The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Lee, Chair
Senator Soto, Vice Chair

MEETING DATE: Tuesday, April 1, 2014
TIME: 9:00 —11:00 a.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Lee, Chair; Senator Soto, Vice Chair; Senators Bradley, Gardiner, Joyner, Latvala, Richter, Ring, and Thrasher

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**CS/SB 586** Environmental Preservation and Conservation / Altman (Similar CS/CS/H 325)	Brownfields; Revising legislative intent with regard to community revitalization in certain areas; revising procedures for designation of brownfield areas by local governments; providing procedures for adoption of a resolution; providing requirements for notice and public hearings; authorizing local governments to use a term other than "brownfield area" when naming such areas; providing an exemption from liability for property damages for entities that execute and implement certain brownfield site rehabilitation agreements, etc. EP 02/05/2014 Fav/CS CA 03/05/2014 Favorable JU 03/18/2014 Not Considered JU 03/25/2014 Not Considered JU 04/01/2014	
2	**SB 870** Smith (Compare CS/H 375)	Insurance; Providing that the absence of a countersignature does not affect the validity of a policy or contract, etc. BI 03/11/2014 Favorable JU 03/25/2014 Not Considered JU 04/01/2014	
3	**SB 1626** Lee (Similar H 1355, Compare CS/H 975, S 600)	Administrative Procedures; Providing conditions under which a proceeding is not substantially justified for purposes of an award under the Florida Equal Access to Justice Act; authorizing certain parties to provide to an agency their understanding of how certain rules apply to specific facts; authorizing the administrative law judge to award attorney fees under certain circumstances; authorizing a party to request mediation of a rule challenge and declaratory statement proceedings, etc. JU 03/25/2014 Not Considered JU 04/01/2014 GO AP	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SB 1496** Evers (Similar H 7039)	Unlicensed Practice of Law; Creating exceptions to the prohibition of unlicensed practice of law, etc. JU 03/25/2014 JU 04/01/2014 GO RC	
5	**CS/SB 1138** Agriculture / Evers (Similar CS/H 1135)	Civil Liability of Farmers; Expanding an existing exemption from civil liability for farmers who gratuitously allow a person to enter upon their land for the purpose of removing farm produce or crops left in the field after harvesting to include farmers who gratuitously allow a person to enter upon their land to remove any farm produce or crops, etc. AG 03/17/2014 Fav/CS JU 04/01/2014	
6	**CS/SB 702** Regulated Industries / Bean (Similar H 745)	Pharmacy Audits; Enumerating the rights of pharmacies relating to audits of pharmaceutical services which are conducted by certain entities; requiring the Office of Insurance Regulation to investigate complaints alleging a violation of pharmacy rights; providing that a willful violation of such rights is an unfair claim settlement practice; exempting audits in which fraudulent activity is suspected or which are related to Medicaid claims, etc. HP 02/11/2014 Favorable RI 03/06/2014 Temporarily Postponed RI 03/13/2014 Fav/CS JU 04/01/2014 AP	
7	**SB 862** Health Policy (Compare H 1381)	Prescription Drug Monitoring; Revising provisions relating to the comprehensive electronic database system and prescription drug monitoring program maintained by the Department of Health; requiring a law enforcement agency to submit a court order as a condition of direct access to information in the program; authorizing the department to provide relevant information that does not contain personal identifying information if the program manager determines a specified pattern exists, etc. JU 04/01/2014 RC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	**CS/SB 976** Health Policy / Bean (Similar CS/H 1179)	Nurse Registries; Providing that registered nurses, licensed practical nurses, certified nursing assistants, companions or homemakers, and home health aides are independent contractors and not employees of the nurse registries that referred them; requiring that certain records be kept in accordance with rules set by the Agency for Health Care Administration; providing that a nurse registry does not have an obligation to review and act upon such records except under certain circumstances; providing the duties of the nurse registry for a violation of certain laws by an individual referred by the nurse registry, etc. HP 03/05/2014 Fav/CS JU 04/01/2014 RC	
9	**SB 920** Dean (Compare CS/CS/H 659)	Protection of Crime Victims; Requiring a licensed private investigator and private investigative agency to determine if an individual being investigated is a petitioner requesting notification of service of an injunction for protection against domestic violence, repeat violence, sexual violence, or dating violence or is a participant in the Address Confidentiality Program for Victims of Domestic Violence within the Office of the Attorney General; providing that a person commits a misdemeanor of the first degree if he or she violates a final injunction for protection against stalking or cyberstalking by having in his or her care, custody, possession, or control any firearm or ammunition, etc. CJ 03/17/2014 Not Considered CJ 03/24/2014 Favorable JU 04/01/2014 AP	
10	**CS/SB 972** Children, Families, and Elder Affairs / Galvano (Similar CS/H 561)	Attorneys for Dependent Children with Disabilities; Providing legislative findings and intent; requiring appointment of an attorney to represent a dependent child who meets one or more specified criteria; requiring the appointment to be in writing; requiring that the appointment continue in effect until the attorney is allowed to withdraw or is discharged by the court or until the case is dismissed; requiring that an attorney not acting in a pro bono capacity be adequately compensated for his or her services and have access to funding for certain costs; providing for financial oversight by the Justice Administrative Commission; providing a limit on attorney fees, etc. CF 03/18/2014 Fav/CS JU 04/01/2014 AP	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
11	**SB 104** Soto (Compare CS/H 755)	Family Law; Providing for consideration of time-sharing schedules or time-sharing arrangements as a factor in the adjustment of awards of child support; authorizing judges in family cases to take judicial notice of certain court records without prior notice to the parties when imminent danger to persons or property has been alleged and it is impractical to give prior notice; providing for a deferred opportunity to present evidence; creating an exception to a prohibition against using evidence other than the verified pleading or affidavit in an ex parte hearing for a temporary injunction for protection against domestic violence, repeat violence, sexual violence, dating violence, or stalking, etc. JU 04/01/2014 CF RC	
12	**CS/SB 798** Regulated Industries / Ring (Similar CS/CS/H 807, Compare H 871, CS/S 1462)	Residential Properties; Providing a condominium association that does not include any units classified as a timeshare project is not required to apply for or receive a public lodging establishment license; providing that an amendment to a declaration relating to rental condominium units does not apply to unit owners who vote against the amendment; providing authority to an association to inspect and repair abandoned condominium units; providing that in the absence of an insurable event, the association or unit owners are responsible for repairs, etc. RI 03/06/2014 Fav/CS JU 04/01/2014 AP	
13	**CS/SB 834** Governmental Oversight and Accountability / Latvala (Identical CS/H 781)	Legal Notices; Requiring legal notices to be posted on a newspaper's website on web pages with specified titles; prohibiting charging a fee or requiring registration for viewing online legal notices; establishing the period for which legal notices are required to be published on the statewide website; requiring that legal notices be archived on the statewide website for a specified period; deleting a provision relating to harmless error; clarifying payment provisions, etc. GO 03/13/2014 Fav/CS JU 04/01/2014 AP RC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
14	**CS/SB 1400** Education / Latvala (Compare H 51, H 205, H 275, CS/CS/CS/H 851, H 5101, CS/CS/H 7057, S 300, S 428, S 732, S 1202)	Postsecondary Student Tuition; Revising the standard tuition and out-of-state fees for workforce education postsecondary programs leading to certain certificates and diplomas and certain other programs at Florida College System institutions; deleting a requirement that the Office of Economic and Demographic Research annually report the rate of inflation to the Governor, the Legislature, and the State Board of Education; requiring a state university, a Florida College System institution, a career center operated by a school district, or a charter technical career center to waive undergraduate tuition for a recipient of a Purple Heart or another combat decoration superior in precedence under certain conditions, etc. ED 03/18/2014 Fav/CS JU 04/01/2014 AED AP	
15	**SB 1526** Thrasher (Identical H 7087, Compare H 7085, Link CS/S 1524)	Public Records/Department of Legal Affairs; Providing exemptions from public records requirements for the notice of a data breach and information held by the Department of Legal Affairs pursuant to certain investigations; authorizing disclosure under certain circumstances; providing for future review and repeal of the exemption under the Open Government Sunset Review Act; providing a statement of public necessity, etc. JU 04/01/2014 RC	
	Other Related Meeting Documents		

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 586
INTRODUCER:	Environmental Preservation and Conservation Committee and Senator Altman
SUBJECT:	Brownfields
DATE:	March 17, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gudeman	Uchino	EP	**Fav/CS**
2.	Stearns	Yeatman	CA	**Favorable**
3.	Davis	Cibula	JU	**Pre-meeting**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 586 clarifies procedures for brownfield designation under the Brownfields Redevelopment Act. The bill provides additional liability protection for individuals responsible for rehabilitating brownfield sites.

II. Present Situation:

The Brownfields Redevelopment Act

The term "brownfield" came into existence in the 1970s and originally referred to any previously developed property, regardless of any contamination issues. The term, as it is currently used, originated in 1992 during a U.S. Congressional field hearing and is defined by the U.S. Environmental Protection Agency (EPA) as, "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[1] In 1995, the EPA created the Brownfields Program in order to manage contaminated property through site remediation and redevelopment. The program was designed to provide local communities access to federal funds allocated for

[1] Robert A. Jones and William F. Welsh, *Michigan Brownfield Redevelopment Innovation: Two Decades of Success*, (September 2010), *available at* http://www.miseagrant.umich.edu/downloads/focus/brownfields/10-201-EMU-Final-Report.pdf (last visited March 14, 2014).

redevelopment, including environmental assessments and cleanups, environmental health studies, and environmental training programs.[2]

In 1997, the Florida Legislature enacted the Brownfields Redevelopment Act (Act).[3] The Act provides financial and regulatory incentives to encourage voluntary remediation and redevelopment of brownfield sites in order to improve public health and reduce environmental hazards.[4] The Act required the Department of Environmental Protection (DEP) to adopt rules to determine site-specific investigation methods, clean-up methods, and cleanup target levels by incorporating risk based corrective action (RBCA) principles,[5] which it did in 1998.[6] In 2013, in an effort to provide consistency and consolidate the cleanup criteria rules, the DEP repealed Rule 62-785, Florida Administrative Code, and is currently merging the rules with Rule 62-780, Florida Administrative Code.

The Act provides liability protection for program participants who have not caused or contributed to the contamination of a brownfield site on or after July 1, 1997. A person who successfully completes a brownfield site rehabilitation agreement (BSRA) is relieved from further liability for remediation of the contaminated site or sites to the state and to third parties.[7] The Act also provides protection from liability for contribution to any other party who has or may incur liability for cleanup of the contaminated site.[8] The Act does not limit the right of a third party, other than the state, to pursue an action for damages to property or person. An action may not require rehabilitation in excess of what is outlined in the approved BSRA, or required by the DEP or the local pollution control program.[9]

The Act provides lenders the same liability protections as program participants as long as the lender has not caused or contributed to the contamination of a brownfield site. The lender liability protections are provided to encourage financing of real-property transactions involving brownfield sites.[10]

The Act also created the brownfield redevelopment bonus refund to provide a refund to qualified businesses for new jobs that are created in a brownfield area.[11] The Act identifies specific

---

[2] The Florida Brownfields Association, *Brownfields 101, available at* http://floridabrownfields.org/associations/11916/files/Brownfields101.pdf (last visited March 14, 2014).
[3] *See* ch. 97-277, Laws of Fla.
[4] Department of Environmental Protection, *Florida Brownfields Redevelopment Act-1998 Annual Report, available at* http://www.dep.state.fl.us/waste/quick_topics/publications/wc/brownfields/leginfo/1998/98final.pdf (last visited March 14, 2014).
[5] ASTM International defines "risk based corrective action principles" as consistent decision-making processes for assessment and response to chemical releases. *See* http://www.astm.org/Standards/E2081.htm (last visited March 14, 2014).
[6] See Rule 62-785, F.A.C.
[7] *Id*. "Brownfield site rehabilitation agreement (BSRA) means an agreement entered into between the person responsible for brownfield site rehabilitation and the DEP or a delegated local program. The BSRA shall at a minimum establish the time frames, schedules, and milestones for completion of site rehabilitation tasks and submission of technical reports, and other commitments or provisions pursuant to s. 376.80(5), F.S., and [Rule 62-780, F.A.C.]"
[8] Todd S. Davis, Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property, 525 (2d ed. 2002).
[9] Section 376.82, F.S.
[10] *Id*.
[11] Section 288.107, F.S.

procedures and criteria for the designation of a brownfield area by local governments, counties, and municipalities.[12]

Economic Incentives

In 1998, the Legislature passed SBs 244, 1202, and 1204, providing economic and financial incentives to promote the redevelopment of brownfield areas.[13] Senate Bill 1202 created the Brownfield Area Loan Guarantee Program, which authorizes up to 5 years of state loan guarantees for redevelopment and applies to 50 percent of the primary lender loan.[14] The loan guarantee applies to 75 percent of the lender loan if the brownfield area redevelopment is for "affordable" housing.[15] Senate Bill 244 authorized a voluntary cleanup tax credit of up to 35 percent of the costs of voluntary cleanup activity of brownfield areas with a maximum allowable amount of $250,000 per site per year.[16] Senate Bill 1204 authorized the Brownfield Property Ownership Clearance Assistance and Revolving Loans Trust Fund to facilitate the redevelopment of properties that may be more difficult to redevelop due to various liens on the property or complications from bankruptcy. The trust fund was created to help clear prior liens on the property through the negotiation process. The loans would then be repaid by the resale of the brownfield property and other activities that may have enhanced the property's value.[17] This trust fund was never capitalized or used for its intended purpose and was later repealed.[18]

In 2006, the Legislature passed HB 7131, which substantially increased the economic and financial incentives for redevelopment of brownfield areas and repealed the Brownfield Property Ownership Clearance Assistance and Revolving Loans Trust Fund.[19] The voluntary cleanup tax credit increased from 35 percent to 50 percent, which may be applied against intangible property tax and corporate income tax for the remediation of the brownfield area with a maximum allowable amount of $500,000 per year per site. The Brownfield Areas Loan Guarantee Program increased from 10 percent to 25 percent. The percentage of tax credit that may be received during the final year of cleanup was increased from 10 percent to 25 percent and the amount was increased from $50,000 to $500,000. The total amount of tax credits that may be granted for brownfield cleanup was increased from $2 million annually to $5 million annually. The law also provides incentives for cleaning unlicensed or historic solid waste dumpsites and requires Enterprise Florida, Inc., to market brownfields for redevelopment and job growth.[20]

---

[12] See ss. 376.80, 125.66, and 166.041, F.S., respectively.
[13] See chs. 98-198, 98-75, and 98-118, Laws of Fla., respectively.
[14] Section 376.86, F.S.
[15] "Affordable" housing, as defined in s. 420.0004, F.S., means that monthly rents or monthly mortgage payments including taxes, insurance, and utilities do not exceed 30 percent of that amount which represents the percentage of median adjusted gross annual income for the households as indicated in ss. 420.0004(9), (11), (12), or (17), F.S.
[16] Section 220.1845, F.S.
[17] *See* ch. 98-118, Laws of Fla.
[18] The Florida Senate, Comm. On Government Efficiency Appropriations, *Senate Bill CS/SB 1092 Staff Analysis*, (April 4, 2006), *available at* http://archive.flsenate.gov/data/session/2006/Senate/bills/analysis/pdf/2006s1092.ge.pdf (last visited February 4, 2014).
[19] See ch. 2006-291, Laws of Fla.
[20] See ss. 196.012, 196.1995, 199.1055, 220.1845, 288.9015, 376.30781, 376.80, and 376.86, F.S. Sections 376.87 and 376.875, F.S., were repealed.

In 2008, the Legislature passed HB 527 providing additional tax credits for brownfield area developers.[21] The law allows a tax credit for the costs incurred to remove solid waste from a brownfield site. The tax credit applicant may claim 50 percent of the cost of solid waste removal, not to exceed $500,000. An additional 25 percent of the total site rehabilitation costs, up to $500,000, may be claimed if a health care facility is constructed on the brownfield site.[22] The DEP must submit an annual report to the President of the Senate and Speaker of the House by August 1 each year. The annual report must include the number, locations and sizes of the brownfield sites that have been remediated or are currently being rehabilitated under the provisions of the Act.[23]

Brownfield Designation Procedures

Currently, a local government that has jurisdiction over a proposed brownfield area is required to notify the DEP of the decision to designate the brownfield area for rehabilitation according to the Act. The notification must include a resolution containing a map of the proposed area and the parcels to be included in the brownfield designation. Municipalities and counties that propose to designate a brownfield area must do so according to the resolution adoption procedures outlined in ss. 166.041 and 125.66, F.S., respectively, and notice the public hearing according to ss. 166.041(3)(c)2. and 125.66(4)(b)2., F.S., respectively.[24]

The Act requires a local government that proposes to designate a brownfield area that is outside of a community redevelopment area, enterprise zone, empowerment zone, closed military base, or designated brownfield pilot project, to notify the DEP of the proposed designation. The notification must include a resolution that contains a map of the proposed area and the parcels to be included in the brownfield designation. The local government is also required to consider if the area warrants development, confirm the area is not too large, determine if the area has the potential for the private sector to participate in the rehabilitation, and determine whether the area has sites that can be used for recreation, cultural or historical preservation.[25]

The Act allows a local government to designate a brownfield area if the person who owns or controls a potential brownfield area is requesting the designation and has agreed to rehabilitate and redevelop the area. The redevelopment must provide an economic benefit to the area and create at least five permanent new jobs. The redevelopment of the proposed area must be consistent with the local comprehensive plan and be able to be permitted. Notice of the proposed designation must be provided to the residents of the area and published in a newspaper of local circulation. The person requesting the designation must also provide reasonable assurance of sufficient financial resources to complete the rehabilitation and redevelopment of the brownfield area and enter into a site rehabilitation agreement with the department or local pollution control program.[26]

[21] See ch. 2008-238, Laws of Fla.
[22] Section 376.30781, F.S.
[23] Section 376.85, F.S.
[24] Chapter 97-277, Laws of Fla.
[25] *Id*.
[26] *Id*.

The Act also requires that if property owners within the proposed designation area request in writing to the local government to have their properties removed from the designation, then the request must be granted.[27]

As of November 22, 2013, local governments have adopted 352 resolutions to officially designate brownfield areas and 190 BSRAs have been executed. A total of 69 Site Rehabilitation Completion Orders or "No Further Action" orders have been issued since the inception of the program for sites that have been remediated to levels protective of human health and the environment. The remaining sites are in some phase of site assessment or cleanup. [28]

III. Effect of Proposed Changes:

Section 1 amends s. 376.78, F.S., to clarify that the redevelopment of a brownfield area within a community redevelopment area, empowerment zone, closed military base, or designated brownfield pilot project area has a positive impact on these areas. By specifying these areas, the bill prioritizes them over non-specified areas.

Section 2 amends s. 376.80, F.S., to clarify, reorganize, and revise the procedures for the designation of a brownfield area for the purpose of rehabilitation under the Brownfields Redevelopment Act.

The bill specifies the following procedures for the designation of a brownfield area:

- A local government with jurisdiction over the brownfield area must adopt a resolution to designate the proposed area.
- The local government must notify the DEP, and, if applicable, the local pollution control program within 30 days of the adoption of the resolution.
- The resolution must continue to include a detailed map of the parcels to be designated or a legal description of the parcels along with a less detailed map.
- Municipalities must adopt the resolution according to s. 166.041, F.S., and the procedures for public hearings must comply with s. 166.041(3)(c)2, F.S.
- Counties must adopt the resolution according to s. 125.66, F.S., and the procedures for the public hearings must comply with s. 125.66(4)(b), F.S.
- Property owners within the proposed brownfield area who make written requests to have their properties removed from the designation before the adoption of the resolution must be granted the request.

The bill specifies that if a designation is proposed by a local government that has jurisdiction over the area and the area is located outside an existing community redevelopment area, or if designation is proposed by a non-governmental entity, then the following public hearing and notification procedures are required:

- At least one of the required public hearings must be conducted as close to the proposed area as possible to provide an opportunity for public input on the size of the area, the objectives

[27] *Id*.
[28] Department of Environmental Protection, *Senate Bill 586 Agency Analysis* (January 2014) (on file with the Senate Committee on Environmental Preservation and Conservation).

for rehabilitation, job opportunities and economic development, and residents' considerations.

- Notice of the public hearing must be published in a newspaper of general circulation, published in ethnic newspapers or community bulletins, posted in the affected area, and announced at a scheduled meeting of the local governing body held prior to the public hearing.
- At the public hearing, the local government must consider whether the proposed brownfield area:
  - Warrants development;
  - Covers an overly large area;
  - Has the potential for the private sector to participate in the rehabilitation; and
  - Contains sites that may be used for recreational open space, cultural, or historical preservation purposes.

The bill specifies that if the designation is proposed by a local government that has jurisdiction over the area and the area is located inside an existing community redevelopment area, an enterprise zone, an empowerment zone, a closed military base, or a designated brownfield pilot project, then the public hearing considerations outlined above are not required. However, the local government must comply with the notification and resolution adoption procedures outlined earlier.

The bill specifies that if the designation is proposed by individuals, corporations, partnerships, limited liability corporations, community-based organizations, not-for-profit corporations, or other non-governmental entities, then the following public hearing and notification procedures are required:

- A public hearing must be conducted as close to the proposed area as possible to provide an opportunity for public input on the size of the area, the objectives for rehabilitation, job opportunities and economic developments, and local residents' considerations.
- Notice of the public hearing must be published in a newspaper of general circulation, published in an ethnic newspaper or community bulletin, posted in the affected area, and announced at a scheduled meeting of the local governing body held prior to the public hearing.
- The person proposing the designation must also meet the following criteria:
  - The person owns or controls the proposed area;
  - The rehabilitation and redevelopment of the proposed area will be economically beneficial and include the creation of at least five new, permanent jobs;
  - The redevelopment is consistent with the local comprehensive plan and is able to be permitted;
  - The person has provided reasonable assurance of sufficient financial resources to complete the rehabilitation and redevelopment of the brownfield area; and
  - The person must enter into a site rehabilitation agreement with the DEP or local pollution control program. The person is entitled to negotiate the terms of the agreement.

The bill specifies that a local government that designates a brownfield area according to these procedures is not required to use the term "brownfield area" within the name of the brownfield area designated by the local government.

Section 3 amends s. 376.82, F.S., to revise the liability protection for a person who executes and implements a successful BSRA to include liability protection for:

- Claims of any person for property damage;
- Diminished value of real property or improvements;
- Lost or delayed rent, sale, or use of real property or improvements; and
- The stigma to real property or improvements caused by the contamination that was addressed in the BSRA.

The liability protection applies to causes of action occurring on or after July 1, 2014. The bill specifies that the liability protection does not apply to a person who commits fraud in demonstrating site conditions, in completing a site rehabilitation agreement, or who exacerbates contamination of a property subject to a BSRA in violation of applicable laws, which causes property damage.

Section 4 provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article I, section 21 of the State Constitution guarantees access to the courts and provides that "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay."

Section 376.82(2), F.S., as discussed above, extends certain immunities from liability to a person who executes and successfully completes a brownfield site rehabilitation agreement. When immunity from liability is legislatively provided to a person, a potential constitutional challenge could be raised that the law violates the right of access to the courts for redress of an injury. The Florida Supreme Court held in *Kluger v. White*[29] that the Legislature cannot abolish a person's right to file certain actions "without providing a reasonable alternative to protect the rights of the people … unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting the public necessity can be shown."[30]

[29] *Kluger v. White*, 281 So. 2d 1, (Fla. 1973).
[30] *Id*., at 4.

In this instance, there is not sufficient information to determine whether the expanded liability protections in the bill violate the clause guaranteeing access to the courts. Historically, property owners responsible for pollution have been liable to adjoining property owners for the diminution in the value of the adjoining properties.[31]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill eliminates the right of a third party to pursue an action for property damages, unless a person commits fraud in demonstrating site conditions, in completing a site rehabilitation agreement, or exacerbates contamination of a property subject to a BSRA in violation of applicable laws. The elimination of this legal remedy may harm third parties whose properties are damaged. However, individuals, corporations, community-based organizations, and not-for-profit corporations proposing to designate brownfield areas should benefit from this limitation of liability provision. The fiscal impacts are too remote to determine at this time.

C. Government Sector Impact:

Local governments may incur costs associated with damages to public property that has been impacted by contamination from a brownfield site due to the limitation of liability provisions in the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 376.78, 376.80, and 376.82.

