may continue to practice as a body wrapper; the board is required to adopt continuing education requirements for the renewal of body wrapping registrations; and eliminate the allowance for hair braiders, hair wrappers, and body wrappers to practice once their application and fee are submitted.

Section 4. Amends 477.014, F.S., to prohibit the use of "cosmetologist", "hair technician", "esthetician", or "nail technician" and prohibit individuals from practicing as cosmetologists, hair technicians, estheticians or nail technicians without being properly licensed as such; allow cosmetologists licensed before January 1, 2007, to perform all services of a licensed cosmetologist; allow facial specialists and manicure/pedicure/nail extension specialists who are registered or enrolled in school before January 1, 2007, to take the exam for licensure; allow specialists registered before January 1, 2007, to continue to practice under the name of their respective specialty registration without taking the respective licensure exam; give the board rulemaking authority for renewal of registration existing before January 1, 2007.

Section 5. Amends 477.019, F.S., to expand the education requirements, set by the Board of Cosmetology, to make application for examination to include the allowance of applicants to be at least 16 years of age or has received a high school diploma or a GED, or has passed an ability-to-benefit test; require the following educational hour requirements:

a. Hair Technician – 1,000 hours
b. Esthetician – 600 hours (from 260 hours)
c. Nail Technician – 350 hours (from 240 hours)
d. Cosmetologist – 1,800 hours (from 1,200 hours)

The bill allows a student who has enrolled and begun his/her education before January 1, 2007, to take the exam to be licensed as a cosmetology upon completion of 1,200 hours; require a student who begins his/her education on or after January 1, 2007, to comply with the new educational hours before taking the exam; eliminate the ability of a student to petition the board to sit for the examination after completing 1,000 educational hours; allow a graduate of a licensed cosmetology school or a program within the public school system, after submitting a complete application for examination for licensure as a cosmetologist, hair technician, esthetician or nail technician to practice in his/her respective area for a maximum of 60 days, provided he/she practices under the supervision of a licensed professional in a

licensed salon; if he/she fails the exam the first time, he/she may continue to practice under the supervision of a licensed professional in a licensed salon for an additional 60 days, provided the applicant applies for the next available exam; the applicant may not continue to practice if he/she fails the exam twice; allows for the endorsement of current active out-of-country cosmetology licenses so long as those out-of-country qualifications are substantially similar to, equivalent to, or greater than the qualifications required of applicants from Florida; require the board and the department to adopt procedures to expedite the process by which qualified endorsement applicants may obtain information validating his/her licensure status from the applicant's original state or country; allow for work experience to be substituted for required educational hours in the amount and manner provided by board rule; and remove the current 48 hour cap on the number of hours of continuing education refresher courses.

Section 6. Amends 477.0212, F.S., to require the board to adopt rules for license renewal or continuing education; and increase statutory fee caps for the reactivation of an inactive license – from $50 to $100.

Section 7. Amends 477.023, F.S., to add the allowance of the certification of grooming and salon services training programs to the already existing cosmetology training programs within the public school system and does not prevent the government operation of any other cosmetology program in this state.

Section 8. Amends 477.025, F.S., to eliminate the distinction between a cosmetology salon and a specialty salon.

Section 9. Amends 477.026, F.S. to add hair technicians, estheticians, and nail technician categories to the current fee structures; increasing fee caps for certain fees; and to eliminate application and endorsement registration fees for specialists.

Section 10. Amends 477.0263, F.S., to exempt individuals conducting department store demonstrations who hold a valid cosmetology license in another state or country to provide cosmetology services outside of a license salon and allow licensees or registrants to perform services outside a licensed salon for special events so long as the person is employed by a licensed salon and appointments for such services are made through a licensed salon.

Section 11. Amends 477.0265, F.S., to change references from "cosmetology" to "in the field of cosmetology."

Section 12. Amends 477.028, F.S., to add conforming language to include "hair technician, esthetician, or nail technician" and change references from "cosmetology" to "in the field of cosmetology."

Section 13. Amends 477.029, F.S., to add conforming language to include "hair technician, esthetician, or nail technician" strike reference to "cosmetology" salon.

Section 14. Repeals s. 477.0201, F.S., relating to specialty registration, qualifications, registration renewal and endorsement.

Section 15. Provides an effective date of January 1, 2007.

C. SECTION DIRECTORY:

Section 1. Amends 477.013, F.S., relating to the definition of "cosmetology" and the services allowed under the "hair technician" license, the "esthetician" license, and the "nail technician" license.

Section 2. Creates 477.0131, F.S., specifying categories of licensure to include hair technician, estheticians, nail technicians, and cosmetologists.

Section 3. Amends 477.0132, F.S., relating to hair braiding, hair wrapping, and body wrapping registration.

Section 4. Amends 477.014, F.S., relating to qualifications for the practice of cosmetology.

Section 5. Amends 477.019, F.S., expanding the education requirements.

Section 6. Amends 477.0212, F.S., requiring the board to adopt rules for license renewal or continuing education; and increase statutory fee caps for the reactivation of an inactive license – from $50 to $100.

Section 7. Amends 477.023, F.S., relating to schools of cosmetology licensure.

Section 8. Amends 477.025, F.S. relating to cosmetology salons; specialty salons; requisites; licensure; inspection; mobile cosmetology salons, and to eliminate the distinction between a cosmetology salon and a specialty salon.

Section 9. Amends 477.026, F.S. relating to fees, increasing fee caps for certain fees; revising fee provisions.

Section 10. Amends 477.0263, F.S., relating to cosmetology services to be performed in licensed salon; exception.

Section 11. Amends 477.0265, F.S., relating to prohibited acts to change references from "cosmetology" to "in the field of cosmetology."

Section 12. Amends 477.028, F.S., relating to disciplinary proceedings to add conforming language.

Section 13. Amends 477.029, F.S., relating to penalties to add conforming language.

Section 14. Repeals s. 477.0201, F.S., relating to specialty registration, qualifications, registration renewal and endorsement.

Section 15. Provides an effective date of January 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

	FY 2006–07	FY 2007-08
Professional Regulation Trust Fund		
Application Fees	$ 491,348	$ 1,061,308
License Fees	443,477	3,441,774
Total Revenue	$ 934,825	$ 4,503,082

2. Expenditures:

See fiscal comments.

FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: None.

B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

C. FISCAL COMMENTS:

The DBPR projects:

- that the bill has a fiscal impact on the DBPR related to workload, testing services and licensure costs;
- the Division of Professions will need additional Other Personal Services (OPS) staff in the board office and expenses budget for travel as this bill will increase board meeting agendas and require additional travel days; and
- licensure costs will be associated with the creation of the new licenses (new application processing procedures, updating LicensEase to incorporate new licenses and their requirements, creation of new applications forms, renewal processing for new license types, etc.).

The DBPR estimates they will also have additional exam testing costs the first year related to the development of four new examinations for cosmetology licensure. The department indicates that the additional workload will be handled with existing staff.

Fee Caps

The DBPR notes that since first being regulated in 1978, cosmetology fee caps have been at the $25 fee level. Fees for endorsement applications were raised to the current level of $50 in 1982. Fees for reactivation were set at the current level of $50 in 1983. As of December 31, 2005, the balance in the cosmetology account within the Professional Regulation Trust Fund was a negative $1,042,545. Without raising the fee caps, the projected deficit as of June 30, 2009, is estimated to be $5,151,823.

The estimated revenues are based on an implementation of January 1, 2007. The maximum impact is based on the current fees being increased to the new statutory caps. In some cases the "current fees" are not at the "current statutory caps". In order to realize the increased revenue the board would have to change the rules.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill gives the board authority to develop continuing education rules for the renewal of body wrapping registrations and all other registrations existing prior to January 1, 2007. The bill allows for work experience to substitute for required educational hours in the amount and manner provided by board rule. The bill provides rulemaking authority for the renewal or reactivation requirements for inactive licensees. There is rulemaking authority which currently exists to include the proposed allowance for hair technicians, estheticians, nail technicians or registered specialists to perform services in a location other than a licensed salon such as a nursing home, hospital or residence when a client, for reasons of ill health, are unable to go to a licensed salon. The bill grants rulemaking authority for the allowance of services outside a licensed salon for special events so long as the individual is employed by a licensed salon and schedules appointments through a licensed salon.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The DBPR notes:

- Section 3. – It is unclear as to how the provision exempting a hair braiding applicant from the required 24 hours of instruction through demonstration of skill in application and removal of hair braiding through a board-approved examination would be implemented.

- Language should be included in the existing statute to show that the department currently issues a full specialty registration. A full specialty registration is merely a combination of the facial and manicure/pedicure/nail extension specialty registrations.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 16, 2006, the Business Regulation Committee adopted four amendments which modified the bill in the following manner and reported the bill favorably with committee substitute.

Amendment #1 and #2 by Carroll - Removes language referencing "manipulating tissue" to avoid conflict with massage therapy.

Amendment #3 by Carroll - Removes language to clarify that an applicant for licensure must provide documentation for approval by endorsement.

Amendment #4 by Carroll - Deletes a duplicate sentence inadvertently placed in the bill.

On April 4, 2006, the Community Colleges and Workforce Committee adopted two amendments which modified the bill in the following manner. This analysis reflects the bill as amended.

Amendment #1 – Removes the increase of the fee caps that the Board of Cosmetology may authorize for the licensing fees collected by DBPR.

Amendment #2 – Removes the word "epilating."

On April 11, 2006, the State Administration Appropriations Committee adopted two amendments which modified the bill in the following manner and reported the bill favorably with committee substitute.

Amendment #1 by Carroll – Conforms language for the definition of cosmetology.

Amendment #2 by Carroll – Increases the fee caps for certain fees.

This staff analysis has been updated to reflect the changes adopted in the committee substitute as amended on 4/11/06.

CHAMBER ACTION

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1 The State Administration Appropriations Committee recommends the
2 following:
3
4 **Council/Committee Substitute**
5 Remove the entire bill and insert:
6 A bill to be entitled
7 An act relating to cosmetology; amending s. 477.013, F.S.;
8 providing and amending definitions; redefining
9 "cosmetology" to include hair technician, esthetician, and
10 nail technician services; including body wrapping within
11 esthetician services; removing a distinction between
12 specialty salons and other salons; creating s. 477.0131,
13 F.S.; authorizing licensure for hair technicians,
14 estheticians, nail technicians, and cosmetologists;
15 amending s. 477.0132, F.S.; requiring passage of a
16 specified course to receive a hair braiding registration;
17 increasing the total hours of instruction and modifying
18 the content of instruction required to constitute a hair
19 braiding course; providing an exemption from a portion of
20 required hair braiding coursework; eliminating future body
21 wrapping registrations; authorizing renewal of current
22 body wrapping registrations; specifying that only the
23 Board of Cosmetology may review, evaluate, and approve

24 required text; amending s. 477.014, F.S.; revising
25 requirements for qualification to practice under ch. 477,
26 F.S.; authorizing current specialists to sit for licensure
27 examinations in certain circumstances; providing for the
28 renewal of current specialty registrations; amending s.
29 477.019, F.S.; revising qualification, education,
30 licensure and renewal, supervised practice, and
31 endorsement requirements for cosmetologist licenses to
32 include and differentiate qualification, education,
33 licensure and renewal, supervised practice, and
34 endorsement requirements for hair technician, esthetician,
35 and nail technician licenses; requiring the board to adopt
36 certain procedures relating to licensure by endorsement;
37 amending s. 477.0212, F.S.; increasing fee caps for the
38 reactivation of an inactive license; requiring the board
39 to adopt certain rules relating to license renewal or
40 continuing education; amending s. 477.023, F.S.;
41 stipulating that the Department of Education is not
42 prevented from issuing grooming and salon services
43 certification; amending s. 477.025, F.S., relating to
44 cosmetology and specialty salons, requisites, licensure,
45 inspection, and mobile cosmetology salons, to conform;
46 amending s. 477.026, F.S.; revising fee provisions to
47 conform; increasing fee caps for certain fees; amending s.
48 477.0263, F.S., to conform; specifying circumstances under
49 which cosmetology or specialty services may be practiced
50 outside of a licensed salon; amending s. 477.0265, F.S.,
51 relating to prohibited acts, to conform; amending s.