[31] *See Courtney Enterprises, Inc., v. Publix Supermarkets, Inc.*, 788 So. 2d 1045 (Fla. 2d DCA 2001).

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Environmental Preservation and Conservation on February 5, 2014:
The committee substitute:

- resolves the technical deficiency that was present in the bill by requiring the municipalities and counties to adhere to the public hearing procedures outlined in ss. 166.041(3)(c)2. and 125.66(4)(b), F.S., respectively;
- resolves the technical deficiency that was present in the bill by eliminating the conflicting newspaper publication size requirement; and
- allows the local government that designates a brownfield area to eliminate the term "brownfield area" within the name of the brownfield area once it has been designated by the local government.

B. Amendments:

None.

512432

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Latvala) recommended the following:

Senate Amendment

Delete lines 75 - 79

and insert:

in s. 166.041, except that the notice for the public hearings on the proposed resolution must be in the form established in s. 166.041(3)(c)2. For counties, the governing body shall adopt the resolution in accordance with the procedures outlined in s. 125.66, except that the notice for

219016

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Latvala) recommended the following:

Senate Amendment

Delete lines 224 - 229
and insert:
does not apply to a person who:
a. Commits fraud in demonstrating site conditions or completing site rehabilitation of a property subject to a brownfield site rehabilitation agreement;
b. Exacerbates contamination of a property subject to a brownfield site rehabilitation agreement in violation of applicable laws, which causes property damages;

219016

c. Causes a new release at a property subject to a brownfield site rehabilitation agreement;

d. If any of the reopeners in s. 376.82(3)(b)-(d) apply, is responsible for brownfield site rehabilitation and who fails to comply with the requirements or timeframes of the brownfield site rehabilitation agreement or fails to comply with applicable timeframes pursuant to department rules;

e. Caused the contamination that is the subject of the brownfield site rehabilitation agreement; or

f. Is determined by a court of competent jurisdiction to be the mere continuation or alter ego of the person identified in sub-subparagraph e. under successor liability principles under applicable law.

955094

LEGISLATIVE ACTION

Senate . House

. . . . . .

The Committee on Judiciary (Latvala) recommended the following:

Senate Substitute for Amendment (219016)

Delete line 224

and insert:

does not apply to a person who caused the discharge or other condition of pollution at a property subject to a brownfield site rehabilitation agreement or is otherwise liable under applicable successor liability principles, who commits fraud in demonstrating

By the Committee on Environmental Preservation and Conservation; and Senator Altman

592-01670-14 2014586c1

A bill to be entitled

An act relating to brownfields; amending s. 376.78, F.S.; revising legislative intent with regard to community revitalization in certain areas; amending s. 376.80, F.S.; revising procedures for designation of brownfield areas by local governments; providing procedures for adoption of a resolution; providing requirements for notice and public hearings; authorizing local governments to use a term other than "brownfield area" when naming such areas; amending s. 376.82, F.S.; providing an exemption from liability for property damages for entities that execute and implement certain brownfield site rehabilitation agreements; providing for applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (8) of section 376.78, Florida Statutes, is amended to read:

376.78 Legislative intent.—The Legislature finds and declares the following:

(8) The existence of brownfields within a community may contribute to, or may be a symptom of, overall community decline, including issues of human disease and illness, crime, educational and employment opportunities, and infrastructure decay. The environment is an important element of quality of life in any community, along with economic opportunity, educational achievement, access to health care, housing quality

592-01670-14 2014586c1

and availability, provision of governmental services, and other socioeconomic factors. Brownfields redevelopment, properly done, can be a significant element in community revitalization, especially within community redevelopment areas, enterprise zones, empowerment zones, closed military bases, or designated brownfield pilot project areas.

Section 2. Subsections (1) and (2) of section 376.80, Florida Statutes, are amended, and subsection (12) is added to that section, to read:

376.80 Brownfield program administration process.—

(1) The following general procedures apply to brownfield designations:

(a) The local government with jurisdiction over a proposed brownfield area shall designate such area pursuant to this section.

(b) For a brownfield area designation proposed by:

1. The jurisdictional local government, the designation criteria under paragraph (2)(a) apply unless the local government proposes to designate a brownfield area within a specified redevelopment area as provided in paragraph (2)(b).

2. Any person other than a governmental entity, including, but not limited to, individuals, corporations, partnerships, limited liability companies, community-based organizations, or not-for-profit corporations, the designation criteria under paragraph (2)(c) apply.

(c) Except as otherwise provided, the following provisions apply to all proposed brownfield area designations:

1. Notification to the department following adoption.—A local government with jurisdiction over the brownfield area must

notify the department, and, if applicable, the local pollution control program under s. 403.182, of its decision to designate a brownfield area for rehabilitation for the purposes of ss. 376.77-376.86. The notification must include a resolution adopted~~,~~ by the local government body. The local government shall notify the department and, if applicable, the local pollution control program under s. 403.182, of the designation within 30 days after adoption of the resolution.

2. Resolution adoption.—The brownfield area designation must be carried out by a resolution adopted by the jurisdictional local government, ~~to~~ which includes ~~is attached~~ a map adequate to clearly delineate exactly which parcels are to be included in the brownfield area or alternatively a less-detailed map accompanied by a detailed legal description of the brownfield area. For municipalities, the governing body shall adopt the resolution in accordance with the procedures outlined in s. 166.041, except that the procedures for the public hearings on the proposed resolution must be in the form established in s. 166.041(3)(c)2. For counties, the governing body shall adopt the resolution in accordance with the procedures outlined in s. 125.66, except that the procedures for the public hearings on the proposed resolution must be in the form established in s. 125.66(4)(b).

3. Right to be removed from proposed brownfield area.—If a property owner within the area proposed for designation by the local government requests in writing to have his or her property removed from the proposed designation, the local government shall grant the request. ~~For municipalities, the governing body shall adopt the resolution in accordance with the procedures~~

~~outlined in s. 166.041, except that the notice for the public hearings on the proposed resolution must be in the form established in s. 166.041(3)(c)2. For counties, the governing body shall adopt the resolution in accordance with the procedures outlined in s. 125.66, except that the notice for the public hearings on the proposed resolution shall be in the form established in s. 125.66(4)(b)2.~~

4. Notice and public hearing requirements for designation of a proposed brownfield area outside a redevelopment area or by a nongovernmental entity.—Compliance with the following provisions is required before designation of a proposed brownfield area under paragraph (2)(a) or paragraph (2)(c):

a. At least one of the required public hearings shall be conducted as close as is reasonably practicable to the area to be designated to provide an opportunity for public input on the size of the area, the objectives for rehabilitation, job opportunities and economic developments anticipated, neighborhood residents' considerations, and other relevant local concerns.

b. Notice of a public hearing must be made in a newspaper of general circulation in the area, must be made in ethnic newspapers or local community bulletins, must be posted in the affected area, and must be announced at a scheduled meeting of the local governing body before the actual public hearing.

(2)(a) Local government-proposed brownfield area designation outside specified redevelopment areas.—If a local government proposes to designate a brownfield area that is outside a community redevelopment area ~~areas~~, enterprise zone ~~zones~~, empowerment zone ~~zones~~, closed military base ~~bases~~, or

designated brownfield pilot project area ~~areas~~, the local government shall provide notice, adopt the resolution, and conduct ~~the~~ public hearings pursuant to paragraph ~~in accordance with the requirements of subsection~~ (1)(c)~~, except at least one of the required public hearings shall be conducted as close as reasonably practicable to the area to be designated to provide an opportunity for public input on the size of the area, the objectives for rehabilitation, job opportunities and economic developments anticipated, neighborhood residents' considerations, and other relevant local concerns. Notice of the public hearing must be made in a newspaper of general circulation in the area and the notice must be at least 16 square inches in size, must be in ethnic newspapers or local community bulletins, must be posted in the affected area, and must be announced at a scheduled meeting of the local governing body before the actual public hearing~~. At a public hearing to designate the proposed brownfield area ~~In determining the areas to be designated~~, the local government must consider:

1. Whether the brownfield area warrants economic development and has a reasonable potential for such activities;

2. Whether the proposed area to be designated represents a reasonably focused approach and is not overly large in geographic coverage;

3. Whether the area has potential to interest the private sector in participating in rehabilitation; and

4. Whether the area contains sites or parts of sites suitable for limited recreational open space, cultural, or historical preservation purposes.

(b) Local government-proposed brownfield area designation

within specified redevelopment areas.—Paragraph (a) does not apply to a proposed brownfield area if the local government proposes to designate the brownfield area inside a community redevelopment area, enterprise zone, empowerment zone, closed military base, or designated brownfield pilot project area and the local government complies with paragraph (1)(c).

(c)~~(b)~~ Brownfield area designation proposed by persons other than a governmental entity.—For designation of a brownfield area that is proposed by a person other than the local government, the local government with jurisdiction over the proposed brownfield area shall provide notice and adopt a resolution to designate the ~~a~~ brownfield area pursuant to paragraph (1)(c) if, at the public hearing to adopt the resolution, the person establishes all of the following ~~under the provisions of this act provided that~~:

1. A person who owns or controls a potential brownfield site is requesting the designation and has agreed to rehabilitate and redevelop the brownfield site.~~,~~

2. The rehabilitation and redevelopment of the proposed brownfield site will result in economic productivity of the area, along with the creation of at least 5 new permanent jobs at the brownfield site that are full-time equivalent positions not associated with the implementation of the brownfield site rehabilitation agreement and that are not associated with redevelopment project demolition or construction activities pursuant to the redevelopment of the proposed brownfield site or area. However, the job creation requirement does ~~shall~~ not apply to the rehabilitation and redevelopment of a brownfield site that will provide affordable housing as defined in s. 420.0004

or the creation of recreational areas, conservation areas, or parks.~~;~~

3. The redevelopment of the proposed brownfield site is consistent with the local comprehensive plan and is a permittable use under the applicable local land development regulations.~~;~~

4. Notice of the proposed rehabilitation of the brownfield area has been provided to neighbors and nearby residents of the proposed area to be designated pursuant to paragraph (1)(c), and the person proposing the area for designation has afforded to those receiving notice the opportunity for comments and suggestions about rehabilitation. Notice pursuant to this subparagraph ~~must be made in a newspaper of general circulation in the area, at least 16 square inches in size, and the notice~~ must be posted in the affected area.~~; and~~

5. The person proposing the area for designation has provided reasonable assurance that he or she has sufficient financial resources to implement and complete the rehabilitation agreement and redevelopment of the brownfield site.

(d)~~(c)~~ Negotiation of brownfield site rehabilitation agreement.—The designation of a brownfield area and the identification of a person responsible for brownfield site rehabilitation simply entitles the identified person to negotiate a brownfield site rehabilitation agreement with the department or approved local pollution control program.

(12) A local government that designates a brownfield area pursuant to this section is not required to use the term "brownfield area" within the name of the brownfield area designated by the local government.

Section 3. Paragraphs (a) and (b) of subsection (2) of section 376.82, Florida Statutes, are amended to read:

376.82 Eligibility criteria and liability protection.—

(2) LIABILITY PROTECTION.—

(a) Any person, including his or her successors and assigns, who executes and implements to successful completion a brownfield site rehabilitation agreement, is ~~shall be~~ relieved of:

1. Further liability for remediation of the contaminated site or sites to the state and to third parties. ~~and of~~

2. Liability in contribution to any other party who has or may incur cleanup liability for the contaminated site or sites.

3. Liability for claims of any person for property damage, including, but not limited to, diminished value of real property or improvements; lost or delayed rent, sale, or use of real property or improvements; or stigma to real property or improvements caused by contamination addressed by a brownfield site rehabilitation agreement. Notwithstanding any other provision of this chapter, this subparagraph applies to causes of action accruing on or after July 1, 2014. This subparagraph does not apply to a person who commits fraud in demonstrating site conditions or completing site rehabilitation of a property subject to a brownfield site rehabilitation agreement or who exacerbates contamination of a property subject to a brownfield site rehabilitation agreement in violation of applicable laws, which causes property damages.

(b) This section does not limit ~~shall not be construed as a limitation on~~ the right of a third party other than the state to pursue an action for damages to persons for bodily harm ~~property~~

~~or person~~; however, such an action may not compel site rehabilitation in excess of that required in the approved brownfield site rehabilitation agreement or otherwise required by the department or approved local pollution control program.

Section 4. This act shall take effect July 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 870
INTRODUCER:	Judiciary Committee and Senator Smith
SUBJECT:	Insurance
DATE:	March 25, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	**Favorable**
2.	Brown	Cibula	JU	**Fav/CS**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 870 provides that the absence of a countersignature by an agent of the insurer does not affect the validity of a property, casualty, or surety insurance policy or contract. This change may reduce the risk that an insured loses coverage due to events the insured cannot control.

Current law provides that property, casualty, and surety insurers do not assume direct liability unless the policy or contract of insurance is countersigned by a licensed agent for the insurer. However, the countersignature requirement may be waived by the insurer. Whether the requirement has been waived is a factual question.

Current law requires insurers of long-term care policies to offer a nonforfeiture protection provision. The bill also clarifies that an insurer may offer a nonforfeiture provision in a long-term care insurance policy in the form of a return of a insured's premium in the event of the insured's death or surrender or cancellation of the policy.

II. Present Situation:

Countersignature Requirement on Property, Casualty, and Surety Policies

Section 624.425(1), F.S., requires all property, casualty, and surety insurance policies or contracts to be issued and countersigned by an agent. The agent must be regularly commissioned, currently licensed, and appointed as an agent for the insurer.

The purpose of the countersignature requirement is "to protect the public…by requiring such policies to be issued by resident, licensed agents over whom the state can exercise control and thus prevent abuses."[1]

The absence of a countersignature does not necessarily invalidate the insurance policy. The insurer may waive the countersignature requirement.[2] If the countersignature requirement is not waived, a policy is not enforceable against the insurer, as a court will not consider the policy properly executed.[3] In the absence of a countersignature, whether a policy is waived is a factual matter determined on a case-by-case basis.[4] In at least one case, a defendant argued that the lack of a countersignature constituted a defense in a breach of contract action.[5]

Section 624.426, F.S., excludes some policies from the countersignature requirement. These are:
- Contracts of reinsurance;
- Policies of insurance on the rolling stock of railroad companies doing a general freight and passenger business;
- United States Custom surety bonds issued by a corporate surety approved by the United States Department of Treasury;
- Policies of insurance issued by insurers whose agents represent one company or a group of companies under common ownership if a company within one group is transferring policies to another company within the same group and the agent of record remains the same; and
- Policies of property, casualty, and surety insurance issued by insurers whose agents represent one company or a group of companies under common ownership and for which the application is lawfully submitted to the insurer.[6]

Nonforfeiture Provision in Long-term Care Insurance Policies

A long-term care insurance policy is defined in law as:

> Any insurance policy or rider … designed to provide coverage on an expense-incurred, indemnity, prepaid, or other basis for one or more necessary or medically necessary diagnostic, preventive, therapeutic, curing, treating, mitigating, rehabilitative, maintenance, or personal care services provided in a setting other than an acute care unit of a hospital.[7]

Insurers who offer long-term care policies must offer a nonforfeiture protection provision providing reduced paid-up insurance, extended term, shortened benefit period, or any other benefits approved by the Office of Insurance Regulation.[8]

---

[1] *Wolfe v. Aetna Insurance Company*, 436 So. 2d 997, 999 (Fla. 5th DCA 1983).
[2] *See Meltsner v. Aetna Casualty and Surety Company of Hartford, Conn.*, 233 So. 2d 849, 850 (Fla. 3rd DCA 1969) (holding under the facts of that case that the countersignature requirement was waived).
[3] 43 Am. Jur. 2d Insurance s. 225.
[4] *See Meltsner*, 233 So.2d at 850 (finding a waiver of the countersignature requirement); *Wolfe*, 436 So.2d at 999 (finding a waiver of the countersignature requirement).
[5] *See FCCI Insurance Company v. Gulfwind Companies, LLC*, 2003 CC 003056 NC (Fla. Sarasota County Court).
[6] Section 624.426, F.S.
[7] Section 627.9404(1), F.S.
[8] Section 627.94072(2), F.S.

III. Effect of Proposed Changes:

CS/SB 870 provides that the absence of a countersignature does not affect the validity of the insurance policy or contract.

The bill will preclude arguments by an insurer that a policy is invalid because it lacks a countersignature.

Current law requires insurers of long-term care policies to offer a nonforfeiture protection provision. The bill also clarifies that an insurer may offer a nonforfeiture provision in a long-term care insurance policy in the form of a return of premium in the event of the insured's death, or surrender or cancellation of the policy. The return of a premium is not currently identified as a benefit in a nonforfeiture provision.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 624.425 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 25, 2014:
The CS clarifies that an insurer may offer a nonforfeiture provision in a long-term care insurance policy in the form of a return of an insured's premium.

B. Amendments:

None.

464780

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Latvala) recommended the following:

Senate Amendment (with title amendment)

Between lines 33 and 34
insert:

Section 2. Subsection (2) of section 627.94072, Florida Statutes, is amended to read:

627.94072 Mandatory offers.—

(2) An insurer that offers a long-term care insurance policy, certificate, or rider in this state shall ~~must~~ offer a nonforfeiture protection provision providing reduced paid-up insurance, extended term, shortened benefit period, or ~~any~~ other

464780

benefit ~~benefits~~ approved by the office if all or part of a premium is not paid. A nonforfeiture provision may also be offered in the form of a return of premium on the death of the insured, or on the complete surrender or cancellation of the policy or contract. Nonforfeiture benefits and any additional premium for such benefits must be computed in an actuarially sound manner~~,~~ using a methodology that has been filed with and approved by the office.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 5

and insert:

amending s. 627.94072, F.S.; providing an alternative form of a nonforfeiture provision for long-term care insurance; providing an effective date.

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment (with title amendment)

Between lines 33 and 34

insert:

Section 2. Section 627.7311, Florida Statutes, is amended to read:

627.7311 Effect of law ~~on personal injury protection policies~~.—

(1) The provisions and procedures authorized in ss. 627.730-627.7405 shall be implemented by insurers offering policies pursuant to the Florida Motor Vehicle No-Fault Law. The

Legislature intends that these provisions and procedures have full force and effect regardless of their express inclusion in an insurance policy form, and a specific provision or procedure authorized in ss. 627.730-627.7405 shall control over general provisions in an insurance policy form. An insurer is not required to amend its policy form or to expressly notify providers, claimants, or insureds in order to implement and apply such provisions or procedures.

(2) Sections 627.730-627.7405 do not preclude a county from enacting and enforcing an ordinance applicable to health care clinics that receive reimbursement under the Florida Motor Vehicle No-Fault Law.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 5

and insert:

amending s. 627.7311, F.S.; providing that a county may enact and enforce ordinances applicable to certain health care clinics; providing an effective date.

461328

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Lee) recommended the following:

Senate Amendment (with title amendment)

Between lines 33 and 34
insert:

Section 1. Subsections (2) through (9) of section 631.54, Florida Statutes, are renumbered as subsections (3) through (10), respectively, and a new subsection (2) is added to that section to read:

631.54 Definitions.—As used in this part, the term:

(2) "Assessment year" means the 12-month period, which may begin on the first day of any calendar quarter, whether January


461328

1, April 1, July 1, or October 1, as specified in an order issued by the office directing insurers to pay an assessment to the association. Upon entry of the order, insurers may begin collecting assessments from policyholders for the assessment year.

Section 2. Subsections (3) and (4) of section 631.57, Florida Statutes, are amended to read:

631.57 Powers and duties of the association.—

(3)(a) To the extent necessary to secure ~~the~~ funds for the respective accounts for the payment of covered claims, to pay the reasonable costs to administer such accounts ~~the same~~, and ~~to the extent necessary~~ to secure ~~the~~ funds for the account specified in s. 631.55(2)(b) or to retire indebtedness, including, without limitation, the principal, redemption premium, if any, and interest on, and related costs of issuance of, bonds issued under s. 631.695 and the funding of ~~any~~ reserves and other payments required under the bond resolution or trust indenture pursuant to which such bonds have been issued, the office, upon certification of the board of directors, shall levy assessments initially estimated in the proportion that each insurer's net direct written premiums in this state in the classes protected by the account bears to the total of said net direct written premiums received in this state by all such insurers for the preceding calendar year for the kinds of insurance included within such account. Assessments shall be remitted to and administered by the board of directors in the manner specified by the approved plan and paragraph (f). Each insurer so assessed shall have at least 30 days' written notice as to the date the initial assessment payment is due and


461328

payable. Every assessment shall be ~~made as~~ a uniform percentage applicable to the net direct written premiums of each insurer in the kinds of insurance included within the account in which the assessment is made. The assessments levied against any insurer may ~~shall~~ not exceed in any one year more than 2 percent of that insurer's net direct written premiums in this state for the kinds of insurance included within such account during the calendar year next preceding the date of such assessments.

(b) If sufficient funds from such assessments, together with funds previously raised, are not available in any one year in the respective account to make all the payments or reimbursements then owing to insurers, the funds available shall be prorated and the unpaid portion ~~shall be~~ paid as soon ~~thereafter~~ as funds become available.

(c) The Legislature finds and declares that all assessments paid by an insurer or insurer group as a result of a levy by the office, including assessments levied pursuant to paragraph (a) and emergency assessments levied pursuant to paragraph (e), constitute advances of funds from the insurer to the association. An insurer may fully recoup such advances by applying the uniform assessment percentage levied by the office to all ~~a separate recoupment factor to the premium of~~ policies of the same kind or line as were considered by the office in determining the assessment liability of the insurer or insurer group as set forth in paragraph (f).

1. Assessments levied under subparagraph (f)1. are paid before policy surcharges are collected and result in a receivable for policy surcharges collected in the future. This amount, to the extent it is likely that it will be realized,

meets the definition of an admissible asset as specified in the National Association of Insurance Commissioners' Statement of Statutory Accounting Principles No. 4. The asset shall be established and recorded separately from the liability regardless of whether it is based on a retrospective or prospective premium-based assessment. If an insurer is unable to fully recoup the amount of the assessment because of a reduction in writings or withdrawal from the market, the amount recorded as an asset shall be reduced to the amount reasonably expected to be recouped.

2. Assessments levied under subparagraph (f)2. are paid after policy surcharges are collected so that the recognition of assets is based on actual premium written offset by the obligation to the association.

(d) ~~No~~ State funds may not ~~of any kind shall~~ be allocated or paid to the ~~said~~ association or any of its accounts.

(e)1.~~a.~~ In addition to assessments ~~otherwise~~ authorized in paragraph (a), and to the extent necessary to secure the funds for the account specified in s. 631.55(2)(b) for the direct payment of covered claims of insurers rendered insolvent by the effects of a hurricane and to pay the reasonable costs to administer such claims, or to retire indebtedness, including, without limitation, the principal, redemption premium, if any, and interest on, and related costs of issuance of, bonds issued under s. 631.695 and the funding of any reserves and other payments required under the bond resolution or trust indenture pursuant to which such bonds have been issued, the office, upon certification of the board of directors, shall levy emergency assessments upon insurers holding a certificate of authority.


461328

The emergency assessments payable under this paragraph by any insurer may ~~shall~~ not exceed in any single year more than 2 percent of that insurer's direct written premiums, net of refunds, in this state during the preceding calendar year for the kinds of insurance within the account specified in s. 631.55(2)(b).

2.~~b.~~ ~~Any~~ Emergency assessments authorized under this paragraph shall be levied by the office upon insurers referred to in subparagraph 1. ~~sub-subparagraph a.~~, upon certification as to the need for such assessments by the board of directors. If ~~In the event~~ the board ~~of directors~~ participates in the issuance of bonds in accordance with s. 631.695, emergency assessments shall be levied in each year that bonds issued under s. 631.695 and secured by such emergency assessments are outstanding~~,~~ in ~~such~~ amounts up to such 2-percent limit as required in order to provide for the full and timely payment of the principal of, redemption premium, if any, and interest on, and related costs of issuance of, such bonds. The emergency assessments ~~provided for in this paragraph~~ are assigned and pledged to the municipality, county, or legal entity issuing bonds under s. 631.695 for the benefit of the holders of such bonds~~,~~ in order ~~to enable such municipality, county, or legal entity~~ to provide for the payment of the principal of, redemption premium, if any, and interest on such bonds, the cost of issuance of such bonds, and the funding of any reserves and other payments required under the bond resolution or trust indenture pursuant to which such bonds have been issued, without ~~the necessity of any~~ further action by the association, the office, or any other party. If ~~To the extent~~ bonds are issued under s. 631.695 and


461328

the association determines to secure such bonds by a pledge of revenues received from the emergency assessments, such bonds, upon such pledge of revenues, shall be secured by and payable from the proceeds of such emergency assessments, and the proceeds of emergency assessments levied under this paragraph shall be remitted directly to and administered by the trustee or custodian appointed for such bonds.