52 477.028, F.S., relating to disciplinary proceedings, to
53 conform; amending s. 477.029, F.S., relating to penalties,
54 to conform; repealing s. 477.0201, F.S., relating to
55 specialty registration, qualifications, registration
56 renewal, and endorsement; providing an effective date.
57
58 Be It Enacted by the Legislature of the State of Florida:
59
60 Section 1. Section 477.013, Florida Statutes, is amended
61 to read:
62 477.013 Definitions.--As used in this chapter, the term:
63 (1) "Board" means the Board of Cosmetology.
64 (2) "Department" means the Department of Business and
65 Professional Regulation.
66 (3) "Cosmetologist" means a person who is licensed to
67 engage in the practice of all cosmetology services in this state
68 under the authority of this chapter, including hair technician
69 services, esthetician services, and nail technician services, or
70 a person who is licensed prior to January 1, 2007, to engage in
71 the practice of cosmetology in this state.
72 (4) "Cosmetology" means the practice of performing or
73 offering to perform for compensation any of the following
74 services for aesthetic rather than medical purposes:
75 (a) Hair technician services, which are:
76 1. Treating a person's hair by:
77 a. Providing any method of treatment as a primary service,
78 including arranging, beautifying, lightening, cleansing,

79 coloring, cutting, dressing, processing, shampooing, shaping,
80 singeing, straightening, styling, tinting, or waving;
81 b. Providing a necessary service that is preparatory or
82 ancillary to a service under sub-subparagraph a., including
83 clipping, cutting, or trimming; or
84 c. Cutting a person's hair as a separate and independent
85 service for which a charge is directly or indirectly made
86 separately from charges for any other service.
87 2. Weaving or braiding a person's hair.
88 3. Shampooing and conditioning a person's hair.
89 4. Servicing a person's wig or artificial hairpiece on a
90 person's head in any manner listed in subparagraph 1.
91 5. Treating a person's mustache or beard by coloring,
92 processing, styling, or trimming.
93 (b) Esthetician services, which are:
94 1. Cleansing, exfoliating, or stimulating a person's skin
95 by hand or by using a mechanical device, apparatus, or appliance
96 with the use of any cosmetic preparation, antiseptic, lotion,
97 powder, oil, clay, cream, or appliance.
98 2. Beautifying a person's skin using a cosmetic
99 preparation, antiseptic, lotion, powder, oil, clay, cream, or
100 appliance.
101 3. Administering facial treatments.
102 4. Removing superfluous hair from a person's body using
103 depilatories, threading, waxing, sugaring, or tweezing.
104 5. Tinting eyebrows or eyelashes with products
105 manufactured specifically for eyebrows or eyelashes.

106 6. Body wrapping, which is a treatment program that uses
107 wraps for the purposes of cleansing and beautifying a person's
108 skin for aesthetic rather than medical or weight-loss purposes
109 and is the application of oils, lotions, or other fluids to the
110 body using wraps. Body wrapping does not include manipulation of
111 the body's superficial tissue, other than that resulting from
112 the application of the wrap materials.
113 7. Submersing parts of the body in a bath of clay, oils,
114 lotions, or other fluids.
115 (c) Nail technician services, which are:
116 1. Treating a person's nails by:
117 a. Cutting, trimming, polishing, painting, printing,
118 tinting, coloring, cleansing, manicuring, or pedicuring; or
119 b. Affixing artificial nails, extensions, or capping.
120 2. Cleansing, treating, or beautifying a person's
121 forearms, hands, legs below the knee, or feet ~~mechanical or~~
122 ~~chemical treatment of the head, face, and scalp for aesthetic~~
123 ~~rather than medical purposes, including, but not limited to,~~
124 ~~hair shampooing, hair cutting, hair arranging, hair coloring,~~
125 ~~permanent waving, and hair relaxing for compensation. This term~~
126 ~~also includes performing hair removal, including wax treatments,~~
127 ~~manicures, pedicures, and skin care services~~.
128 (5) "Salon" means a place of business where the practice
129 of one or more of the cosmetology or specialty services are
130 offered or performed for compensation.
131 (6) ~~(5)~~ "Specialist" means any person registered pursuant
132 to s. 477.014(6) to practice one or more of the following

133 specialties: ~~holding a specialty registration in one or more of~~
134 ~~the specialties registered under this chapter.~~
135 ~~(6) "Specialty" means the practice of one or more of the~~
136 ~~following:~~
137 (a) Manicuring, or the cutting, polishing, tinting,
138 coloring, cleansing, adding, or extending of the nails, and
139 massaging of the hands. This term includes any procedure or
140 process for the affixing of artificial nails, except those nails
141 which may be applied solely by use of a simple adhesive.
142 (b) Pedicuring, or the shaping, polishing, tinting, or
143 cleansing of the nails of the feet, and massaging or beautifying
144 of the feet.
145 (c) Facials, or the massaging or treating of the face or
146 scalp with oils, creams, lotions, or other preparations, and
147 skin care services, which means the treatment of the skin of a
148 person's body, in addition to a person's head, face, and scalp,
149 by the use of a sponge, brush, cloth, or similar device to apply
150 or remove a chemical preparation or other substance without
151 involving massage, as defined in s. 480.033(3), except that
152 chemical peels may be removed by peeling an applied preparation
153 from the skin by hand.
154 (7) "Shampooing" means the cleansing ~~washing~~ of the hair
155 with soap and water or with a special preparation~~, or applying~~
156 ~~hair tonics~~.
157 ~~(8) "Specialty salon" means any place of business wherein~~
158 ~~the practice of one or all of the specialties as defined in~~
159 ~~subsection (6) are engaged in or carried on.~~

160 (8) ~~(9)~~ "Hair braiding" means the weaving or interweaving
161 of a person's own natural ~~human~~ hair for compensation without
162 cutting, coloring, permanent waving, relaxing, removing, or
163 chemical treatment and does not include the use of hair
164 extensions or wefts.
165 (9) ~~(10)~~ "Hair wrapping" means the wrapping of manufactured
166 materials around a strand or strands of human hair, for
167 compensation, without cutting, coloring, permanent waving,
168 relaxing, removing, weaving, chemically treating, braiding,
169 using hair extensions, or performing any other service defined
170 as cosmetology.
171 (10) ~~(11)~~ "Photography studio salon" means an establishment
172 where the hair-arranging services and the application of
173 cosmetic products are performed solely for the purpose of
174 preparing the model or client for the photographic session
175 without shampooing, cutting, coloring, permanent waving,
176 relaxing, or removing of hair or performing any other service
177 defined as cosmetology.
178 ~~(12) "Body wrapping" means a treatment program that uses~~
179 ~~herbal wraps for the purposes of cleansing and beautifying the~~
180 ~~skin of the body, but does not include:~~
181 ~~(a) The application of oils, lotions, or other fluids to~~
182 ~~the body, except fluids contained in presoaked materials used in~~
183 ~~the wraps; or~~
184 ~~(b) Manipulation of the body's superficial tissue, other~~
185 ~~than that arising from compression emanating from the wrap~~
186 ~~materials.~~

187 ~~(13) "Skin care services" means the treatment of the skin~~
188 ~~of the body, other than the head, face, and scalp, by the use of~~
189 ~~a sponge, brush, cloth, or similar device to apply or remove a~~
190 ~~chemical preparation or other substance, except that chemical~~
191 ~~peels may be removed by peeling an applied preparation from the~~
192 ~~skin by hand. Skin care services must be performed by a licensed~~
193 ~~cosmetologist or facial specialist within a licensed cosmetology~~
194 ~~or specialty salon, and such services may not involve massage,~~
195 ~~as defined in s. 480.033(3), through manipulation of the~~
196 ~~superficial tissue.~~
197 Section 2. Section 477.0131, Florida Statutes, is created
198 to read:
199 477.0131 Hair technician, esthetician, nail technician,
200 and cosmetology licenses.--
201 (1) A person who is otherwise qualified by this chapter
202 and who is authorized to practice all of the services listed in
203 s. 477.013(4)(a) shall be licensed as a hair technician.
204 (2) A person who is otherwise qualified by this chapter
205 and who is authorized to practice all of the services listed in
206 s. 477.013(4)(b) shall be licensed as an esthetician.
207 (3) A person who is otherwise qualified by this chapter
208 and who is authorized to practice all of the services listed in
209 s. 477.013(4)(c) shall be licensed as a nail technician.
210 (4) A person who is otherwise qualified by this chapter
211 and who is authorized to practice all of the services listed in
212 s. 477.013(4) shall be licensed as a cosmetologist.
213 Section 3. Section 477.0132, Florida Statutes, is amended
214 to read:

215 477.0132 Hair braiding, hair wrapping, and body wrapping
216 registration.--
217 (1) A person whose occupation or practice is confined
218 solely to hair braiding shall register with the department,
219 shall pay the applicable registration fees, and shall take and
220 pass a course consisting of a minimum of 40 hours, except as
221 otherwise provided in this subsection. The course shall be
222 approved by the board and shall consist of 4 hours of
223 instruction in HIV/AIDS and other communicable diseases, 5 hours
224 of instruction in sanitation and sterilization, 5 hours of
225 instruction in disorders and diseases of the scalp, 2 hours of
226 instruction regarding laws affecting hair braiding, and 24 hours
227 of instruction in the application and removal of hair braiding.
228 A person who demonstrates skill in the application and removal
229 of hair braiding through a board-approved examination may be
230 exempt from the 24 hours of instruction in the application and
231 removal of hair braiding.
232 ~~(a) Persons whose occupation or practice is confined~~
233 ~~solely to hair braiding must register with the department, pay~~
234 ~~the applicable registration fee, and take a two-day 16-hour~~
235 ~~course. The course shall be board approved and consist of 5~~
236 ~~hours of HIV/AIDS and other communicable diseases, 5 hours of~~
237 ~~sanitation and sterilization, 4 hours of disorders and diseases~~
238 ~~of the scalp, and 2 hours of studies regarding laws affecting~~
239 ~~hair braiding.~~
240 (2) ~~(b)~~ A person ~~Persons~~ whose occupation or practice is
241 confined solely to hair wrapping shall ~~must~~ register with the
242 department, pay the applicable registration fee, and take a one-

243 day 6-hour course. The course shall be board approved and
244 consist of instruction ~~education~~ in HIV/AIDS and other
245 communicable diseases, sanitation and sterilization, disorders
246 and diseases of the scalp, and instruction ~~studies~~ regarding
247 laws affecting hair wrapping.
248 (3) A person holding a registration in body wrapping
249 before January 1, 2007, may continue to practice body wrapping
250 as described in s. 477.013(4)(b)6. The board shall adopt by rule
251 continuing education requirements for the renewal of body
252 wrapping registrations.
253 ~~(c) Unless otherwise licensed or exempted from licensure~~
254 ~~under this chapter, any person whose occupation or practice is~~
255 ~~body wrapping must register with the department, pay the~~
256 ~~applicable registration fee, and take a two-day 12-hour course.~~
257 ~~The course shall be board approved and consist of education in~~
258 ~~HIV/AIDS and other communicable diseases, sanitation and~~
259 ~~sterilization, disorders and diseases of the skin, and studies~~
260 ~~regarding laws affecting body wrapping.~~
261 (4) ~~(d)~~ Only the board may review, evaluate, and approve a
262 course and text required of an applicant for registration under
263 this section ~~subsection~~ in the occupation or practice of hair
264 braiding or~~,~~ hair wrapping~~, or body wrapping~~. A provider of such
265 a course is not required to hold a license under chapter 1005.
266 (5) ~~(2)~~ Hair braiding and~~,~~ hair wrapping~~, and body wrapping~~
267 are not required to be practiced in a ~~cosmetology~~ salon ~~or~~
268 ~~specialty salon~~. When hair braiding or~~,~~ hair wrapping~~, or body~~
269 ~~wrapping~~ is practiced outside a ~~cosmetology~~ salon ~~or specialty~~
270 ~~salon~~, disposable implements shall ~~must~~ be used or all