3.~~c.~~ Emergency assessments used to defease bonds issued under this part ~~paragraph~~ may be payable in a single payment or, at the option of the association, may be payable in 12 monthly installments with the first installment being due and payable at the end of the month after an emergency assessment is levied and subsequent installments being due by ~~not later than~~ the end of each succeeding month.

4.~~d.~~ If emergency assessments are imposed, the report required by s. 631.695(7) must ~~shall~~ include an analysis of the revenues generated from the emergency assessments imposed under this paragraph.

5.~~e.~~ If emergency assessments are imposed, the references in sub-subparagraph (1)(a)3.b. and s. 631.695(2) and (7) to assessments levied under paragraph (a) must ~~shall~~ include emergency assessments imposed under this paragraph.

6.~~2.~~ If the board of directors participates in the issuance of bonds in accordance with s. 631.695, an annual assessment under this paragraph shall continue while the bonds issued with respect to which the assessment was imposed are outstanding, including any bonds the proceeds of which were used to refund bonds issued pursuant to s. 631.695, unless adequate provision has been made for the payment of the bonds in the documents


461328

authorizing the issuance of such bonds.

7.~~3.~~ Emergency assessments under this paragraph are not premium and are not subject to the premium tax, to any fees, or to any commissions. An insurer is liable for all emergency assessments that the insurer collects and shall treat the failure of an insured to pay an emergency assessment as a failure to pay the premium. An insurer is not liable for uncollectible emergency assessments.

(f) ~~The recoupment factor applied to policies in accordance with paragraph (c) shall be selected by the insurer or insurer group so as to provide for the probable recoupment of both assessments levied pursuant to paragraph (a) and emergency assessments over a period of 12 months, unless the insurer or insurer group, at its option, elects to recoup the assessment over a longer period. The recoupment factor shall apply to all policies of the same kind or line as were considered by the office in determining the assessment liability of the insurer or insurer group issued or renewed during a 12-month period. If the insurer or insurer group does not collect the full amount of the assessment during one 12-month period, the insurer or insurer group may apply recalculated recoupment factors to policies issued or renewed during one or more succeeding 12-month periods. If, at the end of a 12-month period, the insurer or insurer group has collected from the combined kinds or lines of policies subject to assessment more than the total amount of the assessment paid by the insurer or insurer group, the excess amount shall be disbursed as follows:~~

1. The association, office, and insurers remitting assessments pursuant to paragraph (a) or paragraph (e) must

461328

comply with the following:

a. In the order levying an assessment, the office shall specify the actual percentage amount to be collected uniformly from all the policyholders of insurers subject to the assessment and the date on which the assessment year begins, which may not begin before 90 days after the association board certifies such an assessment.

b. Insurers shall make an initial payment to the association before the beginning of the assessment year on or before the date specified in the order of the office.

c. Insurers that have written insurance in the calendar year before the year in which the assessment is certified by the board shall make an initial payment based on the net direct written premium amount from the prior calendar year as set forth in the insurers annual statement, multiplied by the uniform percentage of premium specified in the order issued by the office. Insurers that have not written insurance in the prior calendar year in any of the lines under the account which are being assessed, but which are writing insurance as of, or after, the date the board certifies the assessment to the office, shall pay an amount based on a good faith estimate of the amount of net direct written premium anticipated to be written in the subject lines of business for the assessment year, multiplied by the uniform percentage of premium specified in the order issued by the office.

d. Insurers shall file a reconciliation report with the association within 45 days after the end of the assessment year which indicates the amount of the initial payment to the association before the assessment year, whether such amount was

461328

based on net direct written premium contained in a prior calendar year annual statement or a good faith projection, the amount actually collected during the assessment year, and such other information contained on a form adopted by the association and provided to the insurers in advance. If the insurer collected from policyholders more than the amount initially paid, the insurer shall pay the excess amount to the association. If the insurer collected from policyholders an amount which is less than the amount initially paid to the association, the association shall credit the insurer that amount against future assessments. Such payment reconciliation report, and any payment of excess amounts collected from policyholders, shall be completed and remitted to the association within 90 days after the end of the assessment year. The association shall send a final reconciliation report on all insurers to the office within 120 days after each assessment year.

e. Insurers remitting reconciliation reports under this paragraph to the association are subject to s. 626.9541(1)(e). ~~If the excess amount does not exceed 15 percent of the total assessment paid by the insurer or insurer group, the excess amount shall be remitted to the association within 60 days after the end of the 12-month period in which the excess recoupment charges were collected.~~

2. The association may use a monthly installment method instead of the method described in sub-subparagraphs (f)1.b. and c. or in combination thereof based on the association's projected cash flow. If the association projects that it has cash on hand for the payment of anticipated claims in the


461328

applicable account for at least 6 months, the board may make an estimate of the assessment needed and may recommend to the office the assessment percentage that may be collected as a monthly assessment. The office may, in the order levying the assessment on insurers, specify that the assessment is due and payable monthly as the funds are collected from insureds throughout the assessment year, in which case the assessment shall be a uniform percentage of premium collected during the assessment year and shall be collected from all policyholders with policies in the classes protected by the account. All insurers shall collect the assessment without regard to whether the insurers reported premium in the year preceding the assessment. Insurers are not required to advance funds if the association and the office elect to use the monthly installment option. All funds collected shall be retained by the association for the payment of current or future claims. This subparagraph does not alter the obligation of an insurer to remit assessments levied pursuant to this subsection to the association. ~~If the excess amount exceeds 15 percent of the total assessment paid by the insurer or insurer group, the excess amount shall be returned to the insurer's or insurer group's current policyholders by refunds or premium credits. The association shall use any remitted excess recoupment amounts to reduce future assessments.~~

(g) Amounts recouped pursuant to this subsection for assessments levied under paragraph (a) due to insolvencies on or after July 1, 2010, are considered premium solely for premium tax purposes and are not subject to fees or commissions. However, insurers shall treat the failure of an insured to pay a


461328

recoupment charge as a failure to pay the premium.

~~(h) At least 15 days before applying the recoupment factor to any policies, the insurer or insurer group shall file with the office a statement for informational purposes only setting forth the amount of the recoupment factor and an explanation of how the recoupment factor will be applied. Such statement shall include documentation of the assessment paid by the insurer or insurer group and the arithmetic calculations supporting the recoupment factor. The insurer or insurer group may use the recoupment factor at any time after the expiration of the 15-day period. The insurer or insurer group need submit only one informational statement for all lines of business using the same recoupment factor.~~

~~(i) No later than 90 days after the insurer or insurer group has completed the recoupment process, the insurer or insurer group shall file with the office, for information purposes only, a final accounting report documenting the recoupment. The report shall provide the amounts of assessments paid by the insurer or insurer group, the amounts and percentages recouped by year from each affected line of business, and the direct written premium subject to recoupment by year. The insurer or insurer group need submit only one report for all lines of business using the same recoupment factor.~~

(h) Assessments levied under this subsection are levied upon insurers. This subsection does not create a cause of action by a policyholder with respect to the levying of, or a policyholder's duty to pay, such assessments.

(4) The office ~~department~~ may exempt or temporarily defer

461328

any insurer from any regular or emergency assessment if the office finds that the insurer is impaired or insolvent or if an assessment would result in such insurer's financial statement reflecting an amount of capital or surplus less than the sum of the minimum amount required by any jurisdiction in which the insurer is authorized to transact insurance.

Section 3. Section 631.64, Florida Statutes, is amended to read:

631.64 Recognition of assessments ~~in rates~~.—Charges or recoupments shall be separately displayed on premium statements to enable policyholders to determine the amount charged for association assessments but may not be included in rates filed and approved by the office. ~~The rates and premiums charged for insurance policies to which this part applies may include amounts sufficient to recoup a sum equal to the amounts paid to the association by the member insurer less any amounts returned to the member insurer by the association, and such rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurer.~~

Section 4. Subsection (5) of section 627.727, Florida Statutes, is amended to read:

627.727 Motor vehicle insurance; uninsured and underinsured vehicle coverage; insolvent insurer protection.—

(5) Any person having a claim against an insolvent insurer as defined in s. 631.54~~(6)~~ under ~~the provisions of~~ this section shall present such claim for payment to the Florida Insurance Guaranty Association only. In the event of a payment to a ~~any~~ person in settlement of a claim arising under ~~the provisions of~~

461328

this section, the association is not subrogated or entitled to ~~any~~ recovery against the claimant's insurer. The association, however, has the rights of recovery as set forth in chapter 631 in the proceeds recoverable from the assets of the insolvent insurer.

Section 5. Subsection (1) of section 631.55, Florida Statutes, is amended to read:

631.55 Creation of the association.—

(1) There is created a nonprofit corporation to be known as the "Florida Insurance Guaranty Association, Incorporated." All insurers defined as member insurers in s. 631.54~~(7)~~ shall be members of the association as a condition of their authority to transact insurance in this state, and, further, as a condition of such authority, an insurer must ~~shall~~ agree to reimburse the association for all claim payments the association makes on the ~~said~~ insurer's behalf if such insurer is subsequently rehabilitated. The association shall perform its functions under a plan of operation established and approved under s. 631.58 and shall exercise its powers through a board of directors established under s. 631.56. The corporation shall have all those powers granted or permitted nonprofit corporations, as provided in chapter 617.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Between lines 4 and 5

insert:

amending s. 631.54, F.S.; defining the term "assessment year"; amending s. 631.57, F.S.; revising


461328

provisions relating to the levy of assessments on insurers by the Florida Insurance Guaranty Association; specifying the conditions under which such assessments are paid; revising procedures and timeframes for the levying of the assessments; deleting the requirement to file a final accounting report documenting the recoupment; revising an exemption for assessments; amending s. 631.64, F.S.; requiring charges or recoupments to be displayed separately on premium statements to policyholders and prohibiting their inclusion in rates; amending ss. 627.727 and 631.55, F.S.; conforming cross-references;

By Senator Smith

31-01023-14 2014870__

A bill to be entitled

An act relating to insurance; amending s. 624.425, F.S.; providing that the absence of a countersignature does not affect the validity of a policy or contract; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 624.425, Florida Statutes, is amended to read:

624.425 Agent countersignature required, property, casualty, surety insurance.—

(1) Except as stated in s. 624.426, no authorized property, casualty, or surety insurer shall assume direct liability as to a subject of insurance resident, located, or to be performed in this state unless the policy or contract of insurance is issued by or through, and is countersigned by, an agent who is regularly commissioned and licensed currently as an agent and appointed as an agent for the insurer under this code. However, the absence of a countersignature does not affect the validity of the policy or contract. If two or more authorized insurers issue a single policy of insurance against legal liability for loss or damage to person or property caused by a ~~the~~ nuclear energy hazard, or a single policy insuring against loss or damage to property by radioactive contamination, whether or not also insuring against one or more other perils that may be insured ~~proper to insure~~ against in this state, such policy if otherwise lawful may be countersigned on behalf of all of the insurers by a licensed and appointed agent of the ~~any~~ insurer

31-01023-14 2014870__

appearing thereon. The producing agent shall receive on each policy or contract the full and usual commission allowed and paid by the insurer to its agents on business written or transacted by them for the insurer.

Section 2. This act shall take effect July 1, 2014.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1626
INTRODUCER:	Senator Lee
SUBJECT:	Administrative Procedures
DATE:	March 24, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	**Pre-meeting**
2.			GO	
3.			AP	

I. Summary:

SB 1626 makes a number of changes to the Administrative Procedure Act, which relate to a state agency's reliance on unadopted or invalid rules, a state agency's liability for attorney fees and costs, and the provision of notices and information to the public.

The bill strengthens a party's ability to assert an agency's reliance on an unadopted or invalid rule as a defense to an agency action. When the defense is asserted, a DOAH judge (an administrative law judge with the Division of Administrative Hearings) must determine the validity of a rule or unadopted rule. This determination may not be rejected by the agency as is currently authorized.

The Administrative Procedure Act makes agencies liable for attorney fees and costs of others in some circumstances as a result of challenges to proposed rules, existing rules, and unadopted rules. When attorney fees and costs are available, they are limited to $50,000.

Under the bill, a state agency may be liable for attorney fees and costs in additional circumstances. These circumstances may result, for example, from the agency improperly denying a petition for a declaratory statement, acting contrary to a declaratory statement, or relying on an unadopted or invalid rule in an enforcement action or licensing decision. The existing limit on attorney fees and costs will not apply to attorney fees and costs for litigating the amount and entitlement to these fees and costs.

Lastly, the bill requires the Department of Management Services and state agencies to provide additional notices and information to the public relating to rulemaking activities. For example, the bill requires state agencies using rulemaking workshops to establish a time certain for the workshops and requires the department to publish information on its website describing the status of rulemaking activities.

II. Present Situation:

Rulemaking and the Administrative Procedure Act

The Administrative Procedure Act (APA) in ch. 120, F.S., sets forth a uniform set of procedures that agencies must follow when exercising delegated rulemaking authority. A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency.[1] Rulemaking authority is delegated by the Legislature[2] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[3] a rule. Agencies do not have discretion whether or not to engage in rulemaking.[4] To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.[5] The grant of rulemaking authority itself need not be detailed.[6] The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[7]

Declaratory Statements

The Administrative Procedure Act provides for the opportunity to request, for notice and opportunity for public input, and for the issuance of a "declaratory statement" of an agency's opinion on the applicability of a law or rule over which the agency has authority to a particular set of facts set forth in the petition.[8] When issued, a declaratory statement is the agency's legal opinion that binds the agency under principles of estoppel. An agency has the option to deny the petition and typically will do so if a live enforcement action is pending with respect to similar facts.

Attorney Fees

For purposes of the Equal Access to Justice Act in awarding attorney fees to a small business, an agency action is reasonably justified if it has a reasonable basis in law and fact at the time the agency acted. In such cases, no fees are allowable.

In addition to the special attorney fee provisions in the Equal Access to Justice Act, the APA provides for the recovery of attorney fees when a non-prevailing party has participated for an improper purpose; when an agency's actions are not substantially justified; when an agency relies upon an unadopted rule and is successfully challenged after 30 days' notice of the need to adopt rules; and when an agency loses an appeal in a proceeding challenging an unadopted rule.[9]

---

[1] Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[2] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).
[3] Section 120.52(17), F.S.
[4] Section 120.54(1)(a), F.S.
[5] Sections 120.52(8) and 120.536(1), F.S.
[6] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 at 599.
[7] *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008) (internal citations omitted); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc.*, 794 So. 2d 696, 704(Fla. 1st DCA 2001).
[8] Section 120.565, F.S.
[9] Section 120.595, F.S.

An agency defense to attorney fees available in actions challenging agency statements defined as rules is that the agency did not know and should not have known that the agency statement was an unadopted rule. Additionally, attorney fees in such actions may be awarded only upon a finding that the agency received notice that the agency statement may constitute an unadopted rule at least 30 days before a petition challenging the agency statement is filed, and the agency fails to publish a notice of rulemaking within that 30 day period.[10]

These attorney fee provisions supplement the attorney fee provisions provided by other laws.[11]

Notice of Rules

Presently, the only notice of adopted rules is the filing with the Department of State. The Department of State publishes such rules in the Florida Administrative Code. However, as a courtesy, the Department of State, once each week, lists newly adopted rules in the Florida Administrative Register, and includes a cumulative list of rules filed for adoption pending legislative ratification.

Burden of Proof

In general, laws carry a presumption of validity, and those challenging the validity of a law carry the burden of proving invalidity. The APA retains this presumption of validity by requiring those challenging adopted rules to carry the burden of proving a rule's invalidity.[12] However, in the case of proposed rules, the APA places the burden on the agency to demonstrate the validity of the rule as proposed, once the challenger has raised specific objections to the rule's validity.[13] In addition, a rule may not be filed for adoption until any pending challenge is resolved.[14]

In the case of a statement or policy in force that was not adopted as a rule, a challenger must prove that the statement or policy meets the definition of a rule under the APA. If so, and if the statement or policy has not been validly adopted, the agency must prove that rulemaking is not feasible or practicable.[15]

Proceedings Involving Rule Challenges

The APA presently applies different procedures when proposed rules, existing rules and unadopted rules are challenged by petition, compared to a challenge to the validity of an existing rule, or an unadopted rule defensively in a proceeding initiated by agency action. In addition to the attorney fees awardable to small businesses under the Equal Access to Justice Act, the APA provides attorney fee awards when a party petitions for invalidation of a rule or unadopted rule, but not when the same successful legal case is made in defense of an enforcement action or grant or denial of a permit or license.

The APA does provide that a (DOAH) judge may determine that an agency has attempted to rely on an unadopted rule in proceedings initiated by agency action. However, this is qualified by a

[10] Section 120.595(4)(b), F.S.
[11] See, for example, ss. 57.105, 57.111, F.S. These sections are specifically preserved in s. 120.595(6), F.S.
[12] Section 120.56(3), F.S.
[13] Section 120.56(2), F.S.
[14] Section 120.54(3)(e)2., F.S.
[15] Section 120.56(4), F.S.

provision that an agency may overrule the DOAH determination if clearly erroneous. If the agency rejects the DOAH determination and is later reversed on appeal, the challenger is awarded attorney fees for the entire proceeding.[16] Additionally, in proceedings initiated by agency action, when a DOAH judge determines that a rule constitutes an invalid exercise of delegated legislative authority the agency has full de novo authority to reject or modify such conclusions of law, provided the final order states with particularity the reasons for rejection or modifying such determination.[17]

In proceedings initiated by a party challenging a rule or unadopted rule, the DOAH judge enters a final order that cannot be overturned by the agency. The only appeal is to the District Court of Appeals.

Final Orders

An agency has 90 days to render a final order in any proceeding, after the hearing if the agency conducts the hearing, or after the recommended order is submitted to the agency if DOAH conducts the hearing (excepting the rule challenge proceedings described above in which the DOAH judge enters the final order).

Judicial Review

A notice of appeal of an appealable order under the APA must be filed within 30 days after the rendering of the order.[18] An order, however, is rendered when filed with the agency clerk. On occasion, a party may not receive notice of the order in time to meet the 30 day appeal deadline. Under the current statute a party may not seek judicial review of the validity of a rule by appealing its adoption but the statute authorizes an appeal from a final order in a rule challenge.[19]

III. Effect of Proposed Changes:

This makes a number of changes to the Administrative Procedure Act, which relate to a state agency's reliance on unadopted or invalid rules, a state agency's liability for attorney fees and costs, and the provision of notices and information to the public.

Rule Challenges

Reliance on Unadopted Rules During Rulemaking (Section 2)

Existing law, ss. 120.56(4)(e) and 120.595(4)(a), F.S., allow a person to challenge an agency statement as an unadopted rule. If the challenger prevails, the agency must "immediately discontinue reliance on the statement and any substantially similar statement until rules addressing the subject are adopted." Similarly, the bill requires an agency to stop using an unadopted rule when it receives a petition to initiate rulemaking relating to an unadopted rule and then proceeds with the rulemaking process.

[16] Section 120.57(1)(e)3., F.S.
[17] Section 120.57(1)(k-*l*), F.S.
[18] Section 120.68(2)(a), F.S.
[19] Section 120.68(9), F.S.

Rule Challenges; Burdens of Challenger and Agency (Section 4)

Under case law, in a rule challenge, a person challenging a rule or proposed rule generally has the burden of going forward with evidence and the ultimate burden of establishing the basis for the claim.[20] Once the challenger satisfies his or her burden, the agency must demonstrate by the greater weight of the evidence that the rule or proposed rule is not an invalid exercise of delegated legislative authority. The bill appears to codify case law defining the respective burdens of the challenger and agency in rule challenge proceedings.

Rule Challenges as a Defense to Agency Action

The bill specifies various ways that a party can assert the invalidity of a rule or unadopted rule as a defense to an agency action. A party may do so by filing a petition for a rule challenge alleging that a rule is an invalid exercise of delegated legislative authority. A party alleging status as a substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time the existing rule at any time during the existence of the rule.

In those circumstances, a DOAH judge must determine the validity of the rule or unadopted rule.

Rule Challenge as a Defense (Section 7)

Under current law, when an agency proposes to take action and there are no disputed factual issues, a person may have a dispute heard by an agency hearing officer. If disputed factual issues exist the dispute generally must be resolved by a DOAH judge, but an agency may reject the judge's conclusions of law in some circumstances.

Under the bill, when no factual disputes exist, a challenge to agency action will be heard by a DOAH judge if the challenger asserts the invalidity of a rule or unadopted rule as a defense to the agency action. The decision of the DOAH judge on the validity of the rule cannot be rejected by the agency. Thus, an agency may not adjudicate the validity of its own rules.

In cases in which an agency's rule or statement is being challenged as a defense and factual disputes exist, the agency must notify the challenger whether it will continue to rely on the rule or unadopted rule in the agency's action. If the agency fails to timely provide the notice, it may not rely on the rule or unadopted rule in the proceeding.

Bifurcation of Challenges to Agency Action Prohibited (Section 4)

The bill prohibits DOAH judge from bifurcating a petition challenging agency action based on an unadopted rule into separate cases—one case for a challenge to the action and one for a challenge to an alleged unadopted rule.

[20] *Keen v. Dept. of Bus. and Professional Regulation*, 920 So. 2d 805, 808 (Fla. 5th DCA 2006). *See also, Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*, 808 So. 2d 243, 251 (Fla. 1st DCA 2002).

Attorney Fees and Costs

The bill specifies additional circumstances in which a state agency may be liable for the attorney fees and costs and limits the circumstances in which private parties may be liable to a state agency for the same.

Challenges to Unadopted or Invalid Rules as a Defense (Section 9)

Under the bill, if a party successfully defends itself against an agency action by showing that the rule or unadopted rule on which the action was based was not valid, the party is entitled to reasonable attorney fees and costs which may not exceed $50,000.

Challenges to Proposed Rules (Section 9)

Under existing law, an agency is not liable for attorney fees in a challenge to a proposed rule, if it demonstrates that its actions were substantially justified based on a reasonable basis in law and fact or if special circumstances exist which would make an award unjust. Under the bill, if the agency loses a challenge to a proposed rule, the agency will be able to avoid liability for attorney fees and costs only if special circumstances exist that would make the award unjust.

Prerequisite to Attorney Fees in Rule Challenge Proceedings (Section 9)

Under existing law, if an agency is notified that it may be relying upon an unadopted rule, the agency can avoid liability for pre-notice attorney fees by initiating rulemaking within 30 days after receiving the notice.

As a prerequisite to the entitlement to attorney fees under the bill, a person challenging a proposed rule, unadopted rule, or existing rule must file a "notice of invalidity" with the agency. The notice must be received by the agency head at least 5 days before the challenge is filed against a proposed rule and 30 before a challenge is filed against an unadopted rule or existing rule.

Attorney Fees; Agency Action Not Substantially Justified (Section 1)

The Florida Equal Access to Justice Act, s. 57.111, F.S., requires a DOAH judge to award attorney fees to a prevailing small business party in any action under the Administrative Procedure Act, if a state agency initiated the action and the agency's action was not substantially justified.

The bill provides specific examples of agency action that is not substantially justified. As a result, a state agency is liable for the attorney fees and costs of a small business if the agency declines to issue a declaratory statement to a business and then takes action against the business based on facts and circumstances similar to those raised in the petition for a declaratory statement. Similarly, the agency is liable if the agency issues a declaratory statement to the business and then acts in contradiction to the declaratory statement.

Attorney Fees; Denial of a Declaratory Statement (Section 5)

The bill provides that a DOAH judge must award reasonable attorney fees to a person whose petition for a declaratory statement is improperly denied by a state agency.

Agency Liability for Fees for Fees (Section 9)

Under the Administrative Procedure Act, attorney fees and costs awarded against an agency are generally limited to $50,000. Under the bill, attorney fees and costs are available for litigating the entitlement to or an amount of fees and costs. These are not subject to the cap on attorney fees and costs.

Attorney Fee Awards against a Nonprevailing Adverse Party (Section 9)

Under existing law, a DOAH judge may award attorney fees against a nonprevailing adverse party who participated in a proceeding for an improper purpose. An improper purpose could exist if the party lost two or more similar cases against the agency. Under the bill, the party must have lost at least three similar cases against the agency.