271 implements shall ~~must~~ be sanitized in a disinfectant approved
272 for hospital use or approved by the federal Environmental
273 Protection Agency.
274 ~~(3) Pending issuance of registration, a person is eligible~~
275 ~~to practice hair braiding, hair wrapping, or body wrapping upon~~
276 ~~submission of a registration application that includes proof of~~
277 ~~successful completion of the education requirements and payment~~
278 ~~of the applicable fees required by this chapter.~~
279 Section 4. Section 477.014, Florida Statutes, is amended
280 to read:
281 477.014 Qualifications for practice.--
282 (1) On and after January 1, 2007, a ~~1979, no~~ person who is
283 not ~~other than a~~ duly licensed or registered under this chapter
284 may not ~~cosmetologist shall~~ practice in any of the cosmetology
285 areas provided in s. 477.013(4) or use the name or title of
286 cosmetologist, hair technician, esthetician, or nail technician.
287 (2) A person licensed or registered under this chapter on
288 or after January 1, 2007, may not practice or hold himself or
289 herself out as qualified to practice in an area in which he or
290 she is not specifically licensed or registered under this
291 chapter.
292 (3) A cosmetologist licensed before January 1, 2007, may
293 perform all the services of a licensed cosmetologist as defined
294 in this chapter.
295 (4) A facial specialist registered or enrolled in a
296 cosmetology school before January 1, 2007, may take the
297 examination for an esthetician license.

298 (5) A manicure, pedicure, and nail extension specialist
299 registered or enrolled in a cosmetology school before January 1,
300 2007, may take the examination for a nail technician license.
301 (6) A specialist registered under this chapter before
302 January 1, 2007, may continue to practice under the name of his
303 or her specialty registration without taking the respective
304 licensure examination. Renewal of all registrations existing
305 before January 1, 2007, shall be accomplished pursuant to rules
306 adopted by the board. Such renewal shall include a full
307 specialty registration, which combines facial and manicure,
308 pedicure, and nail extension.
309 Section 5. Section 477.019, Florida Statutes, is amended
310 to read:
311 477.019 Cosmetologists; hair technicians; estheticians;
312 nail technicians; qualifications; licensure; supervised
313 practice; license renewal; endorsement; continuing education.--
314 (1) A person desiring to be licensed in the field of
315 cosmetology ~~as a cosmetologist~~ shall apply to the department for
316 licensure.
317 (2) An applicant is ~~shall be~~ eligible for licensure by
318 examination to practice cosmetology, hair technician services,
319 esthetician services, or nail technician services if the
320 applicant:
321 (a) Is at least 16 years of age or has received a high
322 school diploma or graduate equivalency diploma or has passed an
323 ability-to-benefit test, which is an independently administered
324 test approved by the United States Secretary of Education as
325 provided in 20 U.S.C. s. 1091(d).~~;~~

326 (b) Pays the required application fee, which is not
327 refundable, and the required examination fee, which is
328 refundable if the applicant is determined to not be eligible for
329 licensure for any reason other than failure to successfully
330 complete the licensure examination.~~; and~~
331 (c)1. Is authorized to practice cosmetology in another
332 state or country, has been so authorized for at least 1 year,
333 and does not qualify for licensure by endorsement as provided
334 for in subsection (6); or
335 2.a. Has received a minimum number of hours of training as
336 follows:
337 (I) For a hair technician, 1,000 hours.
338 (II) For an esthetician, 600 hours.
339 (III) For a nail technician, 350 hours.
340 (IV) For a cosmetologist, 1,800 hours.
341 b. The training ~~Has received a minimum of 1,200 hours of~~
342 ~~training as established by the board, which~~ shall include, but
343 need ~~shall~~ not be limited to, the equivalent of completion of
344 services directly related to the practice of cosmetology at one
345 of the following:
346 (I)~~a.~~ A school of cosmetology licensed pursuant to chapter
347 1005.
348 (II)~~b.~~ A cosmetology program within the public school
349 system.
350 (III)~~c.~~ The Cosmetology Division of the Florida School for
351 the Deaf and the Blind, provided the division meets the
352 standards of this chapter.

353 (IV)~~d.~~ A government-operated cosmetology program in this
354 state.
355 c. A person who has enrolled and begun his or her
356 education before January 1, 2007, may take the examination to be
357 licensed as a cosmetologist upon completion of 1,200 hours of
358 education.
359 d. A person who begins his or her education on or after
360 January 1, 2007, shall comply with the hour requirements in sub-
361 subparagraph a. in order to qualify to take his or her
362 respective examination.
363
364 ~~The board shall establish by rule procedures whereby the school~~
365 ~~or program may certify that a person is qualified to take the~~
366 ~~required examination after the completion of a minimum of 1,000~~
367 ~~actual school hours. If the person then passes the examination,~~
368 ~~he or she shall have satisfied this requirement; but if the~~
369 ~~person fails the examination, he or she shall not be qualified~~
370 ~~to take the examination again until the completion of the full~~
371 ~~requirements provided by this section.~~
372 (3) Upon an applicant receiving a passing grade, as
373 established by board rule, on the examination and paying the
374 initial licensing fee, the department shall issue a license to
375 practice in the applicant's respective area of cosmetology
376 provided in s. 477.013(4).
377 (4) After submitting a complete application to take the
378 first available examination for licensure as a cosmetologist,
379 hair technician, esthetician, or nail technician, a graduate of
380 a licensed cosmetology school or a program within the public

381 school system, which school or program is certified by the
382 Department of Education, is eligible to practice in the
383 graduate's respective area for a maximum period of 60 days,
384 provided such graduate practices under the supervision of a
385 professional licensed under this chapter in a licensed salon. A
386 graduate who fails to pass an examination the first time may
387 continue to practice under the supervision of a professional
388 licensed under this chapter in a licensed salon for an
389 additional 60-day period, provided the graduate applies for the
390 next available examination. A graduate may not continue to
391 practice under this subsection if the graduate fails the
392 examination twice. ~~Following the completion of the first~~
393 ~~licensing examination and pending the results of that~~
394 ~~examination and issuance of a license to practice cosmetology,~~
395 ~~graduates of licensed cosmetology schools or cosmetology~~
396 ~~programs offered in public school systems, which schools or~~
397 ~~programs are certified by the Department of Education, are~~
398 ~~eligible to practice cosmetology, provided such graduates~~
399 ~~practice under the supervision of a licensed cosmetologist in a~~
400 ~~licensed cosmetology salon. A graduate who fails the first~~
401 ~~examination may continue to practice under the supervision of a~~
402 ~~licensed cosmetologist in a licensed cosmetology salon if the~~
403 ~~graduate applies for the next available examination and until~~
404 ~~the graduate receives the results of that examination. No~~
405 ~~graduate may continue to practice under this subsection if the~~
406 ~~graduate fails the examination twice.~~
407 (5) Renewal of license registration shall be accomplished
408 pursuant to rules adopted by the board.

409 (6) The board shall adopt rules specifying procedures for
410 the licensure by endorsement of practitioners desiring to be
411 licensed in this state who hold a current active license in
412 another state or country and who have met qualifications
413 substantially similar to, equivalent to, or greater than the
414 qualifications required of applicants from this state. For
415 purposes of this subsection, work experience may be substituted
416 for required educational hours in the amount and manner provided
417 by board rule.
418 (7)(a) The board shall prescribe by rule continuing
419 education requirements for licensees and registered specialists
420 that ~~intended to~~ ensure the protection of the public through
421 updated training of licensees and registered specialists, not to
422 exceed 16 hours biennially, as a condition for renewal of a
423 license or registration as a specialist under this chapter.
424 Continuing education courses shall include, but not be limited
425 to, the following subjects as they relate to the practice of
426 cosmetology: HIV/AIDS ~~human immunodeficiency virus and acquired~~
427 ~~immune deficiency syndrome~~; Occupational Safety and Health
428 Administration regulations; workers' compensation issues; state
429 and federal laws and rules as they pertain to cosmetologists,
430 the practice of cosmetology, salons, specialists, ~~specialty~~
431 ~~salons,~~ and booth renters; chemical makeup as it pertains to
432 hair, skin, and nails; and environmental issues. Courses given
433 at educational ~~cosmetology~~ conferences may be counted toward the
434 number of continuing education hours required if approved by the
435 board.

436 (b) Any person whose occupation or practice is confined
437 solely to hair braiding or~~,~~ hair wrapping~~, or body wrapping~~ is
438 exempt from the continuing education requirements of this
439 subsection.
440 (c) The board may, by rule, require any licensee in
441 violation of a continuing education requirement to take a
442 refresher course or refresher course and examination in addition
443 to any other penalty. ~~The number of hours for the refresher~~
444 ~~course may not exceed 48 hours.~~
445 Section 6. Section 477.0212, Florida Statutes, is amended
446 to read:
447 477.0212 Inactive status.--
448 (1) A ~~cosmetologist's~~ license issued under this chapter
449 that has become inactive may be reactivated under s. 477.019
450 upon application to the department.
451 (2) The board shall adopt ~~promulgate~~ rules relating to
452 licenses that ~~which~~ have become inactive and for the renewal of
453 inactive licenses. The board shall prescribe by rule a fee not
454 to exceed $100 ~~$50~~ for the reactivation of an inactive license
455 ~~and a fee not to exceed $50 for the renewal of an inactive~~
456 ~~license~~. The board shall prescribe by rule the continuing
457 education requirements to be met prior to license renewal or
458 reactivation.
459 Section 7. Section 477.023, Florida Statutes, is amended
460 to read:
461 477.023 Schools of cosmetology; licensure.--A ~~No~~ private
462 school of cosmetology may not ~~shall be permitted to~~ operate
463 without a license issued by the Commission for Independent

464 Education pursuant to chapter 1005. However, this chapter does
465 not ~~nothing herein shall be construed to~~ prevent certification
466 by the Department of Education of grooming and salon services
467 and cosmetology training programs within the public school
468 system or ~~to~~ prevent government operation of any other program
469 of cosmetology in this state.
470 Section 8. Section 477.025, Florida Statutes, is amended
471 to read:
472 477.025 ~~Cosmetology salons; specialty~~ Salons; requisites;
473 licensure; inspection; mobile ~~cosmetology~~ salons.--
474 (1) No ~~cosmetology salon or specialty~~ salon shall be
475 permitted to operate without a license issued by the department
476 except as provided in subsection (11).
477 (2) The board shall adopt rules governing the licensure
478 and operation of salons ~~and specialty salons~~ and their
479 facilities, personnel, safety and sanitary requirements, and the
480 license application and granting process.
481 (3) Any person, firm, or corporation desiring to operate a
482 ~~cosmetology salon or specialty~~ salon in the state shall submit
483 to the department a salon ~~an~~ application form ~~upon forms~~
484 provided by the department, ~~and accompanied by~~ any relevant
485 information requested by the department, and ~~by~~ an application
486 fee.
487 (4) Upon receiving the application, the department may
488 cause an investigation to be made of the proposed ~~cosmetology~~
489 ~~salon or specialty~~ salon.
490 (5) When an applicant fails to meet all the requirements
491 provided herein, the department shall deny the application in