Declaratory Statements (Section 5)

Under existing law, a person may petition a state agency for a declaratory statement, which is an explanation of how an agency's statutes, rules, or orders apply to the petitioner's particular circumstances. An agency must issue a declaratory statement or deny the petition within 90 days.

The bill provides that if the petitioner includes in the petition a statement that describes or asserts the petitioner's understanding of how and agency rule, policy, or procedure applies, the agency's response is due within 60 days. Thus, by including a statement describing how a petitioner believes an agency rule, policy, or procedure applies to his or her circumstances, the petitioner may accelerate the agency's response.

Notices and Information to the Public and Interested Persons

Workshops (Section 2)

Existing law allows agencies to use public workshops for the purpose of developing rules. During a workshop, agency personnel must be available to explain the agency's proposed rule and to respond to questions or comments on the proposed rule.

The bill requires an agency to establish a "time certain" for rulemaking workshops, if a state agency begins rulemaking based on a petition to initiate rulemaking from a person regulated by the agency or a person having a substantial interest. However, existing law requires that notice of a workshop be published in the Florida Administrative Register at least 14 days before the workshop.[21]

Florida Administrative Register (Section 3)

The Department of State is currently required to publish the Florida Administrative Register on the Internet. The register must contain a variety of variety of notices relating to agency rulemaking and declaratory statements.

[21] Section 120.54(3)(a)2. and 3., F.S.

The bill adds to the required contents of the Florida Administrative Register:
- Notices of rule development;
- Rules filed for adoption during the previous 7 days; and
- Rules filed for adoption pending ratification by the Legislature.

Notice of the Proposed Adoption, Amendment, or Repeal of Rules (Section 3)

Existing law requires an agency to provide notice of its intent to adopt, amend, or repeal a rule. The notice must be published in the Florida Administrative Register and mailed to persons named in the proposed rule or who have requested advance notice of agency proceedings.

The bill requires an agency that provides an e-mail alert service to inform licensees of important information to use its alert system to provide notice of:
- Rule development activities;
- Proposed rules; and
- Filing rules for adoption.

The e-email alerts relating to the rulemaking activities must include links to the proposed or final rules.

Notice to Administrative Procedures Committee (Section 10)

Existing law requires agencies to notify the Administrative Procedures Committee if the decision in a rule challenge proceeding is being appealed.[22] The bill requires the committee to be notified in an additional circumstance—an appeal of a decision in an agency action in which the respondent challenged the validity of a rule or unadopted rule as a defense.

Designation of Minor Violations (Section 11)

Existing law contains a requirement that agencies review their rules to identify rules that if violated would be a minor violation.[23] The review was to have been completed by December 1, 1995. If one of these violations occur, agencies are required issue a notice of noncompliance, which may not include a fine or penalty, as a first response to the violation.

The bill requires agencies to again review their rules to identify those that if violated would be a minor violation. Additionally, rules filed for adoption must be accompanied by a certification by the agency head as to whether any part of a rule that if violated would be a minor violation. These rules must be identified on agency websites or disciplinary guidelines adopted as a rule. These procedures do not apply to the Department of Corrections and educational units.

[22] Section 120.68(2)(a), F.S.
[23] Section 120.695, F.S.

Mediation (Section 8)

Existing law allows a person to seek to mediate the resolution of an agency-initiated action.[24] The bill allows a party that initiates a rule challenge or files a petition for a declaratory statement to seek mediation of the petition as well.

Effective Date (Section 12)

The bill takes effect on July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may make additional attorney fees and costs available to persons who challenge agency actions that are based on invalid or unadopted rules.

C. Government Sector Impact:

The bill may make agencies cautious about pursuing enforcement actions by increasing the circumstances in which agencies may be liable for attorney fees.

Agencies may receive reduced amounts of fines from minor rule violations.

[24] Section 120.573, F.S.

VI. Technical Deficiencies:

In s. 57.111(3)(e)2, F.S., the Legislature may wish to clarify that an agency is liable for attorney fees under the Equal Access to Justice Act only if the agency *improperly* denies a petition for a declaratory statement.

In s. 120.565(5), F.S., the bill provides that a DOAH judge must award attorney fees to a person whose petition for a declaratory statement is improperly denied by a state agency. Elsewhere in the bill and ch. 120, F.S., a person is entitled to costs in addition to attorney fees. As such, the Legislature may wish to make costs available in this instance as well.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 57.111, 120.54, 120.55, 120.56, 120.565, 120.569, 120.57, 120.573, 120.595, 120.68, and 120.695.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

797186

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Lee) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Paragraph (e) of subsection (3) of section 57.111, Florida Statutes, is amended to read:

57.111 Civil actions and administrative proceedings initiated by state agencies; attorney ~~attorneys'~~ fees and costs.—

(3) As used in this section:

(e) A proceeding is "substantially justified" if it had a

797186

reasonable basis in law and fact at the time it was initiated by a state agency. A proceeding is not substantially justified if the specified law, rule, or order at issue in the current agency action is the subject upon which the substantially affected party previously petitioned the agency for a declaratory statement under s. 120.565; the current agency action involves identical or substantially similar facts and circumstances as those raised in the previous petition; and:

1. The agency action contradicts the declaratory statement issued by the agency upon the previous petition; or

2. The agency denied the previous petition under s. 120.565 before initiating the current agency action against the substantially affected party.

Section 2. Paragraph (c) of subsection (7) of section 120.54, Florida Statutes, is amended, and a new paragraph (d) is added, to read:

120.54 Rulemaking.—

(7) PETITION TO INITIATE RULEMAKING.—

(c) Within 30 days after ~~following~~ the public hearing provided for in ~~by~~ paragraph (b), if the agency does not initiate rulemaking or otherwise comply with the requested action, the agency shall publish in the Florida Administrative Register a statement of its reasons for not initiating rulemaking or otherwise complying with the requested action, and of any changes it will make in the scope or application of the unadopted rule. The agency shall file the statement with the committee. The committee shall forward a copy of the statement to the substantive committee with primary oversight jurisdiction of the agency in each house of the Legislature. The committee or

797186

the committee with primary oversight jurisdiction may hold a hearing directed to the statement of the agency. The committee holding the hearing may recommend to the Legislature the introduction of legislation making the rule a statutory standard or limiting or otherwise modifying the authority of the agency.

(d) If the agency initiates rulemaking following a public hearing under paragraph (b), the agency shall publish its notice of rule development within 30 days after the hearing and file its notice of proposed rule within 180 days after the notice of rule development unless by such deadline the agency publishes in the Florida Administrative Register a statement explaining its reasons why a proposed rule has not been filed. If rulemaking is initiated under this paragraph, the agency may not rely on the unadopted rule unless the agency publishes in the Florida Administrative Register a statement explaining why rulemaking has not been feasible or practicable under s. 120.54(1)(a).

Section 3. Section 120.55, Florida Statutes, is amended to read:

120.55 Publication.—

(1) The Department of State shall:

(a)1. Through a continuous revision and publication system, compile and publish electronically, on an Internet website managed by the department, the "Florida Administrative Code." The Florida Administrative Code shall contain all rules adopted by each agency, citing the grant of rulemaking authority and the specific law implemented pursuant to which each rule was adopted, all history notes as authorized in s. 120.545(7), complete indexes to all rules contained in the code, and any other material required or authorized by law or deemed useful by

797186

the department. The electronic code shall display each rule chapter currently in effect in browse mode and allow full text search of the code and each rule chapter. The department may contract with a publishing firm for a printed publication; however, the department shall retain responsibility for the code as provided in this section. The electronic publication shall be the official compilation of the administrative rules of this state. The Department of State shall retain the copyright over the Florida Administrative Code.

2. Rules general in form but applicable to only one school district, community college district, or county, or a part thereof, or state university rules relating to internal personnel or business and finance shall not be published in the Florida Administrative Code. Exclusion from publication in the Florida Administrative Code shall not affect the validity or effectiveness of such rules.

3. At the beginning of the section of the code dealing with an agency that files copies of its rules with the department, the department shall publish the address and telephone number of the executive offices of each agency, the manner by which the agency indexes its rules, a listing of all rules of that agency excluded from publication in the code, and a statement as to where those rules may be inspected.

4. Forms shall not be published in the Florida Administrative Code; but any form which an agency uses in its dealings with the public, along with any accompanying instructions, shall be filed with the committee before it is used. Any form or instruction which meets the definition of "rule" provided in s. 120.52 shall be incorporated by reference

797186

into the appropriate rule. The reference shall specifically state that the form is being incorporated by reference and shall include the number, title, and effective date of the form and an explanation of how the form may be obtained. Each form created by an agency which is incorporated by reference in a rule notice of which is given under s. 120.54(3)(a) after December 31, 2007, must clearly display the number, title, and effective date of the form and the number of the rule in which the form is incorporated.

5. The department shall allow adopted rules and material incorporated by reference to be filed in electronic form as prescribed by department rule. When a rule is filed for adoption with incorporated material in electronic form, the department's publication of the Florida Administrative Code on its Internet website must contain a hyperlink from the incorporating reference in the rule directly to that material. The department may not allow hyperlinks from rules in the Florida Administrative Code to any material other than that filed with and maintained by the department, but may allow hyperlinks to incorporated material maintained by the department from the adopting agency's website or other sites.

(b) Electronically publish on an Internet website managed by the department a continuous revision and publication entitled the "Florida Administrative Register," which shall serve as the official publication and must contain:

1. All notices required by s. 120.54(2) and (3)(a) ~~s. 120.54(3)(a)~~, showing the text of all rules proposed for consideration.

2. All notices of public meetings, hearings, and workshops

797186

conducted in accordance with s. 120.525, including a statement of the manner in which a copy of the agenda may be obtained.

3. A notice of each request for authorization to amend or repeal an existing uniform rule or for the adoption of new uniform rules.

4. Notice of petitions for declaratory statements or administrative determinations.

5. A summary of each objection to any rule filed by the Administrative Procedures Committee.

6. A listing of rules filed for adoption in the previous 7 days.

7. A listing of all rules filed for adoption pending legislative ratification under s. 120.541(3) until notice of ratification or withdrawal of such rule is received.

8.~~6.~~ Any other material required or authorized by law or deemed useful by the department.

The department may contract with a publishing firm for a printed publication of the Florida Administrative Register and make copies available on an annual subscription basis.

(c) Prescribe by rule the style and form required for rules, notices, and other materials submitted for filing.

(d) Charge each agency using the Florida Administrative Register a space rate to cover the costs related to the Florida Administrative Register and the Florida Administrative Code.

(e) Maintain a permanent record of all notices published in the Florida Administrative Register.

(2) The Florida Administrative Register Internet website must allow users to:

797186

(a) Search for notices by type, publication date, rule number, word, subject, and agency.

(b) Search a database that makes available all notices published on the website for a period of at least 5 years.

(c) Subscribe to an automated e-mail notification of selected notices to be sent out before or concurrently with publication of the electronic Florida Administrative Register. Such notification must include in the text of the e-mail a summary of the content of each notice.

(d) View agency forms and other materials submitted to the department in electronic form and incorporated by reference in proposed rules.

(e) Comment on proposed rules.

(3) Publication of material required by paragraph (1)(b) on the Florida Administrative Register Internet website does not preclude publication of such material on an agency's website or by other means.

(4) Each agency shall provide copies of its rules upon request, with citations to the grant of rulemaking authority and the specific law implemented for each rule.

(5) Each agency that provides an e-mail alert service to inform licensees or other registered recipients of important notices shall use such service to notify recipients of each notice required under s. 120.54(2) and (3)(a), including a notice of rule development, notice of proposed rules, and notice of filing rules for adoption, and provide Internet links to the appropriate rule page on the Secretary of State's website or Internet links to an agency website that contains the proposed rule or final rule.

797186

(6) ~~(5)~~ Any publication of a proposed rule promulgated by an agency, whether published in the Florida Administrative Register or elsewhere, shall include, along with the rule, the name of the person or persons originating such rule, the name of the agency head who approved the rule, and the date upon which the rule was approved.

(7) ~~(6)~~ Access to the Florida Administrative Register Internet website and its contents, including the e-mail notification service, shall be free for the public.

(8)(a) ~~(7)(a)~~ All fees and moneys collected by the Department of State under this chapter shall be deposited in the Records Management Trust Fund for the purpose of paying for costs incurred by the department in carrying out this chapter.

(b) The unencumbered balance in the Records Management Trust Fund for fees collected pursuant to this chapter may not exceed $300,000 at the beginning of each fiscal year, and any excess shall be transferred to the General Revenue Fund.

Section 4. Paragraph (b) of subsection (1), paragraph (a) of subsection (2), and subsection (4) of section 120.56, Florida Statutes, are amended to read:

120.56 Challenges to rules.—

(1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.—

(b) The petition challenging the validity of a proposed or adopted rule under this section ~~seeking an administrative determination~~ must state ~~with particularity~~:

1. The particular provisions alleged to be invalid and include a statement ~~with sufficient explanation~~ of the facts or grounds for the alleged invalidity; and

797186

2. Facts sufficient to show that the petitioner ~~person challenging a rule~~ is substantially affected by the challenged adopted rule ~~it,~~ or ~~that the person challenging a proposed rule~~ would be substantially affected by the proposed rule ~~it~~.

(2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—

(a) A substantially affected person may seek an administrative determination of the invalidity of a proposed rule by filing a petition seeking such a determination with the division within 21 days after the date of publication of the notice required by s. 120.54(3)(a); within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(e)2.; within 20 days after the statement of estimated regulatory costs or revised statement of estimated regulatory costs, if applicable, has been prepared and made available as provided in s. 120.541(1)(d); or within 20 days after the date of publication of the notice required by s. 120.54(3)(d). The petition must state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The petitioner has the burden of going forward with evidence sufficient to support the petition. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. ~~A person who is substantially affected by a change in the proposed rule may seek a determination of the validity of such change.~~ A person who is not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the


797186

resulting rule ~~and is not limited to challenging the change to the proposed rule~~.

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS UNADOPTED RULES; SPECIAL PROVISIONS.—

(a) A ~~Any~~ person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state ~~with particularity~~ facts sufficient to show that the statement constitutes an ~~a~~ unadopted rule ~~under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54~~.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3), such notice shall automatically operate as a stay of proceedings pending adoption of the statement as a rule. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings pending rulemaking shall remain in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. ~~If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving~~

(c) The petitioner has the burden of going forward with evidence sufficient to support the petition. The agency then has the burden to prove by a preponderance of the evidence that the

797186

statement does not meet the definition of an unadopted rule, the statement was adopted as a rule in compliance with s. 120.54, or that rulemaking is not feasible or not practicable under s. 120.54(1)(a).

(d) ~~(c)~~ The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Register.

(e) ~~(d)~~ If an administrative law judge enters a final order that all or part of an unadopted rule ~~agency statement~~ violates s. 120.54(1)(a), the agency must immediately discontinue all reliance on ~~upon~~ the unadopted rule ~~statement~~ or any substantially similar statement as a basis for agency action.

(f) ~~(e)~~ If proposed rules addressing the challenged unadopted rule ~~statement~~ are determined to be an invalid exercise of delegated legislative authority as defined in s. 120.52(8)(b)-(f), the agency must immediately discontinue reliance on the unadopted rule ~~statement~~ and any substantially similar statement until rules addressing the subject are properly adopted, and the administrative law judge shall enter a final order to that effect.

(g) ~~(f)~~ All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under subsection (3) or under any other section of


797186

this chapter. This paragraph does not prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

Section 5. Paragraph (l) of subsection (2) of section 120.569, Florida Statutes, is amended to read:

120.569 Decisions which affect substantial interests.—

(2)

(l) Unless the time period is waived or extended with the consent of all parties, the final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated, and it must be rendered within 90 days:

1. After the hearing is concluded, if conducted by the agency;

2. After a recommended order is submitted to the agency and mailed to all parties, if the hearing is conducted by an administrative law judge, except that, at the election of the agency, the time for rendering the final order may be extended up to 10 days after entry of a mandate on any appeal from a final order under s. 120.57(1)(e)4.; or

3. After the agency has received the written and oral material it has authorized to be submitted, if there has been no hearing.

Section 6. Paragraphs (e) and (h) of subsection (1) and subsection (2) of section 120.57, Florida Statutes, are amended to read:

120.57 Additional procedures for particular cases.—

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—

797186

(e)1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. ~~The administrative law judge shall determine whether an agency statement constitutes an unadopted rule.~~ This subparagraph does not preclude application of valid adopted rules and applicable provisions of law to the facts.

2. In a matter initiated as a result of agency action proposing to determine the substantial interests of a party, the party's timely petition for hearing may challenge the proposed agency action based on a rule that is an invalid exercise of delegated legislative authority or based on an alleged unadopted rule. For challenges brought under this subparagraph:

a. The challenge shall be pled as a defense using the procedures set forth in s. 120.56(1)(b).

b. Section 120.56(3)(a) applies to a challenge alleging that a rule is an invalid exercise of delegated legislative authority.

c. Section 120.56(4)(c) applies to a challenge alleging an unadopted rule.

d. The agency has 15 days from the date of receipt of a challenge under this subparagraph to serve the challenging party with a notice as to whether the agency will continue to rely upon the rule or the alleged unadopted rule as a basis for the action determining the party's substantive interests. Failure to timely serve the notice constitutes a binding stipulation that the agency may not rely upon the rule or unadopted rule further in the proceeding. The agency shall include a copy of this

797186

notice with the referral of the matter to the division under s. 120.569(2)(a).

e. This subparagraph does not preclude the consolidation of any proceeding under s. 120.56 with any proceeding under this paragraph.

3.~~2.~~ Notwithstanding subparagraph 1., if an agency demonstrates that the statute being implemented directs it to adopt rules, that the agency has not had time to adopt those rules because the requirement was so recently enacted, and that the agency has initiated rulemaking and is proceeding expeditiously and in good faith to adopt the required rules, ~~then~~ the agency's action may be based upon those unadopted rules if~~, subject to de novo review by~~ the administrative law judge determines that rulemaking is neither feasible nor practicable and the unadopted rules would not constitute an invalid exercise of delegated legislative authority if adopted as rules. An unadopted rule ~~The agency action~~ shall not be presumed valid ~~or invalid~~. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority vested in the agency by ~~derived from~~ the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is

797186

irrational;

e. Is not being applied to the substantially affected party without due notice; and

f. Does not impose excessive regulatory costs on the regulated person, county, or city.

4. If the agency timely serves notice of continued reliance upon a challenged rule or an alleged unadopted rule under sub-subparagraph 2.d., the administrative law judge shall determine whether the challenged rule is an invalid exercise of delegated legislative authority or whether the challenged agency statement constitutes an unadopted rule and if that unadopted rule meets the requirements of subparagraph 3. The determination shall be rendered as a separate final order no earlier than the date on which the administrative law judge serves the recommended order.

5.~~3.~~ The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (k) and (l), except that the administrative law judge's determination ~~regarding an unadopted rule~~ under subparagraph 4. ~~1. or subparagraph 2.~~ shall be included as a conclusion of law that the agency may not reject ~~not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law~~. ~~In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable~~

797186

~~attorney's fee for the initial proceeding and the proceeding for review.~~

(h) Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order. This paragraph does not apply to proceedings authorized by paragraph (e).

(2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—In any case to which subsection (1) does not apply:

(a) The agency shall:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.

2. Give parties or their counsel the option, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to

797186

justify its action or inaction.

3. If the objections of the parties are overruled, provide a written explanation within 7 days.

(b) An agency may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. No later than the date provided by the agency under subparagraph (a)2. for presenting material in opposition to the agency's proposed action or refusal to act, the party may file a petition under s. 120.56 challenging the rule, portion of rule, or unadopted rule upon which the agency bases its proposed action or refusal to act. The filing of a challenge under s. 120.56 pursuant to this paragraph shall stay all proceedings on the agency's proposed action or refusal to act until entry of the final order by the administrative law judge, which shall provide additional notice that the stay of the pending agency action is terminated and any further stay pending appeal of the final order must be sought from the appellate court.

(c) ~~(b)~~ The record shall only consist of:

1. The notice and summary of grounds.

2. Evidence received.

3. All written statements submitted.

4. Any decision overruling objections.

5. All matters placed on the record after an ex parte communication.

6. The official transcript.

7. Any decision, opinion, order, or report by the presiding officer.

Section 7. Section 120.595, Florida Statutes, is amended to

797186

read:

120.595 Attorney ~~Attorney's~~ fees and costs.—

(1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—

(a) ~~The provisions of~~ This subsection is ~~are~~ supplemental to, and does ~~do~~ not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.

(b) The final order in a proceeding conducted pursuant to s. 120.57(1) must ~~shall~~ award all reasonable costs and all ~~a~~ reasonable attorney fees ~~attorney's fee~~ to the prevailing party only if ~~where~~ the administrative law judge determines that the nonprevailing adverse party ~~has been determined by the administrative law judge to have~~ participated in the proceeding for an improper purpose.

(c) In proceedings conducted pursuant to s. 120.57(1), it shall be rebuttably presumed that a nonprevailing adverse party participated in the current proceeding for an improper purpose if the administrative law judge determines that:

1. The nonprevailing adverse party participated in another such proceeding involving the same prevailing party and project as an adverse party in which the nonprevailing adverse party did not establish either the factual or legal merits of its position.

2. The factual or legal position asserted in the current proceeding would have been cognizable in the previous proceeding ~~and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection~~. ~~In making such determination, the administrative law judge shall consider~~

797186

~~whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.~~

(d) In a ~~any~~ proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall ~~so~~ designate that party and ~~shall~~ determine the award of costs and attorney ~~attorney's~~ fees.

(e) For purposes ~~the purpose~~ of this subsection, the term:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. If ~~In the event that~~ a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party

797186

having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. ~~In no event shall~~ The term "nonprevailing party" or "prevailing party" may not be deemed to include a ~~any~~ party that has intervened in a previously existing proceeding to support the position of an agency.

(f) For challenges brought under s. 120.57(1)(e), when the agency relies on a challenged rule or an alleged unadopted rule pursuant to s. 120.57(1)(e)2.d., if the appellate court or the administrative law judge declares the rule or portion of the rule to be invalid or that the agency statement is an unadopted rule that does not meet the requirements of s. 120.57(1)(e)4., a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney fees, unless the agency demonstrates that special circumstances exist which would make the award unjust. An award of attorney fees as provided by this paragraph may not exceed $50,000.

(2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO SECTION 120.56(2).—If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney ~~attorney's~~ fees, unless the agency demonstrates that ~~its actions were substantially justified or~~ special circumstances exist which would make the award unjust. ~~An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or~~

797186

~~administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(c).~~ An ~~No~~ award of attorney ~~attorney's~~ fees as provided by this subsection may not ~~shall~~ exceed $50,000.

(3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO SECTION 120.56(3) AND (5).—If the appellate court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3) or (5), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney ~~attorney's~~ fees, unless the agency demonstrates that ~~its actions were substantially justified or~~ special circumstances exist which would make the award unjust. ~~An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(c).~~ An ~~No~~ award of attorney ~~attorney's~~ fees as provided by this subsection may not ~~shall~~ exceed $50,000.

(4) CHALLENGES TO UNADOPTED RULES ~~AGENCY ACTION~~ PURSUANT TO SECTION 120.56(4).—

(a) If the appellate court or administrative law judge determines that all or part of an unadopted rule ~~agency~~

797186

~~statement~~ violates s. 120.54(1)(a), or that the agency must immediately discontinue reliance upon ~~on~~ the unadopted rule ~~statement~~ and any substantially similar statement pursuant to s. 120.56(4)(f) ~~s. 120.56(4)(c)~~, a judgment or order shall be entered against the agency for reasonable costs and reasonable attorney ~~attorney's~~ fees, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

(b) Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3)(a), such notice shall automatically operate as a stay of proceedings pending rulemaking. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings under this paragraph remains in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. The administrative law judge shall award reasonable costs and reasonable attorney ~~attorney's~~ fees incurred ~~accrued~~ by the petitioner before ~~prior to~~ the date the notice was published~~, unless the agency proves to the administrative law judge that it did not know and should not have known that the statement was an unadopted rule~~. ~~Attorneys' fees and costs under this paragraph and paragraph (a) shall be awarded only upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before a petition under s. 120.56(4) was filed and that the agency failed to publish the required notice of rulemaking pursuant to s. 120.54(3) that addresses the statement within that 30-day period. Notice to the~~

797186

~~agency may be satisfied by its receipt of a copy of the s. 120.56(4) petition, a notice or other paper containing substantially the same information, or a petition filed pursuant to s. 120.54(7).~~ An award of attorney ~~attorney's~~ fees as provided by this paragraph may not exceed $50,000.