492 writing and shall list the specific requirements not met. No
493 applicant denied licensure because of failure to meet the
494 requirements herein shall be precluded from reapplying for
495 licensure.
496 (6) When the department determines that the proposed
497 ~~cosmetology salon or specialty~~ salon may reasonably be expected
498 to meet the requirements set forth herein, the department shall
499 grant the license upon such conditions as it shall deem proper
500 under the circumstances and upon payment of the original
501 licensing fee.
502 (7) No license for operation of a ~~cosmetology salon or~~
503 ~~specialty~~ salon may be transferred from the name of the original
504 licensee to another. It may be transferred from one location to
505 another only upon approval by the department, which approval
506 shall not be unreasonably withheld.
507 (8) Renewal of license registration for ~~cosmetology salons~~
508 ~~or specialty~~ salons shall be accomplished pursuant to rules
509 adopted by the board. The board is further authorized to adopt
510 rules governing delinquent renewal of licenses and may impose
511 penalty fees for delinquent renewal.
512 (9) The board is authorized to adopt rules governing the
513 periodic inspection of ~~cosmetology salons and specialty~~ salons
514 licensed under this chapter.
515 (10)(a) The board shall adopt rules governing the
516 licensure, operation, and inspection of mobile ~~cosmetology~~
517 salons, including their facilities, personnel, and safety and
518 sanitary requirements.

519 (b) Each mobile salon must comply with all licensure and
520 operating requirements specified in this chapter or chapter 455
521 or rules of the board or department that apply to ~~cosmetology~~
522 salons at fixed locations, except to the extent that such
523 requirements conflict with this subsection or rules adopted
524 pursuant to this subsection.
525 (c) A mobile ~~cosmetology~~ salon must maintain a permanent
526 business address, located in the inspection area of the local
527 department office, at which records of appointments,
528 itineraries, license numbers of employees, and vehicle
529 identification numbers of the licenseholder's mobile salon shall
530 be kept and made available for verification purposes by
531 department personnel, and at which correspondence from the
532 department can be received.
533 (d) To facilitate periodic inspections of mobile
534 ~~cosmetology~~ salons, prior to the beginning of each month each
535 mobile salon licenseholder must file with the board a written
536 monthly itinerary listing the locations where and the dates and
537 hours when the mobile salon will be operating.
538 (e) The board shall establish fees for mobile ~~cosmetology~~
539 salons, not to exceed the fees for ~~cosmetology~~ salons at fixed
540 locations.
541 (f) The operation of mobile ~~cosmetology~~ salons must be in
542 compliance with all local laws and ordinances regulating
543 business establishments, with all applicable requirements of the
544 Americans with Disabilities Act relating to accommodations for
545 persons with disabilities, and with all applicable OSHA
546 requirements.

547 (11) Facilities licensed under part II or part III of
548 chapter 400 shall be exempt from the provisions of this section
549 and a cosmetologist licensed pursuant to s. 477.019 may provide
550 salon services exclusively for facility residents.
551 Section 9. Section 477.026, Florida Statutes, is amended
552 to read:
553 477.026 Fees; disposition.--
554 (1) The board shall set fees according to the following
555 schedule:
556 (a) For hair technicians, estheticians, nail technicians,
557 or cosmetologists, fees for original licensing, license renewal,
558 and delinquent renewal may ~~shall~~ not exceed $50 ~~$25~~.
559 (b) For hair technicians, estheticians, nail technicians,
560 or cosmetologists, fees for endorsement application,
561 examination, and reexamination may ~~shall~~ not exceed $150 ~~$50~~.
562 (c) For ~~cosmetology and specialty~~ salons, fees for license
563 application, original licensing, license renewal, and delinquent
564 renewal may ~~shall~~ not exceed $100 ~~$50~~.
565 ~~(d) For specialists, fees for application and endorsement~~
566 ~~registration shall not exceed $30.~~
567 (d) ~~(e)~~ For specialists, fees for ~~initial registration,~~
568 registration renewal~~,~~ and delinquent renewal may ~~shall~~ not
569 exceed $100 ~~$50~~.
570 (e) ~~(f)~~ For hair braiders and~~,~~ hair wrappers, ~~and body~~
571 ~~wrappers,~~ fees for registration may ~~shall~~ not exceed $40 ~~$25~~.
572 (2) All moneys collected by the department from fees
573 authorized by this chapter shall be paid into the Professional
574 Regulation Trust Fund, which fund is created in the department,

575 and shall be applied in accordance with ss. 215.37 and 455.219.
576 The Legislature may appropriate any excess moneys from this fund
577 to the General Revenue Fund.
578 (3) The department, with the advice of the board, shall
579 prepare and submit a proposed budget in accordance with law.
580 Section 10. Section 477.0263, Florida Statutes, is amended
581 to read:
582 477.0263 Cosmetology services to be performed in licensed
583 salon; exceptions ~~exception~~.--
584 (1) Cosmetology or specialty services shall be performed
585 only by licensed cosmetologists, hair technicians, estheticians,
586 nail technicians, or registered specialists in licensed salons,
587 except as otherwise provided in this section.
588 (2) Pursuant to rules established by the board,
589 cosmetology or specialty services may be performed by a licensed
590 cosmetologist, hair technician, esthetician, nail technician, or
591 registered specialist in a location other than a licensed salon,
592 including, but not limited to, a nursing home, hospital, or
593 residence, when a client for reasons of ill health is unable to
594 go to a licensed salon. Arrangements for the performance of such
595 cosmetology or specialty services in a location other than a
596 licensed salon shall be made only through a licensed salon.
597 (3) Any person who holds a valid cosmetology license in
598 any state or who is authorized to practice cosmetology in any
599 country, territory, or jurisdiction of the United States may
600 perform cosmetology services in a location other than a licensed
601 salon when such services are performed in connection with the
602 motion picture, fashion photography, theatrical, or television

603 industry; a photography studio salon; a manufacturer trade show
604 demonstration; a department store demonstration; or an
605 educational seminar.
606 (4) Pursuant to rules established by the board,
607 cosmetology, hair technician, esthetician, nail technician, or
608 specialty services may be performed in a location other than a
609 licensed salon when such services are performed in connection
610 with a special event and are performed by a person who is
611 employed by a licensed salon and who holds the proper license or
612 specialty registration. Scheduling an appointment for the
613 performance of such services in a location other than a licensed
614 salon shall be made through a licensed salon.
615 Section 11. Section 477.0265, Florida Statutes, is amended
616 to read:
617 477.0265 Prohibited acts.--
618 (1) It is unlawful for any person to:
619 (a) Engage in the practice of cosmetology or a specialty
620 without an active license in the field of cosmetology ~~as a~~
621 ~~cosmetologist~~ or registration as a specialist issued by the
622 department pursuant to the provisions of this chapter.
623 (b) Own, operate, maintain, open, establish, conduct, or
624 have charge of, either alone or with another person or persons,
625 a ~~cosmetology salon or specialty~~ salon:
626 1. Which is not licensed under the provisions of this
627 chapter; or
628 2. In which a person not licensed in the field of
629 cosmetology or registered as a ~~cosmetologist or a~~ specialist is
630 permitted to perform cosmetology services or any specialty.

631 (c) Engage in willful or repeated violations of this
632 chapter or of any rule adopted by the board.
633 (d) Permit an employed person to engage in the practice of
634 cosmetology or of a specialty unless such person holds a valid,
635 active license in the field of cosmetology ~~as a cosmetologist~~ or
636 a registration as a specialist.
637 (e) Obtain or attempt to obtain a license or registration
638 for money, other than the required fee, or any other thing of
639 value or by fraudulent misrepresentations.
640 (f) Use or attempt to use a license to practice in the
641 field of cosmetology or a registration to practice a specialty,
642 which license or registration is suspended or revoked.
643 (g) Advertise or imply that skin care services or body
644 wrapping, as performed under this chapter, has ~~have~~ any
645 relationship to the practice of massage therapy as defined in s.
646 480.033(3), except those practices or activities defined in s.
647 477.013.
648 (h) In the practice of cosmetology, use or possess a
649 cosmetic product containing a liquid nail monomer containing any
650 trace of methyl methacrylate (MMA).
651 (2) Any person who violates any provision of this section
652 commits a misdemeanor of the second degree, punishable as
653 provided in s. 775.082 or s. 775.083.
654 Section 12. Section 477.028, Florida Statutes, is amended
655 to read:
656 477.028 Disciplinary proceedings.--
657 (1) The board may ~~shall have the power to~~ revoke or
658 suspend the license of a cosmetologist, hair technician,

659 esthetician, or nail technician licensed under this chapter, or
660 the registration of a specialist registered under this chapter,
661 and may ~~to~~ reprimand, censure, deny subsequent licensure or
662 registration of, or otherwise discipline a cosmetologist, hair
663 technician, esthetician, nail technician, or a specialist
664 licensed or registered under this chapter in any of the
665 following cases:
666 (a) Upon proof that a license or registration has been
667 obtained by fraud or misrepresentation.
668 (b) Upon proof that the holder of a license or
669 registration is guilty of fraud or deceit or of gross
670 negligence, incompetency, or misconduct in the practice or
671 instruction of cosmetology or a specialty.
672 (c) Upon proof that the holder of a license or
673 registration is guilty of aiding, assisting, procuring, or
674 advising any unlicensed person to practice in the field of
675 cosmetology ~~as a cosmetologist~~.
676 (2) The board may ~~shall have the power to~~ revoke or
677 suspend the license of a ~~cosmetology salon or a specialty~~ salon
678 licensed under this chapter; ~~, to~~ deny subsequent licensure of
679 such salon; ~~,~~ or ~~to~~ reprimand, censure, or otherwise discipline
680 the owner of such salon in either of the following cases:
681 (a) Upon proof that a license has been obtained by fraud
682 or misrepresentation.
683 (b) Upon proof that the holder of a license is guilty of
684 fraud or deceit or of gross negligence, incompetency, or
685 misconduct in the operation of the salon so licensed.

686 (3) Disciplinary proceedings shall be conducted pursuant
687 to the provisions of chapter 120.
688 (4) The department may ~~shall~~ not issue or renew a license
689 or certificate of registration under this chapter to any person
690 against whom or salon against which the board has assessed a
691 fine, interest, or costs associated with investigation and
692 prosecution until the person or salon has paid in full such
693 fine, interest, or costs associated with investigation and
694 prosecution or until the person or salon complies with or
695 satisfies all terms and conditions of the final order.
696 Section 13. Section 477.029, Florida Statutes, is amended
697 to read:
698 477.029 Penalty.--
699 (1) It is unlawful for any person to:
700 (a) Hold himself or herself out as a cosmetologist, hair
701 technician, esthetician, nail technician, specialist, hair
702 wrapper, hair braider, or body wrapper unless duly licensed or
703 registered, or otherwise authorized, as provided in this
704 chapter.
705 (b) Operate any ~~cosmetology~~ salon unless it has been duly
706 licensed as provided in this chapter.
707 (c) Permit an employed person to practice cosmetology or a
708 specialty unless duly licensed or registered, or otherwise
709 authorized, as provided in this chapter.
710 (d) Present as his or her own the license of another.
711 (e) Give false or forged evidence to the department in
712 obtaining any license provided for in this chapter.

713 (f) Impersonate any other licenseholder of like or
714 different name.
715 (g) Use or attempt to use a license that has been revoked.
716 (h) Violate any provision of s. 455.227(1), s. 477.0265,
717 or s. 477.028.
718 (i) Violate or refuse to comply with any provision of this
719 chapter or chapter 455 or a rule or final order of the board or
720 the department.
721 (2) Any person who violates the provisions of this section
722 is ~~shall be~~ subject to one or more of the following penalties,
723 as determined by the board:
724 (a) Revocation or suspension of any license or
725 registration issued pursuant to this chapter.
726 (b) Issuance of a reprimand or censure.
727 (c) Imposition of an administrative fine not to exceed
728 $500 for each count or separate offense.
729 (d) Placement on probation for a period of time and
730 subject to such reasonable conditions as the board may specify.
731 (e) Refusal to certify to the department an applicant for
732 licensure.
733 Section 14. Section 477.0201, Florida Statutes, is
734 repealed.
735 Section 15. This act shall take effect January 1, 2007.