(c) Notwithstanding the provisions of chapter 284, an award shall be paid from the budget entity of the secretary, executive director, or equivalent administrative officer of the agency, and the agency is ~~shall~~ not ~~be~~ entitled to payment of an award or reimbursement for payment of an award under any provision of law.

~~(d) If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and attorney's fees against a party if the appellate court or administrative law judge determines that the party participated in the proceedings for an improper purpose as defined in paragraph (1)(c) or that the party or the party's attorney knew or should have known that a claim was not supported by the material facts necessary to establish the claim or would not be supported by the application of then-existing law to those material facts.~~

(5) APPEALS.—When there is an appeal, the court in its discretion may award reasonable attorney ~~attorney's~~ fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified


797186

findings of fact in a recommended order, the court shall award reasonable attorney ~~attorney's~~ fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

(6) NOTICE OF INVALIDITY.—A party failing to serve a notice of proposed challenge under this subsection is not entitled to an award of reasonable costs and reasonable attorney fees under this section.

(a) Before filing a petition challenging the validity of a proposed rule under s. 120.56(2), an adopted rule under s. 120.56(3), or an agency statement defined as an unadopted rule under s. 120.56(4), a substantially affected person shall serve the agency head with notice of the proposed challenge. The notice shall identify the proposed or adopted rule or the unadopted rule that the person proposes to challenge and a brief explanation of the basis for that challenge. The notice must be received by the agency head at least 5 days before the filing of a petition under s. 120.56(2), and at least 30 days before the filing of a petition under s. 120.56(3) or s. 120.56(4).

(b) This subsection does not apply to defenses raised and challenges authorized by s. 120.57(1)(e) or s. 120.57(2)(b).

(7) DETERMINATION OF RECOVERABLE FEES AND COSTS.—For purposes of this chapter, s. 57.105(5), and s. 57.111, in addition to an award of reasonable attorney fees and costs, the prevailing party, if the prevailing party is not a state agency, shall also recover reasonable attorney fees and costs incurred in litigating entitlement to, and the determination or quantification of, reasonable attorney fees and costs for the underlying matter. Reasonable attorney fees and costs awarded

797186

for litigating entitlement to, and the determination or quantification of, reasonable attorney fees and costs for the underlying matter are not subject to the limitations on amounts provided in this chapter or s. 57.111.

(8) ~~(6)~~ OTHER SECTIONS NOT AFFECTED.—Other provisions, including ss. 57.105 and 57.111, authorize the award of attorney ~~attorney's~~ fees and costs in administrative proceedings. Nothing in this section shall affect the availability of attorney ~~attorney's~~ fees and costs as provided in those sections.

Section 8. Subsections (1), (2), and (9) of section 120.68, Florida Statutes, are amended to read:

120.68 Judicial review.—

(1)(a) A party who is adversely affected by final agency action is entitled to judicial review.

(b) A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings, or a final order under s. 120.57(1)(e)4., is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(2)(a) Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.

(b) All proceedings shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the date that ~~rendition of~~ the order being appealed was filed with the agency clerk. Such time is hereby extended for any party 10 days from receipt by such party of the notice of the order, if such notice is received after the 25th day from the filing of the order. If

797186

the appeal is of an order rendered in a proceeding initiated under s. 120.56, or a final order under s. 120.57(1)(e)4., the agency whose rule is being challenged shall transmit a copy of the notice of appeal to the committee.

(c) ~~(b)~~ When proceedings under this chapter are consolidated for final hearing and the parties to the consolidated proceeding seek review of final or interlocutory orders in more than one district court of appeal, the courts of appeal are authorized to transfer and consolidate the review proceedings. The court may transfer such appellate proceedings on its own motion, upon motion of a party to one of the appellate proceedings, or by stipulation of the parties to the appellate proceedings. In determining whether to transfer a proceeding, the court may consider such factors as the interrelationship of the parties and the proceedings, the desirability of avoiding inconsistent results in related matters, judicial economy, and the burden on the parties of reproducing the record for use in multiple appellate courts.

(9) No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.56, under s. 120.57(1)(e)5., or under s. 120.57(2)(b), or an agency's findings of immediate danger, necessity, and procedural fairness prerequisite to the adoption of an emergency rule pursuant to s. 120.54(4), unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.

Section 9. Section 120.695, Florida Statutes, is amended to

797186

read:

120.695 Notice of noncompliance; designation of minor violation rules.—

(1) It is the policy of the state that the purpose of regulation is to protect the public by attaining compliance with the policies established by the Legislature. Fines and other penalties may be provided in order to assure compliance; however, the collection of fines and the imposition of penalties are intended to be secondary to the primary goal of attaining compliance with an agency's rules. It is the intent of the Legislature that an agency charged with enforcing rules shall issue a notice of noncompliance as its first response to a minor violation of a rule in any instance in which it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it.

(2)(a) Each agency shall issue a notice of noncompliance as a first response to a minor violation of a rule. A "notice of noncompliance" is a notification by the agency charged with enforcing the rule issued to the person or business subject to the rule. A notice of noncompliance may not be accompanied with a fine or other disciplinary penalty. It must identify the specific rule that is being violated, provide information on how to comply with the rule, and specify a reasonable time for the violator to comply with the rule. A rule is agency action that regulates a business, occupation, or profession, or regulates a person operating a business, occupation, or profession, and that, if not complied with, may result in a disciplinary penalty.

(b) Each agency shall review all of its rules and designate

797186

those for which a violation would be a minor violation and for which a notice of noncompliance must be the first enforcement action taken against a person or business subject to regulation. A violation of a rule is a minor violation if it does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm. ~~If an agency under the direction of a cabinet officer mails to each licensee a notice of the designated rules at the time of licensure and at least annually thereafter, the provisions of paragraph (a) may be exercised at the discretion of the agency. Such notice shall include a subject-matter index of the rules and information on how the rules may be obtained.~~

(c) ~~The agency's review and designation must be completed by December 1, 1995;~~

1. No later than June 30, 2015, and thereafter within 3 months after any request of the rules ombudsman in the Executive Office of the Governor, each agency shall review ~~under the direction of the Governor shall make a report to the Governor, and each agency under the joint direction of the Governor and Cabinet shall report to the Governor and Cabinet by January 1, 1996, on which of~~ its rules and certify to the President of the Senate, the Speaker of the House of Representatives, the Administrative Procedures Committee, and the rules ombudsman those rules that have been designated as rules the violation of which would be a minor violation under paragraph (b), consistent with the legislative intent stated in subsection (1). The rules ombudsman shall promptly report the failure of an agency to timely complete the required review and file the required certification to the Governor, the President of the Senate, the

797186

Speaker of the House of Representatives, and the Administrative Procedures Committee.

2. Beginning on July 1, 2015, each agency shall:

a. Publish all rules that it has designated as rules the violation of which would be a minor violation, either as a complete list on the agency's Internet website or by incorporation of the designations in the agency's disciplinary guidelines, which shall be adopted as a rule.

b. Ensure that all investigative and enforcement personnel are knowledgeable of the agency's designations under this section.

3. For each rule filed for adoption, the agency head shall certify whether any part of the rule is designated as a rule the violation of which would be a minor violation and shall update the listing required by sub-subparagraph 2.a.

(d) The Governor or the Governor and Cabinet, as appropriate ~~pursuant to paragraph (c)~~, may evaluate the review and designation effects of each agency subject to the direction and supervision of such authority and may direct ~~apply~~ a different designation than that applied by such ~~the~~ agency.

(e) Notwithstanding s. 120.52(1)(a), this section does not apply to:

1. The Department of Corrections;

2. Educational units;

3. The regulation of law enforcement personnel; or

4. The regulation of teachers.

(f) Designation pursuant to this section is not subject to challenge under this chapter.

Section 10. This act shall take effect July 1, 2014.

797186

824

825 ================ T I T L E A M E N D M E N T ================

826 And the title is amended as follows:

827 Delete everything before the enacting clause

828 and insert:

829 A bill to be entitled

830 An act relating to administrative procedures; amending

831 s. 57.111, F.S.; providing conditions under which a

832 proceeding is not substantially justified for purposes

833 of an award under the Florida Equal Access to Justice

834 Act; amending s. 120.54, F.S.; requiring agencies to

835 publish its notice of rule development within 30 days

836 if initiating rulemaking at the request of the

837 petitioner; requiring an agency to publish its notice

838 of proposed rule within 180 days of the notice of rule

839 development; providing an exception; limiting reliance

840 upon an unadopted rule in certain circumstances;

841 amending s. 120.55, F.S.; providing for publication of

842 notices of rule development and of rules filed for

843 adoption; providing additional notice of rule

844 development, proposals, and adoptions; amending s.

845 120.56, F.S.; providing that the petitioner

846 challenging a proposed rule or unadopted agency

847 statement has the burden of going forward with

848 evidence sufficient to support the petition; amending

849 s. 120.569, F.S.; granting agencies additional time to

850 render final orders in certain circumstances; amending

851 s. 120.57, F.S.; conforming proceedings that oppose

852 agency action based on an invalid or unadopted rule to

797186

proceedings used for challenging rules; requiring the agency to issue a notice stating whether the agency will rely on the challenged rule or alleged unadopted rule; authorizing the administrative law judge to make certain findings on the validity of certain alleged unadopted rules; authorizing the administrative law judge to issue a separate final order on certain rules and alleged unadopted rules; prohibiting agencies from rejecting specific conclusions of law; providing for stay of proceedings not involving disputed issues of fact upon timely filing of a rule challenge; providing that the final order terminates the stay; amending s. 120.595, F.S.; requiring that a final order in specified administrative proceedings award all reasonable costs and attorney fees to a prevailing party under certain circumstances; revising the criteria used by an administrative law judge to determine whether a party participated in a proceeding for an improper purpose; removing certain exceptions from requirements that attorney fees and costs be rendered against the agency in proceedings in which the petitioner prevails in a rule challenge; requiring service of notice of invalidity to an agency before bringing a rule challenge as a condition precedent to award of attorney fees and costs; authorizing the recovery of reasonable attorney fees and costs incurred by a prevailing party in litigating entitlement to or quantification of underlying attorney fees and costs; removing certain limitations


797186

on such attorney fees and costs; removing redundancies; amending s. 120.68, F.S.; providing for appellate review of orders rendered in challenges to specified rules or unadopted rules; amending s. 120.695, F.S.; removing obsolete provisions with respect to required agency review and designation of minor violations; requiring agency review and certification of minor violation rules by a specified date; requiring the reporting of agency failure to complete the review and file certification of such rules; requiring minor violation certification for all rules adopted after a specified date; requiring public notice; providing for applicability; providing an effective date.

By Senator Lee

24-01138-14 20141626__

A bill to be entitled

An act relating to administrative procedures; amending s. 57.111, F.S.; providing conditions under which a proceeding is not substantially justified for purposes of an award under the Florida Equal Access to Justice Act; amending s. 120.54, F.S.; requiring agencies to set a time for workshops if initiating rulemaking at the request of the petitioner; amending s. 120.55, F.S.; providing for publication of notices of rule development and of rules filed for adoption; providing additional notice of rule development, proposals, and adoptions; amending s. 120.56, F.S.; clarifying that petitions for administrative determinations apply to rules or proposed rules; providing that a petitioner challenging a rule, proposed rule, or agency statement has the burden of going forward after which the agency has the burden of proving that the rule, proposed rule, or agency statement is not invalid; prohibiting an administrative law judge from bifurcating certain petitions challenging agency action into separate cases; amending s. 120.565, F.S.; authorizing certain parties to provide to an agency their understanding of how certain rules apply to specific facts; requiring the agency to provide a declaratory statement within 60 days; authorizing the administrative law judge to award attorney fees under certain circumstances; amending s. 120.569, F.S.; granting agencies additional time to render final orders in certain circumstances; amending s. 120.57, F.S.; conforming

24-01138-14 20141626__

proceedings that oppose agency action based on an invalid or unadopted rule to proceedings used for challenging rules; requiring the agency to issue a notice stating whether the agency will rely on the challenged rule or alleged unadopted rule; authorizing the administrative law judge to make certain findings on the validity of certain alleged unadopted rules; authorizing the administrative law judge to issue a separate final order on certain rules and alleged unadopted rules; prohibiting agencies from rejecting specific conclusions of law; providing for stay of proceedings not involving disputed issues of fact upon timely filing of a rule challenge; providing that the final order terminates the stay; amending s. 120.573, F.S.; authorizing a party to request mediation of a rule challenge and declaratory statement proceedings; amending s. 120.595, F.S.; providing for an award of attorney fees and costs in specified challenges to agency action; providing criteria that, if met, establish that a nonprevailing party participated in an administrative proceeding for an improper purpose; revising provisions providing for the award of attorney fees and costs by the appellate court or administrative law judge against the agency or party in specified administrative challenges; providing exceptions for the award of attorney fees and costs; capping the amount of attorney fees that may be awarded; requiring notice of a proposed challenge by the petitioner as a condition precedent to filing a

challenge and being eligible for the reimbursement of attorney fees and costs; authorizing the recovery of attorney fees and costs incurred in litigating entitlement to attorney fees and costs in administrative actions; providing such attorney fees and costs are not limited in amount; amending s. 120.68, F.S.; requiring specified agencies in appeals of certain final orders to provide a copy of the notice of appeal to the Administrative Procedures Committee; amending s. 120.695, F.S.; removing obsolete provisions with respect to required agency review and designation of minor violations; requiring agency review and certification of minor violation rules by a specified date; requiring the reporting of agency failure to complete the review and file certification of such rules; requiring minor violation certification for all rules adopted after a specified date; requiring public notice; providing for nonapplicability; conforming provisions to changes made by the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (e) of subsection (3) of section 57.111, Florida Statutes, is amended to read:

57.111 Civil actions and administrative proceedings initiated by state agencies; attorney ~~attorneys'~~ fees and costs.—

(3) As used in this section:

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency. A proceeding is not substantially justified if the specified law, rule, or order at issue in the current agency action is the subject upon which the substantially affected party previously petitioned the agency for a declaratory statement under s. 120.565; the current agency action involves identical or substantially similar facts and circumstances as those raised in the previous petition and:

1. The agency action contradicts the declaratory statement issued by the agency upon the previous petition; or

2. The agency denied the previous petition under s. 120.565 before initiating the current agency action against the substantially affected party.

Section 2. Paragraph (c) of subsection (7) of section 120.54, Florida Statutes, is amended to read:

120.54 Rulemaking.—

(7) PETITION TO INITIATE RULEMAKING.—

(c) Within 30 days after ~~following~~ the public hearing provided for in ~~by~~ paragraph (b), if the petition's requested action requires rulemaking and the agency initiates rulemaking, the agency shall establish a time certain for the rulemaking workshops and shall discontinue reliance upon the agency statement or unadopted rule until it adopts appropriate rules pursuant to subsection (3). If the agency does not initiate rulemaking or otherwise comply with the requested action, the agency shall publish in the Florida Administrative Register a statement of its reasons for not initiating rulemaking or otherwise complying with the requested action, and of any

changes it will make in the scope or application of the unadopted rule. The agency shall file the statement with the committee. The committee shall forward a copy of the statement to the substantive committee with primary oversight jurisdiction of the agency in each house of the Legislature. The committee or the committee with primary oversight jurisdiction may hold a hearing directed to the statement of the agency. The committee holding the hearing may recommend to the Legislature the introduction of legislation making the rule a statutory standard or limiting or otherwise modifying the authority of the agency.

Section 3. Section 120.55, Florida Statutes, is amended to read:

120.55 Publication.—

(1) The Department of State shall:

(a)1. Through a continuous revision and publication system, compile and publish electronically, on an Internet website managed by the department, the "Florida Administrative Code." The Florida Administrative Code shall contain all rules adopted by each agency, citing the grant of rulemaking authority and the specific law implemented pursuant to which each rule was adopted, all history notes as authorized in s. 120.545(7), complete indexes to all rules contained in the code, and any other material required or authorized by law or deemed useful by the department. The electronic code shall display each rule chapter currently in effect in browse mode and allow full text search of the code and each rule chapter. The department may contract with a publishing firm for a printed publication; however, the department shall retain responsibility for the code as provided in this section. The electronic publication shall be

the official compilation of the administrative rules of this state. The Department of State shall retain the copyright over the Florida Administrative Code.

2. Rules general in form but applicable to only one school district, community college district, or county, or a part thereof, or state university rules relating to internal personnel or business and finance shall not be published in the Florida Administrative Code. Exclusion from publication in the Florida Administrative Code shall not affect the validity or effectiveness of such rules.

3. At the beginning of the section of the code dealing with an agency that files copies of its rules with the department, the department shall publish the address and telephone number of the executive offices of each agency, the manner by which the agency indexes its rules, a listing of all rules of that agency excluded from publication in the code, and a statement as to where those rules may be inspected.

4. Forms shall not be published in the Florida Administrative Code; but any form which an agency uses in its dealings with the public, along with any accompanying instructions, shall be filed with the committee before it is used. Any form or instruction which meets the definition of "rule" provided in s. 120.52 shall be incorporated by reference into the appropriate rule. The reference shall specifically state that the form is being incorporated by reference and shall include the number, title, and effective date of the form and an explanation of how the form may be obtained. Each form created by an agency which is incorporated by reference in a rule notice of which is given under s. 120.54(3)(a) after December 31, 2007,

must clearly display the number, title, and effective date of the form and the number of the rule in which the form is incorporated.

5. The department shall allow adopted rules and material incorporated by reference to be filed in electronic form as prescribed by department rule. When a rule is filed for adoption with incorporated material in electronic form, the department's publication of the Florida Administrative Code on its Internet website must contain a hyperlink from the incorporating reference in the rule directly to that material. The department may not allow hyperlinks from rules in the Florida Administrative Code to any material other than that filed with and maintained by the department, but may allow hyperlinks to incorporated material maintained by the department from the adopting agency's website or other sites.

(b) Electronically publish on an Internet website managed by the department a continuous revision and publication entitled the "Florida Administrative Register," which shall serve as the official publication and must contain:

1. All notices required by s. 120.54(2) and (3)(a) ~~s. 120.54(3)(a)~~, showing the text of all rules proposed for consideration.

2. All notices of public meetings, hearings, and workshops conducted in accordance with s. 120.525, including a statement of the manner in which a copy of the agenda may be obtained.

3. A notice of each request for authorization to amend or repeal an existing uniform rule or for the adoption of new uniform rules.

4. Notice of petitions for declaratory statements or

administrative determinations.

5. A summary of each objection to any rule filed by the Administrative Procedures Committee.

6. A listing of rules filed for adoption in the previous 7 days.

7. A listing of all rules filed for adoption pending legislative ratification under s. 120.541(3) until notice of ratification or withdrawal of such rule is received.

8.~~6.~~ Any other material required or authorized by law or deemed useful by the department.

The department may contract with a publishing firm for a printed publication of the Florida Administrative Register and make copies available on an annual subscription basis.

(c) Prescribe by rule the style and form required for rules, notices, and other materials submitted for filing.

(d) Charge each agency using the Florida Administrative Register a space rate to cover the costs related to the Florida Administrative Register and the Florida Administrative Code.

(e) Maintain a permanent record of all notices published in the Florida Administrative Register.

(2) The Florida Administrative Register Internet website must allow users to:

(a) Search for notices by type, publication date, rule number, word, subject, and agency.

(b) Search a database that makes available all notices published on the website for a period of at least 5 years.

(c) Subscribe to an automated e-mail notification of selected notices to be sent out before or concurrently with

publication of the electronic Florida Administrative Register. Such notification must include in the text of the e-mail a summary of the content of each notice.

(d) View agency forms and other materials submitted to the department in electronic form and incorporated by reference in proposed rules.

(e) Comment on proposed rules.

(3) Publication of material required by paragraph (1)(b) on the Florida Administrative Register Internet website does not preclude publication of such material on an agency's website or by other means.

(4) Each agency shall provide copies of its rules upon request, with citations to the grant of rulemaking authority and the specific law implemented for each rule.

(5) Each agency that provides an e-mail alert service to inform licensees or other registered recipients of important notices shall use such service to notify recipients of each notice required under s. 120.54(2) and (3)(a), including a notice of rule development, notice of proposed rules, and notice of filing rules for adoption, and provide Internet links to the appropriate rule page on the Department of State's website or Internet links to an agency website that contains the proposed rule or final rule.

(6)~~(5)~~ Any publication of a proposed rule promulgated by an agency, whether published in the Florida Administrative Register or elsewhere, shall include, along with the rule, the name of the person or persons originating such rule, the name of the agency head who approved the rule, and the date upon which the rule was approved.

(7)~~(6)~~ Access to the Florida Administrative Register Internet website and its contents, including the e-mail notification service, shall be free for the public.

(8)~~(7)~~(a) All fees and moneys collected by the Department of State under this chapter shall be deposited in the Records Management Trust Fund for the purpose of paying for costs incurred by the department in carrying out this chapter.

(b) The unencumbered balance in the Records Management Trust Fund for fees collected pursuant to this chapter may not exceed $300,000 at the beginning of each fiscal year, and any excess shall be transferred to the General Revenue Fund.

Section 4. Subsections (1), (3), and (4) of section 120.56, Florida Statutes, are amended to read:

120.56 Challenges to rules.—

(1) GENERAL PROCEDURES ~~FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE~~.—

(a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

(b) The petition seeking an administrative determination of the rule or proposed rule must state the facts and ~~with particularity~~ the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the petitioner ~~person~~ challenging the ~~a~~ rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by the proposed rule ~~it~~.

(c) The petition shall be filed by electronic means with

the division which shall, immediately upon filing, forward by electronic means copies to the agency whose rule is challenged, the Department of State, and the committee. Within 10 days after receiving the petition, the division director shall, if the petition complies with the requirements of paragraph (b), assign an administrative law judge who shall conduct a hearing within 30 days thereafter, unless the petition is withdrawn or a continuance is granted by agreement of the parties or for good cause shown. Evidence of good cause includes, but is not limited to, written notice of an agency's decision to modify or withdraw the proposed rule or a written notice from the chair of the committee stating that the committee will consider an objection to the rule at its next scheduled meeting. The failure of an agency to follow the applicable rulemaking procedures or requirements set forth in this chapter shall be presumed to be material; however, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired.

(d) Within 30 days after the hearing, the administrative law judge shall render a decision and state the reasons therefor in writing. The division shall forthwith transmit by electronic means copies of the administrative law judge's decision to the agency, the Department of State, and the committee.

(e) Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. The petitioner has the burden of going forward with the evidence. The agency has the burden of proving by a preponderance of the evidence that the rule, proposed rule, or agency statement is not an invalid exercise of delegated

legislative authority. Hearings shall be conducted in the same manner as provided by ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action. The petitioner and the agency whose rule is challenged shall be adverse parties. Other substantially affected persons may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings. Failure to proceed under this section shall not constitute failure to exhaust administrative remedies.

(3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.—

(a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. The petitioner has the ~~a~~ burden of going forward with the evidence as set forth in paragraph (1)(b), and the agency has the burden of proving by a preponderance of the evidence that the existing rule is not an invalid exercise of delegated legislative authority as to the objections raised.

(b) The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Register in the first available issue after the rule has become void.

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.—

(a) Any person substantially affected by an agency statement may seek an administrative determination that the

statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state ~~with particularity~~ facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3), such notice shall automatically operate as a stay of proceedings pending adoption of the statement as a rule. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings pending rulemaking shall remain in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible or not practicable under s. 120.54(1)(a).

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Register.

(d) If an administrative law judge enters a final order that all or part of an agency statement violates s.

120.54(1)(a), the agency must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

(e) If proposed rules addressing the challenged statement are determined to be an invalid exercise of delegated legislative authority as defined in s. 120.52(8)(b)-(f), the agency must immediately discontinue reliance upon ~~on~~ the statement and any substantially similar statement until rules addressing the subject are properly adopted, and the administrative law judge shall enter a final order to that effect.

(f) If a petitioner files a petition challenging agency action and a part of that petition alleges the presence of or reliance upon agency statements or unadopted rules, the administrative law judge may not bifurcate the petition into separate cases, but shall consider the challenge to the proposed agency action and the allegation that such agency action was based upon the presence of or reliance upon agency statements or unadopted rules.

(g)~~(f)~~ All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under subsection (3) or under any other section of this chapter. This paragraph does not prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

Section 5. Subsection (2) of section 120.565, Florida Statutes, is amended, and subsections (4) and (5) are added to that section, to read:

120.565 Declaratory statement by agencies.—

(2) The petition seeking a declaratory statement shall state ~~with particularity~~ the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

(4) The petitioner or substantially affected person may submit to the agency clerk a statement that describes or asserts the petitioner's understanding of how the agency rule, policy, or procedure applies to a set of facts and circumstances. The agency has 60 days to review the petitioner's statement and to either accept the statement or offer changes and other clarifications so as to establish the plain meaning of how the agency rule, policy, or procedure applies to the set of facts and circumstances described in the petitioner's statement.

(5) If the agency denies a request for a declaratory statement and the petitioner appeals the denial, and if the administrative law judge finds that the agency improperly denied the request, the administrative law judge shall award to the petitioner reasonable attorney fees.

Section 6. Paragraph (l) of subsection (2) of section 120.569, Florida Statutes, is amended to read:

120.569 Decisions which affect substantial interests.—

(2)

(l) Unless the time period is waived or extended with the consent of all parties, the final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated, and it must be rendered within 90 days:

1. After the hearing is concluded, if conducted by the

agency;

2. After a recommended order is submitted to the agency and mailed to all parties, if the hearing is conducted by an administrative law judge, except that, at the election of the agency, the time for rendering the final order may be extended up to 10 days after entry of a mandate on any appeal from a final order under s. 120.57(1)(e)4.; or

3. After the agency has received the written and oral material it has authorized to be submitted, if there has been no hearing.

Section 7. Paragraphs (e) and (h) of subsection (1) and subsection (2) of section 120.57, Florida Statutes, are amended to read:

120.57 Additional procedures for particular cases.—

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—

(e)1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. ~~The administrative law judge shall determine whether an agency statement constitutes an unadopted rule.~~ This subparagraph does not preclude application of valid adopted rules and applicable provisions of law to the facts.

2. In a matter initiated as a result of agency action proposing to determine the substantial interests of a party, the party's timely petition for hearing may challenge the proposed agency action based on a rule that is an invalid exercise of delegated legislative authority or based on an alleged unadopted

rule. For challenges brought under this subparagraph:

a. The challenge shall be pled as a defense using the procedures set forth in s. 120.56(1)(b).

b. Section 120.56(3)(a) applies to a challenge alleging that a rule is an invalid exercise of delegated legislative authority.

c. Section 120.56(4)(c) applies to a challenge alleging an unadopted rule.

d. The agency has 15 days from the date of receipt of a challenge under this subparagraph to serve the challenging party with a notice whether the agency will continue to rely upon the rule or the alleged unadopted rule as a basis for the action determining the party's substantive interests. Failure to timely serve the notice constitutes a binding stipulation that the agency may not rely upon the rule or unadopted rule further in the proceeding. The agency shall include a copy of this notice with the referral of the matter to the division under s. 120.569(2)(a).

e. This subparagraph does not preclude the consolidation of any proceeding under s. 120.56 with any proceeding under this paragraph.

3.~~2.~~ Notwithstanding subparagraph 1., if an agency demonstrates that the statute being implemented directs it to adopt rules, that the agency has not had time to adopt those rules because the requirement was so recently enacted, and that the agency has initiated rulemaking and is proceeding expeditiously and in good faith to adopt the required rules, then the agency's action may be based upon those unadopted rules if~~, subject to de novo review by~~ the administrative law judge

determines that rulemaking is neither feasible nor practicable and the unadopted rules would not constitute an invalid exercise of delegated legislative authority if adopted as rules. An unadopted rule ~~The agency action~~ shall not be presumed valid ~~or invalid~~. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority vested in the agency by ~~derived from~~ the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;

e. Is not being applied to the substantially affected party without due notice; and

f. Does not impose excessive regulatory costs on the regulated person, county, or city.

4. If the agency timely serves notice of continued reliance upon a challenged rule or an alleged unadopted rule under sub-subparagraph 2.d., the administrative law judge shall determine whether the challenged rule is an invalid exercise of delegated legislative authority or whether the challenged agency statement constitutes an unadopted rule and if that unadopted rule meets the requirements of subparagraph 3. The determination shall be rendered as a separate final order no earlier than the date on

which the administrative law judge serves the recommended order.

5.~~3.~~ The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (k) and (l), except that the administrative law judge's determination ~~regarding an unadopted rule~~ under subparagraph 4. ~~1. or subparagraph 2.~~ shall be included as a conclusion of law that the agency may not reject ~~not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review.~~

(h) Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if

applicable, and any other information required by law to be contained in the final order. This paragraph does not apply to proceedings authorized by paragraph (e).

(2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—In any case to which subsection (1) does not apply:

(a) The agency shall:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.

2. Give parties or their counsel the option, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the parties are overruled, provide a written explanation within 7 days.

(b) An agency may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. No later than the date provided by the agency under subparagraph (a)2. for presenting material in opposition to the agency's proposed action or refusal to act, the party may file a petition under s. 120.56 challenging the rule, portion of rule, or unadopted rule upon which the agency bases its proposed action or refusal to act. The filing of a challenge under s. 120.56 pursuant to this paragraph shall stay all proceedings on

the agency's proposed action or refusal to act until entry of the final order by the administrative law judge, which shall provide additional notice that the stay of the pending agency action is terminated and any further stay pending appeal of the final order must be sought from the appellate court.

(c) ~~(b)~~ The record shall only consist of:

1. The notice and summary of grounds.

2. Evidence received.

3. All written statements submitted.

4. Any decision overruling objections.

5. All matters placed on the record after an ex parte communication.

6. The official transcript.

7. Any decision, opinion, order, or report by the presiding officer.

Section 8. Section 120.573, Florida Statutes, is amended to read:

120.573 Mediation of disputes.—

(1) Each announcement of an agency action that affects substantial interests shall advise whether mediation of the administrative dispute for the type of agency action announced is available and that choosing mediation does not affect the right to an administrative hearing. If the agency and all parties to the administrative action agree to mediation, in writing, within 10 days after the time period stated in the announcement for election of an administrative remedy under ss. 120.569 and 120.57, the time limitations imposed by ss. 120.569 and 120.57 shall be tolled to allow the agency and parties to mediate the administrative dispute. The mediation shall be

concluded within 60 days after ~~of~~ such agreement unless otherwise agreed by the parties. The mediation agreement shall include provisions for mediator selection, the allocation of costs and fees associated with mediation, and the mediating parties' understanding regarding the confidentiality of discussions and documents introduced during mediation. If mediation results in settlement of the administrative dispute, the agency shall enter a final order incorporating the agreement of the parties. If mediation terminates without settlement of the dispute, the agency shall notify the parties in writing that the administrative hearing processes under ss. 120.569 and 120.57 are resumed.

(2) Any party to a proceeding conducted pursuant to a petition seeking an administrative determination of the invalidity of an existing rule, proposed rule, or unadopted agency statement under s. 120.56 or a proceeding conducted pursuant to a petition seeking a declaratory statement under s. 120.565 may request mediation of the dispute under this section.

Section 9. Section 120.595, Florida Statutes, is amended to read:

120.595 Attorney ~~Attorney's~~ fees.—

(1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—

(a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and ~~a~~ reasonable attorney fees ~~attorney's fee~~ to the prevailing party if the

administrative law judge determines ~~only where~~ the nonprevailing adverse party ~~has been determined by the administrative law judge to have~~ participated in the proceeding for an improper purpose.

1.~~(c)~~ Other than as provided in paragraph (d), in proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. ~~In making such determination, the administrative law judge shall consider whether~~ The nonprevailing adverse party shall be presumed to have participated in the pending proceeding for an improper purpose if:

a. Such party was an adverse party ~~has participated~~ in three ~~two~~ or more other such proceedings involving the same prevailing party and the same subject; ~~project as an adverse party and in~~

b. In those ~~which such two or more~~ proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position;~~, and shall consider~~

c. ~~Whether~~ The factual or legal position asserted in the pending ~~instant~~ proceeding would have been cognizable in the previous proceedings; and~~. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose~~

d. The nonprevailing adverse party has not rebutted the presumption of participating in the pending proceeding for an improper purpose.

2.~~(d)~~ If ~~In any proceeding in which the administrative law judge determines that~~ a party is determined to have participated in the proceeding for an improper purpose, the recommended order shall include such findings of fact and conclusions of law to establish the conclusion ~~so designate~~ and shall determine the award of costs and attorney ~~attorney's~~ fees.

(c)~~(c)~~ For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

(d) For challenges brought under s. 120.57(1)(e), when the agency relies on a challenged rule or an alleged unadopted rule pursuant to s. 120.57(1)(e)2.d., if the appellate court or the administrative law judge declares the rule or portion of the

rule to be invalid or that the agency statement is an unadopted rule which does not meet the requirements of s. 120.57(1)(e)4., a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney fees. An award of attorney fees as provided by this paragraph may not exceed $50,000.

(2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO SECTION 120.56(2).—If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney ~~attorney's~~ fees, unless the agency demonstrates that ~~its actions were substantially justified or~~ special circumstances exist which would make the award unjust. ~~An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.~~ If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney ~~attorney's~~ fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(c) ~~(1)(c)~~. An ~~No~~ award of attorney ~~attorney's~~ fees as provided by this subsection may not ~~shall~~ exceed $50,000.

(3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO SECTION 120.56(3) AND (5).—If the appellate court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3) or (5), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney

~~attorney's~~ fees, unless the agency demonstrates that ~~its actions were substantially justified or~~ special circumstances exist which would make the award unjust. ~~An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.~~ If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney ~~attorney's~~ fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(c) ~~(1)(c)~~. An ~~No~~ award of attorney ~~attorney's~~ fees as provided by this subsection may not ~~shall~~ exceed $50,000.

(4) CHALLENGES TO UNADOPTED RULES ~~AGENCY ACTION~~ PURSUANT TO SECTION 120.56(4).—

(a) If the appellate court or administrative law judge determines that all or part of an unadopted rule ~~agency statement~~ violates s. 120.54(1)(a), or that the agency must immediately discontinue reliance upon ~~on~~ the unadopted rule ~~statement~~ and any substantially similar statement pursuant to s. 120.56(4)(e), a judgment or order shall be entered against the agency for reasonable costs and reasonable attorney ~~attorney's~~ fees, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

(b) Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3)(a), such notice shall

automatically operate as a stay of proceedings pending rulemaking. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings under this paragraph remains in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. The administrative law judge shall award reasonable costs and reasonable attorney ~~attorney's~~ fees incurred ~~accrued~~ by the petitioner before ~~prior to~~ the date the notice was published~~,~~ ~~unless the agency proves to the administrative law judge that it did not know and should not have known that the statement was an unadopted rule. Attorneys' fees and costs under this paragraph and paragraph (a) shall be awarded only upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before a petition under s. 120.56(4) was filed and that the agency failed to publish the required notice of rulemaking pursuant to s. 120.54(3) that addresses the statement within that 30-day period. Notice to the agency may be satisfied by its receipt of a copy of the s. 120.56(4) petition, a notice or other paper containing substantially the same information, or a petition filed pursuant to s. 120.54(7)~~. An award of attorney ~~attorney's~~ fees as provided by this paragraph may not exceed $50,000.

(c) Notwithstanding the provisions of chapter 284, an award shall be paid from the budget entity of the secretary, executive director, or equivalent administrative officer of the agency, and the agency is ~~shall~~ not ~~be~~ entitled to payment of an award or reimbursement for payment of an award under any provision of law.

(d) If the agency prevails in the proceedings, the

appellate court or administrative law judge shall award reasonable costs and attorney ~~attorney's~~ fees against a party if the appellate court or administrative law judge determines that the party participated in the proceedings for an improper purpose as defined in paragraph (1)(c) ~~(1)(c)~~ or that the party or the party's attorney knew or should have known that a claim was not supported by the material facts necessary to establish the claim or would not be supported by the application of then-existing law to those material facts.

(5) APPEALS.—When there is an appeal, the court in its discretion may award reasonable attorney ~~attorney's~~ fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney ~~attorney's~~ fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

(6) NOTICE OF INVALIDITY.—A party failing to serve a notice of proposed challenge under this subsection is not entitled to an award of reasonable costs and reasonable attorney fees under this section.

(a) Before filing a petition challenging the validity of a proposed rule under s. 120.56(2), an adopted rule under s. 120.56(3), or an agency statement defined as an unadopted rule under s. 120.56(4), a substantially affected person shall serve

the agency head with notice of the proposed challenge. The notice shall identify the proposed or adopted rule or the unadopted rule that the person proposes to challenge and a brief explanation of the basis for that challenge. The notice must be received by the agency head at least 5 days before the filing of a petition under s. 120.56(2), and at least 30 days before the filing of a petition under s. 120.56(3) or s. 120.56(4).

(b) This subsection does not apply to defenses raised and challenges authorized by s. 120.57(1)(e) or s. 120.57(2)(b).

(7) DETERMINATION OF RECOVERABLE FEES AND COSTS.—For purposes of this chapter, s. 57.105(5), and s. 57.111, in addition to an award of reasonable attorney fees and reasonable costs, the prevailing party shall also recover reasonable attorney fees and reasonable costs incurred in litigating entitlement to, and the determination or quantification of, reasonable attorney fees and reasonable costs for the underlying matter. Reasonable attorney fees and reasonable costs awarded for litigating entitlement to, and the determination or quantification of, reasonable attorney fees and reasonable costs for the underlying matter are not subject to the limitations on amounts provided in this chapter or s. 57.111.

(8)~~(6)~~ OTHER SECTIONS NOT AFFECTED.—Other provisions, including ss. 57.105 and 57.111, authorize the award of attorney ~~attorney's~~ fees and costs in administrative proceedings. Nothing in this section shall affect the availability of attorney ~~attorney's~~ fees and costs as provided in those sections.

Section 10. Paragraph (a) of subsection (2) and subsection (9) of section 120.68, Florida Statutes, are amended to read:

120.68 Judicial review.—

(2)(a) Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law. All proceedings shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed. If the appeal is of an order rendered in a proceeding initiated under s. 120.56, or a final order under s. 120.57(1)(e)4., the agency whose rule is being challenged shall transmit a copy of the notice of appeal to the committee.

(9) No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.56, under s. 120.57(1)(e)5., or under s. 120.57(2)(b), or an agency's findings of immediate danger, necessity, and procedural fairness prerequisite to the adoption of an emergency rule pursuant to s. 120.54(4), unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.

Section 11. Section 120.695, Florida Statutes, is amended to read:

120.695 Notice of noncompliance; designation of minor violation rules.—

(1) It is the policy of the state that the purpose of regulation is to protect the public by attaining compliance with the policies established by the Legislature. Fines and other penalties may be provided in order to assure compliance; however, the collection of fines and the imposition of penalties

are intended to be secondary to the primary goal of attaining compliance with an agency's rules. It is the intent of the Legislature that an agency charged with enforcing rules shall issue a notice of noncompliance as its first response to a minor violation of a rule in any instance in which it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it.

(2)(a) Each agency shall issue a notice of noncompliance as a first response to a minor violation of a rule. A "notice of noncompliance" is a notification by the agency charged with enforcing the rule issued to the person or business subject to the rule. A notice of noncompliance may not be accompanied with a fine or other disciplinary penalty. It must identify the specific rule that is being violated, provide information on how to comply with the rule, and specify a reasonable time for the violator to comply with the rule. A rule is agency action that regulates a business, occupation, or profession, or regulates a person operating a business, occupation, or profession, and that, if not complied with, may result in a disciplinary penalty.

(b) Each agency shall review all of its rules and designate those for which a violation would be a minor violation and for which a notice of noncompliance must be the first enforcement action taken against a person or business subject to regulation. A violation of a rule is a minor violation if it does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm. ~~If an agency under the direction of a cabinet officer mails to each licensee a notice of the designated rules~~

~~at the time of licensure and at least annually thereafter, the provisions of paragraph (a) may be exercised at the discretion of the agency. Such notice shall include a subject-matter index of the rules and information on how the rules may be obtained.~~

(c) ~~The agency's review and designation must be completed by December 1, 1995;~~

1. No later than June 30, 2015, and after such date within 3 months after any request of the rules ombudsman in the Executive Office of the Governor, each agency shall review ~~under the direction of the Governor shall make a report to the Governor, and each agency under the joint direction of the Governor and Cabinet shall report to the Governor and Cabinet by January 1, 1996, on which of~~ its rules and certify to the President of the Senate, the Speaker of the House of Representatives, the Administrative Procedures Committee, and the rules ombudsman those rules that have been designated as rules the violation of which would be a minor violation under paragraph (b), consistent with the legislative intent stated in subsection (1). For each agency failing to timely complete the review and file the certification as required by this section, the rules ombudsman shall promptly report such failure to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Administrative Procedures Committee.

2. Beginning on July 1, 2015, each agency shall:

a. Publish all rules that the agency has designated as rules the violation of which would be a minor violation, either as a complete list on the agency's website or by incorporation of the designations in the agency's disciplinary guidelines adopted as a rule.

b. Ensure that all investigative and enforcement personnel are knowledgeable of the agency's designations under this section.

3. For each rule filed for adoption, the agency head shall certify whether any part of the rule is designated as a rule the violation of which would be a minor violation and shall update the listing required by sub-subparagraph 2.a.

(d) The Governor or the Governor and Cabinet, as appropriate ~~pursuant to paragraph (c)~~, may evaluate the review and designation effects of each agency subject to the direction and supervision of such authority and may direct ~~apply~~ a different designation than that applied by such ~~the~~ agency.

(e) Notwithstanding s. 120.52(1)(a), this section does not apply to:

1. The Department of Corrections;

2. Educational units;

3. The regulation of law enforcement personnel; or

4. The regulation of teachers.

(f) Designation pursuant to this section is not subject to challenge under this chapter.

Section 12. This act shall take effect July 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1496
INTRODUCER:	Senator Evers
SUBJECT:	Unlicensed Practice of Law
DATE:	March 31, 2014
REVISED:	03/31/14

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	**Pre-meeting**
2.			GO	
3.			RC	

I. Summary:

SB 1496 lists seven activities that are not considered a violation of the statute prohibiting the unlicensed practice of law. Those activities are:

- Pro se representation by an individual;
- Serving as a mediator or arbitrator;
- Providing services under the supervision of an attorney in compliance with the Rules of Professional Conduct, which are promulgated by the Florida Supreme Court;
- Providing services authorized by court rule;
- Acting within the lawful scope of practice of a business or profession regulated by the state;
- Giving legal notice in the form and manner required by law; or
- Representation of another person before a legislative body, committee, commission, or board.

Under existing s. 454.23, F.S., it is a third degree felony to engage in the unlicensed or unauthorized practice of law. A definition of the unlicensed practice of law is not contained in statue but has been developed over the years through case law and advisory opinions. This list of seven activities provides some clarity as to what is not criminal conduct when performed by a lay person and prohibits prosecution of those activities.

II. Present Situation:

The Florida Supreme Court has stated that the primary goal of regulating the unlicensed practice of law is the protection of the public. The Court's regulation is not performed to "aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop."[1] Accordingly, there are two methods to enforce that prohibition: civil actions and criminal penalties.

[1] *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1189 (Fla. 1978).

Civil Actions

Civil actions are authorized and governed by court rules. Article V, section 15, of the Florida Constitution provides that the Supreme Court has exclusive jurisdiction to regulate the admission of people to the practice of law as well as the discipline of those admitted. The Florida Bar, then, "as an official arm of the court,"[2] has been delegated the duty and responsibility of investigating and prosecuting alleged offenders.[3] In dealing with the unlicensed practice of law, the bar employs two separate methods in an attempt to protect the public. The Bar will investigate written complaints submitted by the public and issue advisory opinions regarding what constitutes the unlicensed practice of law when requested by an individual or organization.

Complaints

The Florida Bar is authorized to receive a written complaint signed by the complainant which alleges the unlicensed practice of law. If a circuit committee in the jurisdiction where the alleged offender resides or conducts business determines that the unlicensed practice of law has occurred, the committee may issue a cease and desist affidavit or recommend civil prosecution. The remedies available to the Bar are to seek injunctive relief before the Supreme Court to enjoin the offender, seek restitution for the victim, assess a monetary penalty of $1,000 per violation, and recover costs that the Bar has expended pursuing the action. If the injunction is violated, the Bar may file an action before the Supreme Court of Florida seeking indirect criminal contempt that may result in restitution to the victim, a penalty of up to $2,500, imprisonment not to exceed 5 months, or both, and costs the Bar expended pursuing the action.[4]

According to The Florida Bar, the unauthorized practice of law, or UPL, is a significant problem in this state. The Bar reports opening 655 cases in 2011, 714 cases in 2012, and 550 cases in 2013. In this fiscal year, which runs from July 1-June 30, 361 cases have been opened. As of March 3, 2014, nine cases are pending at the Supreme Court of Florida and nine cases are pending with a state attorney. The Bar also reports closing 390 cases in this fiscal year, but points out that those cases were opened over several years.[5]

Advisory Opinions

The Florida Bar is also authorized to issue advisory opinions to individuals or organizations seeking guidance as to whether certain activities constitute the unlicensed practice of law. Under this process, a person or organization may submit a written request, in hypothetical form, seeking guidance. If the committee agrees to accept the request for a formal advisory opinion, notice is published and a public hearing is held in which the committee takes testimony from interested individuals. After the public hearing, the committee decides whether it will issue a proposed formal advisory opinion and what it will contain. If the committee determines that the conduct in question constitutes the unlicensed practice of law, a proposed, or draft, formal advisory opinion is filed with the Florida Supreme Court. The Court may then adopt, reject, or modify the

[2] R. Regulating Fla. Bar 10-1.2.
[3] *Id.*
[4] R. Regulating Fla. Bar 10-7.2.
[5] E-mail from Lori Holcomb, Director, Client Protection, The Florida Bar (March 21, 2014) (on file with the Senate Committee on Judiciary).

opinion.[6] Between 1988 and 1997, nine advisory opinions have been released determining whether certain activities by business groups constitute the unlicensed practice of law. Two additional formal advisory opinions are pending.[7]

Criminal Penalties

The Legislature enacted a statute in 1925 which prohibited the unlicensed practice of law. The statute stated that any person who was not entitled to practice law or who held himself out to the public as being qualified to practice law without having first obtained a certificate from the State Board of Law Examiners, as required by law, would be guilty of a penal offence punishable by not more than $1,000 or imprisonment in a "county jail with or without hard labor for not more than twelve months" or by both the fine and imprisonment.[8] In 1971, the $1,000 fine and hard labor provisions were replaced and the offense became a first degree misdemeanor.[9] The statute was amended in 1997 to clarify that it applied also to women[10] and again in 2004 to establish a third degree felony penalty for the unlicensed practice of law or for any person who unlawfully holds himself or herself out to the public as qualified to practice law.

Section 454.23, F.S., states that it is a felony of the third degree for an unlicensed or unauthorized person to practice law in this state or hold himself or herself out to the public as qualified to practice law in the state or willfully pretend or imply that he or she is qualified or recognized by law as qualified to practice law in this state. A third degree felony is punishable by a term of imprisonment that does not exceed 5 years and a fine that does not exceed $5,000.[11]

The Florida Department of Law Enforcement (FDLE) reports that between 2004 and 2013, 104 arrests were made for a violation of this statute. Of those arrests, 50 cases resulted in a judicial disposition of guilty and seven cases were categorized as adjudication withheld. In 2014, six arrests have been reported and one count has been recorded as adjudication withheld.[12]

Definition

The "unlicensed practice of law" is not defined in statute or in court rules. When the allegation was made that an earlier version of the statute was unconstitutionally vague, the First District Court of Appeal concluded that the statute was not void for vagueness.[13] The court further noted that the definition of the practice of law "is not confined to the language in section 454.23, but rather, is shaped by the decisional law and court rules as well as common understanding and practices."[14]

---

[6] Florida Bar Rule 10-9.1.
[7] The Florida Bar, *Formal Advisory Opinions*, http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/34fac28eda9ca382852579ac006aff21!OpenDocument#FAORequestReMedicaidPlan (last visited March 28, 2014).
[8] Chapter 10175, s. 21, Laws of Fla. (1925).
[9] Chapter 71-136, s. 384, Laws of Fla.
[10] Chapter 97-103, s. 184, Laws of Fla.
[11] See ss. 775.082(3)(d) and 775.083(1)(c), F.S.
[12] E-mail from Rachel Truxell, Office of Legislative Affairs, Florida Department of Law Enforcement (March 21, 2014) (on file with the Senate Committee on Judiciary).
[13] *State v. Foster*, 674 So. 2d 747 (Fla. 1st DCA 1996).
[14] *Id.*, at 751.

The definition of the unlicensed practice of law is derived from case law and formal advisory opinions developed by The Florida Bar Standing Committee on Unlicensed Practice of Law. In demonstrating the difficulty in defining the practice of law to establish what constitutes the unlicensed practice of law, the Florida Supreme Court has stated:

> This definition is broad and is given content by this court only as it applies to specific circumstances of each case. We agree that "any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure 'for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order.'"[15]

Throughout the years courts have decided, on a case by case basis, what constitutes the unauthorized practice of law. Some unauthorized activities involve a nonlawyer examining witnesses,[16] taking a deposition,[17] and representing an investor for compensation in a securities arbitration against a broker.[18]

In contrast, the courts have found that the practice of law does not include:
- A real estate licensee preparing residential lease forms approved by the Court,[19]
- A nonlawyer property manager preparing complaints for eviction and handling uncontested residential evictions on behalf of a landlord,[20]
- Title insurance companies and their agents preparing abstracts of title to real property and issuing policies of title insurance,[21] and
- Lobbying.[22]

III. Effect of Proposed Changes:

This bill, in an effort to further define what constitutes the unlicensed practice of law, lists seven activities that do not constitute the unlicensed practice of law. Those activities include:
- Pro se representation by an individual;
- Serving as a mediator or arbitrator;
- Providing services under the supervision of an attorney in compliance with the Rules of Professional Conduct;
- Providing services authorized by court rules;
- Acting within the lawful scope of practice of a business or profession regulated by the state;
- Giving legal notice in the form and manner required by law; or

---

[15] *Brumbaugh* at 1191, 1192 (quoting *State Bar of Michigan v. Cramer*, 399 Mich. 116, 249 N.W. 2d 1 at 7 (1976).
[16] *Millen v. Millen*, 122 So. 3d 496 (Fla. 3d DCA 2013)
[17] *Foster*, supra note 10.
[18] *The Florida Bar Re Advisory Opinion on Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997).
[19] *The Florida Bar Re: Advisory Opinion-Nonlawyer Preparation of Residential Leases Up To One Year In Duration*, 602 So. 2d 914 (Fla. 1992).
[20] *The Florida Bar Re Advisory Opinion-Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions*, 627 So. 2d 485 (Fla. 1993).
[21] *Cooperman et al., v. West Coast Title Company*, 75 So. 2d 818 (Fla. 1954).
[22] *Florida Association of Professional Lobbyists, Inc., etc., v. Division of Legislative Information Services*, 7 So. 3d 511 (Fla 2009).

- Representation of another person before a legislative body, committee, commission, or board.

This list provides some measure of clarity as to what activities may be performed by a lay person.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator does not expect the bill to have a significant fiscal impact.[23]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends s. 454.23, F.S.

[23] Office of the State Courts Administrator, *2014 Judicial Impact Statement for SB 1496*, March 23, 2014.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

877792

LEGISLATIVE ACTION

Senate	.	House
Comm: FAV	.	
03/25/2014	.	
	.	
	.	
	.	

The Committee on Judiciary (Latvala) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 454.23, Florida Statutes, is amended to read:

454.23 Unlicensed practice of law; prohibition; penalties; exceptions.—

(1) A ~~Any~~ person not licensed or otherwise authorized to practice law in this state who ~~practices law in this state or~~ holds himself or herself out to the public as qualified to

877792

practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to practice law in this state, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) A person not licensed or otherwise authorized to practice law in this state who practices law in this state commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, a person engaging in any of the following activities is exempt from prosecution under this subsection:

(a) Pro se representation of one's self in one's individual capacity and not in any representative capacity for any other person, business entity, or trust;

(b) Serving as a mediator or arbitrator;

(c) Providing services under the supervision of an attorney in compliance with The Florida Bar's Rules of Professional Conduct;

(d) Providing services authorized by court rule;

(e) Acting within the lawful scope of practice of a business or profession licensed by the state;

(f) The giving of a legal notice in the form and manner required by law; however, this paragraph does not apply to notice required as part of a court proceeding or as required by court rule; or

(g) Representation before a legislative body, committee, commission, or board.

Section 2. This act shall take effect July 1, 2014.

877792

41
42 ========== T I T L E A M E N D M E N T ==========
43 And the title is amended as follows:
44 Delete everything before the enacting clause
45 and insert:
46 A bill to be entitled
47 An act relating to the unlicensed practice of law;
48 amending s. 454.23, F.S.; exempting persons engaging
49 in certain activities from criminal prosecution for
50 the unlicensed practice of law; providing an effective
51 date.

434964

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
03/25/2014	.	
	.	
	.	
	.	

The Committee on Judiciary (Soto) recommended the following:

Senate Amendment to Amendment (877792) (with title amendment)

Before line 5
insert:
Section 1. Subsection (3) is added to section 454.021, Florida Statutes, to read:
454.021 Attorneys; admission to practice law; Supreme Court to govern and regulate.—
(3) A person may not be disqualified from admission to practice law in this state solely because he or she is not a

434964

United States citizen.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 47

and insert:

An act relating to the practice of law; amending s. 454.021, F.S.; providing that a person may not be disqualified from admission to practice law based solely on lack of United States citizenship;

952212

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
03/25/2014	.	
	.	
	.	
	.	

The Committee on Judiciary (Soto) recommended the following:

Senate Amendment to Amendment (877792) (with title amendment)

Before line 5
insert:
Section 1. Subsection (3) is added to section 454.021, Florida Statutes, to read:
454.021 Attorneys; admission to practice law; Supreme Court to govern and regulate.—
(3) Upon certification by the Florida Board of Bar Examiners that an applicant who is not lawfully present in the

952212

United States has fulfilled all requirements for admission to practice law in this state, the Supreme Court of Florida may admit that applicant as an attorney at law authorized to practice in this state and may direct an order be entered upon its records to that effect.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 47

and insert:

An act relating to the practice of law; amending s. 454.021, F.S.; authorizing the Supreme Court of Florida to admit a bar applicant who is not lawfully present in the United States;

405152

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
03/25/2014	.	
	.	
	.	
	.	

The Committee on Judiciary (Soto) recommended the following:

Senate Amendment (with title amendment)

Before line 9
insert:
Section 1. Subsection (3) is added to section 454.021, Florida Statutes, to read:
454.021 Attorneys; admission to practice law; Supreme Court to govern and regulate.—
(3) A person may not be disqualified from admission to practice law in this state solely because he or she is not a United States citizen.

405152

12
13 ========== T I T L E A M E N D M E N T ==========
14 And the title is amended as follows:
15 Delete line 2
16 and insert:
17 An act relating to the practice of law; amending s.
18 454.021, F.S.; providing that a person may not be
19 disqualified from admission to practice law based
20 solely on lack of United States citizenship;

379872

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
03/25/2014	.	
	.	
	.	
	.	

The Committee on Judiciary (Soto) recommended the following:

Senate Amendment (with title amendment)

Before line 9
insert:
Section 1. Subsection (3) is added to section 454.021, Florida Statutes, to read:
454.021 Attorneys; admission to practice law; Supreme Court to govern and regulate.—
(3) A person may not be disqualified from admission to practice law in this state solely because he or she is not a United States citizen if he or she has deferred action status

379872

approved by the United States Department of Homeland Security.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 2

and insert:

An act relating to the practice of law; amending s. 454.021, F.S.; providing that a person may not be disqualified from admission to practice law based solely on lack of United States citizenship if he or she has approved deferred action status;

By Senator Evers

2-01145A-14 20141496__

A bill to be entitled

An act relating to the unlicensed practice of law; amending s. 454.23, F.S.; creating exceptions to the prohibition of unlicensed practice of law; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 454.23, Florida Statutes, is amended to read:

454.23 Unlicensed practice of law; prohibition; penalties; exceptions.—

(1) A ~~Any~~ person not licensed or otherwise authorized to practice law in this state who practices law in this state or holds himself or herself out to the public as qualified to practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to practice law in this state, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Notwithstanding subsection (1), the following activities are not prohibited by this section:

(a) Pro se representation by an individual;

(b) Serving as a mediator or arbitrator;

(c) Providing services under the supervision of an attorney in compliance with the Rules of Professional Conduct;

(d) Providing services authorized by court rule;

(e) Acting within the lawful scope of practice of a

Florida Senate - 2014 **SB 1496**

2-01145A-14 20141496__

business or profession regulated by the state;

(f) Giving legal notice in the form and manner required by law; or

(g) Representation of another person before a legislative body, committee, commission, or board.

Section 2. This act shall take effect July 1, 2014.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 1138
INTRODUCER:	Agriculture Committee and Senator Evers
SUBJECT:	Civil Liability of Farmers
DATE:	March 31, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Weidenbenner	Becker	AG	**Fav/CS**
2.	Davis	Cibula	JU	**Pre-meeting**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1138 expands a farmer's protection from civil liability from negligence actions by a person who, without compensation, enters onto the farmer's land to remove farm produce or crops. The expansion of liability protection occurs in two ways:

Under existing law, if a farmer allows a person without charge onto a farm to harvest crops or produce leftover after the farm is harvested, the farmer is not liable for damages caused by the condition of the crops or produce or the condition of the land. Under the bill, a farmer may allow a person to harvest crops or produce at any time without being liable for the condition of the crops or produce or the condition of the land.

Under existing law, a farmer may be liable for damages caused by dangerous conditions not disclosed by the farmer to a person who is allowed to harvest leftover crops or produce. Under the bill, the farmer is not liable for those damages. However, the farmer remains liable for injury or death directly resulting from the farmer's gross negligence or intentional acts.

II. Present Situation:

Gleaning

Gleaning is the process of gathering leftover crops from fields after commercial harvesters or reapers complete their work.[1] Gleaning was common in earlier civilizations as a means of

[1] See www.merriam-webster.com/dictionary/glean.

providing for widows and the poor who had no harvests. Today, gleaning is often practiced by humanitarian organizations as a method of providing food for impoverished people.[2] However, the opening up of someone's land for gleaning may result in injury, damages, and litigation.

Premises Liability

A person who is injured on someone else's property may seek damages for tort liability if the person in control of the property breached a duty of care owed to the injured person.[3] People who enter the property of another person are categorized as invitees, licensees, or trespassers, and that status is determined by the relationship between the parties.[4]

Florida law has generally defined an invitee as a person "who entered the premises of another for purposes connected with the business of the owner or occupier."[5] The two duties owed by the landowner to the invitee are the duties to:

- Use reasonable care in keeping the property in a reasonably safe condition; and
- Warn of concealed conditions "which are known or should be known to the landowner"[6] but are not known to the invitee and cannot be discovered by the invitee exercising due care.[7]

Legislative History

Before 1992 there was no specific statute governing or limiting the liability of farmers who allowed others to enter their land to gather crops that remained after harvest. However, in 1992, Florida passed a protective law[8] for farmers[9] that exempts them from civil liability if they gratuitously allow a person to enter onto their land to remove any farm produce or crops that remain in the fields after harvesting. The farmer is exempt from civil liability due to any injury or death that results from the nature or condition of the land or the nature, age, or condition of the farm produce or crop.[10] The exemption does not apply if an injury or death directly results from the gross negligence, intentional act, or known dangerous conditions that are not disclosed by the farmer.[11]

Some farmers have indicated that there are circumstances under which they would allow gleaning before harvesting but are reluctant to do so because of their concern about exposure to legal liability.[12]

---

[2] The Palm Beach County Legislative Affairs Department estimates that millions of pounds of produce, representing different commodities, are plowed under each year in Palm Beach County.
[3] 74 AM. JUR. 2d *Torts* s. 7 (2014).
[4] 41 FLA. JUR. 2d *Premises Liability* s. 4 (2014).
[5] Thomas D. Sawaya, FLORIDA PERSONAL INJURY LAW AND PRACTICE WITH WRONGFUL DEATH ACTIONS, s. 10:6 (2014 edition).
[6] *Id*.
[7] *Id*.
[8] Chapter 92-85, s. 1, Laws of Fla.
[9] "Farmer" is defined as "a person who is engaging in the growing or producing of farm produce, either part time or full time, for personal consumption or for sale and who is the owner or lessee of the land or a person designated in writing by the owner or lessee to act as her or his agent." Section 768.137(1), F.S.
[10] Section 768.137(2), F.S.
[11] Section 768.137(3), F.S.
[12] Telephone conversation with Adam Basford, Director of State Legislative Affairs, Florida Farm Bureau (March 27, 2014) and conversation with Todd Bonlarron, Palm Beach County Legislative Affairs Department (March 27, 2014).

III. Effect of Proposed Changes:

This bill expands a farmer's protection from civil liability from negligence actions by a person who, without compensation, enters onto the farmer's land to remove farm produce or crops. The expansion of liability protection occurs in two ways:

Under existing law, if a farmer allows a person without charge onto a farm to harvest crops or produce leftover after the farm is harvested, the farmer is not liable for damages caused by the condition of the crops or produce or the condition of the land. Under the bill, a farmer may allow a person to harvest crops or produce at any time without being liable for the condition of the crops or produce or the condition of the land.

Under existing law, a farmer may be liable for damages caused by dangerous conditions not disclosed by the farmer to a person who is allowed to harvest leftover crops or produce. Under the bill, the farmer is not liable for those damages. However, the farmer remains liable for injury or death directly resulting from the farmer's gross negligence or intentional acts.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill grants farmers exemptions from liability. Exemptions from liability, however, may violate Article I, section 21 of the State Constitution which guarantees access to the courts and provides that "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." The access to courts provision limits the power of the Legislature to abolish causes of action.

In interpreting the access to courts provision, the Florida Supreme Court held in *Kluger v. White*[13] that:

> where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of

[13] *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

> Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. s. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Actions based on premises liability or an implied warranty that food must be reasonably fit for human consumption predate the adoption of the Constitution of 1968. However, committee staff have not found a specific case or statute predating the current Constitution which expressly found that a gleaner could bring a premises liability action against a farmer or an action based on the condition of crops or produce gleaned. Accordingly, whether the bill violates Article I, section 21 of the State Constitution is not clear.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Humanitarian organizations that pick up produce and crops to provide food to the needy might see an increase in the willingness of farmers to allow them to gather more produce. This could result in food banks, charitable organizations, and ministries receiving more food for their clients.

Persons seeking redress as discussed above under "Other Constitutional Issues" might be adversely affected by their inability to pursue litigation and receive monetary compensation for damages.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 768.137 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Agriculture on March 17, 2014:
The committee substitute removes the requirement that the farmer must disclose known dangerous conditions to be exempt from civil liability for injury to invitees who come onto his land to remove farm produce or crops.

B. Amendments:

None.

142498

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Soto) recommended the following:

Senate Amendment

Delete lines 32 - 33

and insert:

from the gross negligence or~~,~~ intentional act of the farmer, or the failure of the farmer to warn of a dangerous condition of which the farmer has actual knowledge unless the dangerous condition would be obvious to a person entering upon the farmer's land ~~from known dangerous conditions not disclosed by the farmer~~.

By the Committee on Agriculture; and Senator Evers

575-02732-14 20141138c1

A bill to be entitled

An act relating to the civil liability of farmers; amending s. 768.137, F.S.; expanding an existing exemption from civil liability for farmers who gratuitously allow a person to enter upon their land for the purpose of removing farm produce or crops left in the field after harvesting to include farmers who gratuitously allow a person to enter upon their land to remove any farm produce or crops; revising exceptions to the exemption from civil liability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (2) and (3) of section 768.137, Florida Statutes, are amended to read:

768.137 Definition; limitation of civil liability for certain farmers; exception.—

(2) A ~~Any~~ farmer who gratuitously allows a person ~~persons~~ to enter upon the farmer's ~~her or his own~~ land for the purpose of removing ~~any~~ farm produce or crops is ~~remaining in the fields following the harvesting thereof, shall be~~ exempt from civil liability:

(a) Arising out of any injury or the death of such person due to ~~resulting from~~ the nature or condition of the ~~such~~ land; or

(b) Arising out of any injury or death due to the nature, age, or condition of the ~~any such~~ farm produce or crops removed by such person ~~crop~~.

575-02732-14 20141138c1

(3) The exemption from civil liability provided for in this section does ~~shall~~ not apply if injury or death directly results from the gross negligence or~~,~~ intentional act of~~, or~~ ~~from known dangerous conditions not disclosed by~~ the farmer.

Section 2. This act shall take effect July 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 702

INTRODUCER: Regulated Industries Committee and Senators Bean and Sobel

SUBJECT: Pharmacy Audits

DATE: March 31, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Peterson	Stovall	HP	**Favorable**
2.	Pringle	Imhof	RI	**Fav/CS**
3.	Munroe	Cibula	JU	**Pre-meeting**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 702 establishes the rights of a pharmacy when it is audited directly or indirectly by a managed care company, insurance company, third-party payor, pharmacy benefit manager, or an entity that represents responsible parties, such as companies or groups that self-insure. The rights created are largely the same as the requirements currently applicable to Medicaid audits of pharmacies. The rights do not apply to audits based on a suspicion of fraud or audits of Medicaid fee-for-service claims.

The bill requires the Office of Insurance Regulation to investigate a complaint from a pharmacy that alleges a willful violation of provisions of the bill by an entity regulated by the office. It provides for the complaint procedure and that a violation is an unfair claim settlement practice under s. 641.3903(5)(c)1. and 4., F.S., and enforceable as provided in part I, ch. 641, F.S., and s. 626.9521, F.S.

II. Present Situation:

Pharmacy Regulation

Pharmacies and pharmacists are regulated under the Florida Pharmacy Act (the Act) found in ch. 465, F.S.[1] The Board of Pharmacy (the board) is created within the Department of Health to adopt rules to implement provisions of the Act and take other actions according to duties conferred on it in the Act.[2]

[1] Other pharmacy paraprofessionals, including pharmacy interns and pharmacy technicians, are also regulated under the Act.
[2] Section 465.005, F.S.

Several pharmacy types are specified in law and are required to be permitted or registered under the Act:

- Community pharmacy – a location where medicinal drugs are compounded, dispensed, stored, or sold or where prescriptions are filled or dispensed on an outpatient basis.[3]
- Institutional pharmacy – a location in a hospital, clinic, nursing home, dispensary, sanitarium, extended care facility, or other facility where medical drugs are compounded, dispensed, stored, or sold. The Act further classifies institutional pharmacies according to the type of facility or activities with respect to the handling of drugs within the facility.[4]
- Nuclear pharmacy – a location where radioactive drugs and chemicals within the classification of medicinal drugs are compounded, dispensed, stored, or sold, excluding hospitals or the nuclear medicine facilities of such hospitals.[5]
- Internet pharmacy – a location not otherwise permitted under the Act, whether within or outside the state, which uses the internet to communicate with or obtain information from consumers in this state in order to fill or refill prescriptions or to dispense, distribute, or otherwise engage in the practice of pharmacy in this state.[6]
- Non-resident pharmacy – a location outside this state which ships, mails, or delivers, in any manner, a dispensed drug into this state.[7]
- Special pharmacy – a location where medicinal drugs are compounded, dispensed, stored, or sold if such location is not otherwise defined which provides miscellaneous specialized pharmacy service functions.[8]

Each pharmacy is subject to inspection by the Department of Health and discipline for violations of applicable state or federal law relating to pharmacy. Any pharmacy located outside this state which ships, mails, or delivers, in any manner, a dispensed drug into this state is considered a nonresident pharmacy, and must register with the board as a nonresident pharmacy.[9,10]

Pharmacy Audits

Advances in pharmaceuticals have transformed health care over the last several decades. Many health care problems are prevented, cured, or managed effectively for years through the use of prescription drugs. As a result, national expenditures for retail prescription drugs have grown from $120.9 billion in 2000 to $263.3 billion in 2012.[11] Health plan sponsors, which include commercial insurers, private employers, and government plans, such as Medicaid and Medicare,

[3] *See* s. 465.018, F.S.
[4] *See* s. 465.019, F.S.
[5] *See* s. 465.0193, F.S.
[6] *See* s. 465.0197, F.S.
[7] *See* s. 465.0156, F.S.
[8] *See* s. 465.0196, F.S.
[9] Section 465.0156, F.S.
[10] However, the board may grant an exemption from the registration requirements to any nonresident pharmacy that confines its dispensing activity to isolated transactions. *See* s. 465.0156(2), F.S.
[11] Centers for Medicare and Medicaid Services, *National Health Expenditures Web Tables, Table 16, Retail Prescription Drugs Aggregate, Percent Change, and Percent Distribution, by Source of Funds: Selected Calendar Years 1970-2012, available at* https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/tables.pdf (last visited March 26, 2014).

spent $216.5 billion on prescription drugs in 2012 and consumers paid $46.8 billion out of pocket for prescription drugs that year.[12]

As expenditures for drugs have increased, health plan sponsors have looked for ways to control that spending. Among other things, they have turned to pharmacy benefit managers (PBMs), which are third party administrators of prescription drug programs. PBMs initially emerged in the 1980s as prescription drug claims processors. PBMs now provide a range of services including developing and managing pharmacy networks, developing drug formularies, providing mail order services, and processing and auditing claims.

In 2007, there were approximately 70 PBMs operating in the United States and managing prescription drug benefits for an estimated 95 percent of health beneficiaries nationwide.[13] Industry mergers in recent years have cut the number of large PBMs to two which together control 60 percent of the market and provide benefits for approximately 240 million people.[14]

The audit process is one means used by PBMs and health plan sponsors to review pharmacy programs. The audits are designed to ensure that procedures and reimbursement mechanisms are consistent with contractual and regulatory requirements. Over the years, different types of audits have been developed to address changes in benefit and billing processes. A concurrent daily review audit is intended to make immediate changes to a claim before payment is made and is triggered when a PBM or health plan sponsor's computer systems identify an unusual prescription, e.g. by volume dispensed, number of days supplied. A retrospective audit may be conducted as a desk-top audit or an in-pharmacy audit. PBM or health plan sponsor staff conduct a desk audit remotely by contacting pharmacies to obtain supporting documentation, such as the written prescription, for a claim the staff are reviewing. An in-pharmacy audit is the most extensive and can last for days or weeks. During an in-pharmacy audit, audit staff require pharmacies to provide documentation for prescriptions dispensed during a specified time period. When the auditors identify errors or lack of documentation to support the claim, they notify the pharmacy and request repayment of all or a portion of the prescription cost. The last form of audit is an investigative audit which occurs where there is a suspicion of fraud or abuse.

Pharmacies have increasingly complained about the onerous and burdensome nature of these audits. A 2011 survey conducted among members of the National Community Pharmacists Association found that pharmacy audits were focusing on trivial errors (misspelling patient names or incorrect data) rather than intentional, fraudulent acts.[15]

---

[12] *Id.*

[13] Office of Program Policy Analysis & Government Accountability, *Legislature Could Consider Options to Address Pharmacy Benefit Manager Business Practices*, Report No. 07-08 (February 2007), *available at* http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0708rpt.pdf (last visited March 26, 2014).

[14] Office of Program Policy Analysis & Government Accountability, *Research memorandum: Pharmacy Benefit Managers* (December 2, 2013) (on file with the Senate Health Policy Committee).

[15] National Community Pharmacists Association, *New Survey Reveals Pharmacists are Increasingly Struggling to Care for Patients Amid Predatory Audits, Unfair Reimbursement Practices*, http://www.ncpanet.org/index.php/news-releases/1062-new-survey-reveals-pharmacists-are-increasingly-struggling-to-care-for-patients-amid-predatory-audits-unfair-reimbursement-practices (last visited March 26, 2014).

Organizations such as the National Community Pharmacists Association,[16] which represents independent pharmacies, have been advocating for legislation at the federal and state levels to address what they perceive as predatory practices by pharmacy benefit managers. As of 2013, 29 states[17] have passed fair and uniform pharmacy audit laws that regulate PBM pharmacy audit practices. Elements of these laws typically include:

- Prior notification.
- Limiting the audit timeframe to not more than 24 months.
- Recoupment based on direct evidence and not extrapolation.
- Prohibiting recoupment or penalties for clerical errors.
- Requiring the availability of a consulting pharmacist if the audit involves clinical judgment.
- Providing a timeframe for receiving results and the opportunity to appeal.
- Exempting audits based on a suspicion of fraud from the auditing criteria.[18]

Medicaid Pharmacy Audits

In 2003, the Legislature established requirements for Medicaid audits of pharmacies. The requirements are as follows:

- The agency conducting the audit must give the pharmacist at least 1 week's prior notice of the initial audit for each audit cycle.
- An audit must be conducted by a pharmacist licensed in Florida.
- Any clerical or recordkeeping error, such as a typographical error, scrivener's error, or computer error regarding a document or record required under the Medicaid program does not constitute a willful violation and is not subject to criminal penalties without proof of intent to commit fraud.
- A pharmacist may use the physician's record or other order for drugs or medicinal supplies written or transmitted by any means of communication for purposes of validating the pharmacy record with respect to orders or refills of a legend or narcotic drug.
- A finding of an overpayment or underpayment must be based on the actual overpayment or underpayment and may not be a projection based on the number of patients served having a similar diagnosis or on the number of similar orders or refills for similar drugs.
- Each pharmacy shall be audited under the same standards and parameters.
- A pharmacist must be allowed at least 10 days in which to produce documentation to address any discrepancy found during an audit.
- The period covered by an audit may not exceed 1 calendar year.
- An audit may not be scheduled during the first 5 days of any month due to the high volume of prescriptions filled during that time.

---

[16] National Community Pharmacists Association, *NCPA to Medicare: Rein in Egregious Pharmacy Audits; Reform Preferred Networks; and Curb Mail Order Waste in 2014 Prescription Drug Plans*. Found at: http://www.ncpanet.org/index.php/news-releases/1593-ncpa-to-medicare-rein-in-egregious-pharmacy-audits-reform-preferred-networks-and-curb-mail-order-waste-in-2014-prescription-drug-plans (last visited February 6, 2014).

[17] Alabama, Arizona, California, Colorado, Florida (Medicaid, only), Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, and Vermont.

[18] Office of Program Policy Analysis & Government Accountability, *supra* note 8.

- The audit report must be delivered to the pharmacist within 90 days after conclusion of the audit. A final audit report must be delivered to the pharmacist within 6 months after receipt of the preliminary audit report or final appeal, whichever is later.
- The agency conducting the audit may not use the accounting practice of extrapolation in calculating penalties for Medicaid audits.[19]

The law requires the Agency for Health Care Administration (AHCA) to establish a process that allows a pharmacist to obtain a preliminary review of an audit report and the ability to appeal an unfavorable audit report without the necessity of obtaining legal counsel. The preliminary review and appeal may be conducted by an ad hoc peer review panel, appointed by the AHCA, which consists of pharmacists who maintain an active practice. If, following the preliminary review, the AHCA or the review panel finds that an unfavorable audit report is unsubstantiated, the AHCA must dismiss the audit report without the necessity of any further proceedings.

These requirements do not apply to investigative audits conducted by the Medicaid Fraud Control Unit of the Department of Legal Affairs or to investigative audits conducted by the AHCA when there is reliable evidence that the claim which is the subject of the audit involves fraud, willful misrepresentation, or abuse under the Medicaid program.

III. Effect of Proposed Changes:

Section 1 establishes the rights of a pharmacy when it is audited directly or indirectly by a managed care company, insurance company, third-party payor, pharmacy benefit manager, or an entity that represents responsible parties such as companies or groups, referred to in the bill as "entity." The rights include:

- To have at least 7 days prior notice of each initial on-site audit;
- To have an on-site audit scheduled during the first 5 days of the month, only by consent of the pharmacist;
- To limit the audit period to 24 months after the date a claim is submitted to or adjudicated by the entity;
- To have an audit that requires clinical or professional judgment conducted by or in consultation with a pharmacist;
- To use the records of a hospital, physician, or other authorized practitioner to validate the pharmacy records in accordance with state and federal law;
- To be reimbursed for a claim that was retroactively denied for a clerical, typographical, scrivener's, or computer error, if the prescription was properly dispensed, unless the pharmacy has a pattern of such errors or fraudulent billing is alleged or the error results in actual financial loss to the entity;
- To receive the preliminary audit report within 120 days after the audit is concluded and the final audit report within 6 months after receiving the preliminary report;
- To have 10 business days after the preliminary audit report is delivered in which to produce documentation to address a discrepancy or audit finding; and

[19] Section 465.188, F.S.

- To have recoupment or penalties based on actual overpayments, not extrapolation.[20]

The rights do not apply to audits that are based on a suspicion of fraud or audits for Medicaid fee-for-service claims. The Office of Insurance Regulation is required to investigate a complaint from a pharmacy that alleges a willful violation of the bill by an entity conducting an audit of the pharmacy on behalf of a managed care company or insurance company regulated by the office. The complaint must be in writing, signed by the authorized pharmacy representative and contain facts that demonstrate a violation of the bill's provisions.

A violation is an unfair claim settlement practice under s. 641.3903(5)(c)1., F.S.,[21] and s. 641.3903(5)(c)4., F.S.[22], and is enforceable against the entity as provided in part I, ch. 641, F.S., relating to health maintenance organizations and s. 626.9521, F.S., relating to unfair methods of competition and unfair or deceptive acts or practices applicable to insurers.

Section 2 provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will have an indeterminate fiscal impact on the private health sponsors through potential modifications in pharmacy auditing methodologies and limitations on recoupment of claims.

[20] Extrapolation is a process whereby statistical sampling is used to calculate and project the amount of overpayment made on claims. See e.g., "Extrapolate" means to estimate (a value or values of a function) for values of the argument not used in the process of estimation; infer (a value or values) from known values. THE AMERICAN HERITAGE DICTIONARY (2nd ed. 1985)
[21] "Committing or performing with such frequency as to indicate a general business practice any of the following: 1. Failing to adopt and implement standards for the proper investigation of claims" Section 641.3903(5)(c).1., F.S.
[22] "Committing or performing with such frequency as to indicate a general business practice any of the following: 4. Denying of claims without conducting reasonable investigations based upon available information Section 641.3903(5)(c).4., F.S.

The prior notification requirement and limitation on audits during the first 5 days of the month may allow pharmacies to manage workload more efficiently.

C. Government Sector Impact:

The bill will have an indeterminate, but likely insignificant, fiscal impact on government pharmacies, e.g. public health departments. These pharmacies may file claims from time-to-time with private health sponsors and are subject to random audits, but the substantial majority of their claims are paid by Medicaid.

VI. Technical Deficiencies:

None.

VII. Related Issues:

According to the Agency for Health Care Administration, the bill will not have a direct impact on the Medicaid Program Integrity Office within the Agency for Health Care Administration.[23] Under the Statewide Medicaid Managed Care program, the Medicaid Program Integrity Office will not directly audit pharmacy claims of those providers that contract with Florida Managed Medical Assistance plans. The plans will submit pharmacy encounter data to the agency and the agency will have a third party contractor analyze the claims. This process is not affected by the bill.[24]

The agency noted that under the bill, fee-for-service Medicaid audits or investigation of potential fraudulent claims by the agency is specifically exempted. There is a remaining question as to whether the agency's ability to look at potential abuse is affected by this bill.[25] Agency staff is reviewing this further.[26]

VIII. Statutes Affected:

This bill creates section 465.1885 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries Committee on March 13, 2014
The CS provides that the additional records used to validate the pharmacy's records will be in accordance with state and federal law.

[23] Correspondence between the Senate Regulated Industries Committee staff and staff of the Agency for Health Care Administration (March 12, 2014) (on file with the Senate Committee on Judiciary).
[24] *Id.*
[25] *Id.*
[26] *Id.*

The CS provides that a pharmacy will not be reimbursed for an erroneous claim if it causes actual loss to an entity covered by the bill. It also defines what a "properly and dispensed" prescription means.

The CS changes the timeframe for a pharmacy to receive the preliminary audit report from 90 to 120 days.

The CS provides that the Office of Insurance Regulation must investigate a complaint from a pharmacy which alleges a willful violation of the provisions of the bill by an entity regulated by the office. It provides for the complaint procedure and that a violation is an unfair claim settlement practice under s. 641.3903(5)(c)1. and 4., F.S., and enforceable as provided in part I, ch. 641, F.S., and s. 626.9521, F.S.

B. Amendments:

None.

By the Committee on Regulated Industries; and Senators Bean and Sobel

580-02547-14 2014702c1

A bill to be entitled

An act relating to pharmacy audits; creating s. 465.1885, F.S.; enumerating the rights of pharmacies relating to audits of pharmaceutical services which are conducted by certain entities; requiring the Office of Insurance Regulation to investigate complaints alleging a violation of pharmacy rights; providing that a willful violation of such rights is an unfair claim settlement practice; exempting audits in which fraudulent activity is suspected or which are related to Medicaid claims; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 465.1885, Florida Statutes, is created to read:

465.1885 Pharmacy audits; rights.—

(1) If an audit of the records of a pharmacy licensed under this chapter is conducted directly or indirectly by a managed care company, an insurance company, a third-party payor, a pharmacy benefit manager, or an entity that represents responsible parties such as companies or groups, referred to as an "entity" in this section, the pharmacy has the following rights:

(a) To be notified at least 7 calendar days before the initial on-site audit for each audit cycle.

(b) To have the on-site audit scheduled after the first 5 calendar days of a month unless the pharmacist consents

580-02547-14 2014702c1

otherwise.

(c) To have the audit period limited to 24 months after the date a claim is submitted to or adjudicated by the entity.

(d) To have an audit that requires clinical or professional judgment conducted by or in consultation with a pharmacist.

(e) To use the records of a hospital, physician, or other authorized practitioner, which are transmitted by any means of communication, to validate the pharmacy records in accordance with state and federal law.

(f) To be reimbursed for a claim that was retroactively denied for a clerical error, typographical error, scrivener's error, or computer error if the prescription was properly and correctly dispensed, unless a pattern of such errors exists, fraudulent billing is alleged, or the error results in actual financial loss to the entity. For the purposes of this section, a prescription is properly and correctly dispensed if the pharmacy dispenses the correct drug to the correct patient with the correct issuing directions.

(g) To receive the preliminary audit report within 120 days after the conclusion of the audit.

(h) To produce documentation to address a discrepancy or audit finding within 10 business days after the preliminary audit report is delivered to the pharmacy.

(i) To receive the final audit report within 6 months after receiving the preliminary audit report.

(j) To have recoupment or penalties based on actual overpayments and not according to the accounting practice of extrapolation.

(2) The Office of Insurance Regulation shall investigate a

complaint received from a pharmacy which alleges a willful violation of this section by an entity conducting an audit of the pharmacy on behalf of a managed care company or insurance company regulated by the office. Such complaint must be in writing, signed by an authorized representative of the affected pharmacy, and contain ultimate facts that demonstrate a violation of this section. A violation of this section is an unfair claim settlement practice as described in s. 641.3903(5)(c)1. and 4., enforceable against the entity as provided in part I of chapter 641 and s. 626.9521.

(3) The rights contained in this section do not apply to audits in which fraudulent activity is suspected or to audits related to fee-for-service claims under the Medicaid program.

Section 2. This act shall take effect July 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary

BILL:	SB 862
INTRODUCER:	Health Policy Committee
SUBJECT:	Prescription Drug Monitoring
DATE:	March 31, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall		**HP SPB 7016 as introduced**
2.	Munroe	Cibula	JU	**Pre-meeting**
3.			RC	

I. Summary:

SB 862 amends section 893.055, F.S., relating to the prescription drug monitoring program to improve clarity by reorganizing text, rephrasing imprecise language, and deleting outdated or redundant language.

The bill also makes several substantive changes to:

- Require a law enforcement agency to obtain a court order showing a finding of reasonable suspicion of potential criminal activity, fraud, or theft regarding prescribed controlled substances before information within the prescription drug monitoring program (PDMP) database may be released to that agency;
- Allow the Department of Health (DOH or department) to send only relevant information which is not personal identifying information to a law enforcement agency when the DOH determines a pattern consistent with indicators of controlled substance abuse exists;
- Define the term "dispense" or "dispensing" using existing language in the statute and in the definitions section of chapter 893, F.S.;
- Fund, subject to the General Appropriations Act, the PDMP with up to $500,000 annually from excess collections related to the practice of pharmacy; and
- Eliminate the PDMP direct support organization.

II. Present Situation:

Florida's Prescription Drug Monitoring Program

Chapter 2009-197, L.O.F, established the PDMP in s. 893.055, F.S. The PDMP uses a comprehensive electronic system/database to monitor the prescribing and dispensing of certain controlled substances.[1] Dispensers of certain controlled substances must report specified

[1] Section 893.055(2)(a), F.S.

information to the PDMP database, including the name of the prescriber, the date the prescription was filled and dispensed, and the name, address, and date of birth of the person to whom the controlled substance is dispensed.[2]

The PDMP became operational on September 1, 2011, when it began receiving prescription data from pharmacies and dispensing practitioners.[3] Dispensers have reported over 87 million controlled substance prescriptions to the PDMP since its inception.[4] Health care practitioners began accessing the PDMP on October 17, 2011.[5] Law enforcement agencies began requesting data from the PDMP in support of active criminal investigations on November 14, 2011.[6]

Accessing the PDMP database

Section 893.0551, F.S., makes certain identifying information[7] of a patient or patient's agent, a health care practitioner, a dispenser, an employee of the practitioner who is acting on behalf of and at the direction of the practitioner, a pharmacist, or a pharmacy that is contained in records held by the department under s. 893.055, F.S., confidential and exempt from the public records laws in s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution.[8]

Direct access to the PDMP database is presently limited to medical doctors, osteopathic physicians, dentists, podiatric physicians, advanced registered nurse practitioners, physician assistants, and pharmacists.[9] Currently, prescribers are not required to consult the PDMP database before prescribing a controlled substance for a patient however physicians and pharmacists queried the database more than 3.7 million times during fiscal year 2012-2013.[10]

Indirect access to the PDMP database is provided to:

- The DOH or certain health care regulatory boards;
- The Attorney General for Medicaid fraud cases;
- Law enforcement agencies during active investigations[11] involving potential criminal activity, fraud, or theft regarding prescribed controlled substances; and
- Patients, or the legal guardians or designated health care surrogates of incapacitated patients.[12]

---

[2] Section 893.055(3)(a)-(c), F.S.
[3] Florida Health, *2012-2013 Prescription Drug Monitoring Program Annual Report*, available at http://www.floridahealth.gov/reports-and-data/e-forcse/news-reports/_documents/2012-2013pdmp-annual-report.pdf, last visited on March 19, 2014.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Such information includes name, address, telephone number, insurance plan number, government-issued identification number, provider number, and Drug Enforcement Administration number, or any other unique identifying information or number.
[8] Section 893.0551(2)(a)-(h), F.S.
[9] Section 893.055(7)(b), F.S.
[10] *Supra* at n. 3
[11] Section 893.055(1)(h), F.S., defines an "active investigation" as an investigation that is being conducted with a reasonable, good faith belief that it could lead to the filing of administrative, civil, or criminal proceedings, or that is ongoing and continuing and for which there is a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.
[12] Section 893.055(7)(c)1.-4., F.S.

Law enforcement agencies may receive information from the PDMP database through the procedures outlined in the DOH's "Training Guide for Law Enforcement and Investigative Agencies."[13] Agencies that wish to gain access to the PDMP database must first appoint a sworn law enforcement officer as an administrator who verifies and credentials other law enforcement officers within the same agency.[14] The administrator may then register individual law enforcement officers with the DOH.

Registered law enforcement officers may not directly access the PDMP, instead when they wish to obtain information from the PDMP database, they must submit a query to the DOH.[15] These queries may be for a patient's history, a prescriber's history, or a pharmacy's dispensing history.[16] The registered law enforcement officer must fill out a form indicating what type of search they want to perform, what parameters (name, date, time period, etc.) they want to include, and some details of the active investigation they are pursuing including a case number. This form is submitted to the DOH and, in most instances, the requested information is made available to the requesting officer. In some cases, a request is denied. Generally, a request is denied due to lack of sufficient identifying information (incorrect spelling of a name, wrong social security number, etc.) or, alternatively, a request may return no results. The DOH may also deny a request that it finds not to be authentic or authorized.[17]

Funding the PDMP

Restrictions on how the DOH may fund implementation and operation of the PDMP are also included in statute. The DOH is prohibited from using state funds and any money received directly or indirectly from prescription drug manufacturers to implement the PDMP.[18] Funding for the PDMP comes from three funding sources:[19]

- Donations procured by the Florida PDMP Foundation, Inc.;
- Federal grants; and
- Private grants and donations.

The Legislature appropriated $500,000 of the DOH's general revenue funds during the 2013 session to fund the PDMP for fiscal year 2013-2014.[20]

---

[13] This training guide may be found at http://www.hidinc.com/assets/files/flpdms/FL%20PDMP_Training%20Guide%20for%20Enforcement%20and%20Investigative%20Agencies.pdf, last viewed on March 19, 2014.
[14] See the DOH's "Law enforcement administrator appointment form," available at http://www.floridahealth.gov/reports-and-data/e-forcse/law-enforcement-information/_documents/admin-appoint-form.pdf, last visited on March 19, 2014.
[15] During FY 2012-2013 a total of 487 authorized law enforcement users queried the PDMP database 32,839 times. Id. at note 3.
[16] *Id.* at note 11.
[17] Section 893.055(7)(c), F.S., requires the DOH to verify a request as being "authentic and authorized" before releasing information from the PDMP.
[18] Section 893.055(10) and (11)(c), F.S.
[19] Florida Department of Health, Electronic-Florida Online Reporting of Controlled Substances Evaluation (E-FORCSE) webpage, available at http://www.floridahealth.gov/reports-and-data/e-forcse/funding/index.html, last visited on March 19, 2014.
[20] Chapter 2013-153, Laws of Fla.

PDMP Direct-Support Organization

The Florida PDMP Foundation, Inc., (Foundation) is the direct-support organization authorized under the prescription drug monitoring program in s. 893.055, F.S. The Foundation is a not-for-profit Florida corporation that operates under contract with the department to acquire funding to support the PDMP. The Foundation transfers money to the department for the development, implementation, and ongoing operation of the PDMP.

Current law provides for the reversion, without penalty, to the state of all money and property held in trust by the Foundation for the benefit of the PDMP if the Foundation ceases to exist or if the contract is terminated.[21]

Prescription Drug Monitoring Programs in Other States

As of December 2013, every state except Missouri has passed PDMP legislation and only New Hampshire and Washington, D.C., have yet to bring their PDMP to operation status.[22] The Legislature's Office of Program Policy Analysis and Government Accountability (OPPAGA) examined the PDMPs of 26 of those states, including Florida.[23] All PDMPs examined are either run by the states in-house or by contract with private vendors. Most states do not require prescribers to register in order to use the PDMP and primarily encourage prescribers to use the database through education and outreach programs.[24] Only three of the 26 states require prescribers to access the database before prescribing most or all controlled substances.[25] In 17 of 23 states, including Florida, accessing the database is strictly voluntary, and in the remaining six states accessing the database is only required under limited circumstances.[26]

All states reviewed have the authority to take punitive action against dispensers of prescription drugs which do not comply with their state's respective laws and rules on their state's PDMP. These punitive actions can come in the form of fines, licensure disciplinary action, or criminal charges. However, states rarely use these punitive measures when dispensers do not comply with PDMP requirements.

As of December 5, 2013, 18 states require law enforcement agencies to obtain a search warrant, subpoena, court order, or other type of judicial process in order to access the information in their state's PDMP.[27]

---

[21] *See* s. 893.055(11)(d)4., F.S.
[22] National Alliance for Model State Drug Laws. *Compilation of State Prescription Monitoring Programs Maps*, can be found at http://www.namsdl.org/library/ last visited on March 19, 2014.
[23] *OPPAGA Review of State Prescription Drug Monitoring Programs*, January 31, 2013, on file with the Senate Health Policy Committee.
[24] *Id.* at 8.
[25] Kentucky, New Mexico, and New York. *Id.* at 4.
[26] These circumstances typically revolve around how often a drug is prescribed, if the drug is in a specific class or schedule, if there is a reasonable suspicion that the patient it abusing drugs, or if the prescription was written in a pain clinic. Id.
[27] These states are: Alaska, Arkansas, Colorado, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, and Wisconsin. See the National Alliance for Model State Drug Laws, *Law Enforcement Access to State PMP Data*, available at http://www.namsdl.org/library/ , last visited on March 19, 2014.

Unauthorized Release of PDMP Data

In the early summer of 2013, the PDMP information of approximately 3,300 individuals was improperly shared with a person or persons who were not authorized to obtain such information.[28] The original information was released from the PDMP by the DOH during a Drug Enforcement Administration (DEA) investigation of a ring of individuals who used four doctor's information to conduct prescription fraud. Although as a result of the investigation only six individuals were ultimately charged, the information of approximately 3,300 individuals was released to the DEA because the DEA searched the PDMP for the records of all the patients of the four doctors who had been the victims of the prescription drug fraud.[29] During the conduct of the investigation and the resulting prosecution, the DEA shared the full file with the prosecutor who, in turn, shared the full file with the defense attorney during discovery. The improper release of information occurred when a defense attorney associated with the case shared the file with a colleague who was not associated with the case.[30]

Reasonable Suspicion v. Probable Cause

The terms reasonable suspicion and probable cause are legal terms of art that refer to the level of proof that be proffered before a certain action, generally a police action, may be taken. Reasonable suspicion is the lesser standard which is applied to actions such as Terry stops[31] and to searches in areas where there is a lesser expectation of privacy, such as in a school.[32] Probable cause is the greater of the two standards and is the one the police must meet when arresting a suspect.[33]

In order to meet the standard for reasonable suspicion, a police officer must be able to show a "well-founded, articulable suspicion of criminal activity."[34] In contrast, in order to meet the standard for probable cause, an officer must be able to show that the "facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."[35] The key difference between the standards lies in the knowledge of the officer. With reasonable suspicion, the officer must only suspect that a crime has been committed, while with probable cause, the officer must have enough evidence to convince a "prudent man" that a crime has been committed.

[28] See John Woodrow Cox, *Did Florida's prescription pill database really spring a leak?*, Tampa Bay Times, July 5, 2013. Available at http://www.tampabay.com/news/politics/did-floridas-prescription-pill-database-really-spring-a-leak/2130108, last visited on March 19, 2014, and see the DOH presentation to the Senate Health Policy Committee on the PDMP, September 24, 2013, on file with Health Policy Committee staff.
[29] *Id.*
[30] *Id.*
[31] *Terry v. Ohio*, 392 U.S. 1 (1968).
[32] *See R.M. v. State*, 129 So. 3d 1157 (Fla. 3d DCA 2014).
[33] *Popple v. State*, 626 So. 2d 185, 186-187 (Fla. 1993).
[34] Id.
[35] *Henry v. U.S.*, 361 U.S. 98, 102 (1959) (internal citations omitted).

III. Effect of Proposed Changes:

The bill amends s. 893.055, F.S., to significantly, but technically, revise the section by reorganizing and grouping related items, clarifying imprecise language, and deleting outdated or redundant language.

The bill also makes several substantive changes to:

- Require a law enforcement agency to obtain a court order from a court of competent jurisdiction showing a finding of reasonable suspicion of potential criminal activity, fraud, or theft regarding prescribed controlled substances before information within the PDMP database may be released to that agency.
- Allow the DOH to send only relevant information, which is not personal identifying information, to a law enforcement agency when the DOH determines a pattern consistent with indicators of controlled substance abuse exists. A law enforcement agency may use this information to support the court order necessary to obtain identified records, if needed for a lawful investigation.
- Define the term "dispense" or "dispensing" using existing language in the statute and in the definitions section of ch. 893, F.S.
- Fund, subject to the General Appropriations Act, the PDMP with up to $500,000 annually from excess collections related to the practice of pharmacy; and,
- Eliminate the PDMP direct support organization.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Law enforcement agencies may incur a cost associated with obtaining a court order prior to accessing information in the PDMP.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 893.055 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

742068

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Thrasher) recommended the following:

Senate Amendment (with title amendment)

Delete line 288
and insert:
dispensing of a one-time, 72-hour perioperative supply or emergency resupply of a

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:
Delete line 7
and insert:

742068

Department of Health; exempting the dispensing of a 72-hour perioperative supply of prescription medication from the requirement to report; requiring a law enforcement

121548

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Thrasher) recommended the following:

Senate Amendment (with title amendment)

Delete lines 360 - 427

and insert:

3. A law enforcement agency during active investigations of ~~regarding~~ potential criminal activity, fraud, or theft regarding prescribed controlled substances, in accordance with paragraph (d).

4. A patient or the legal guardian or designated health care surrogate of an incapacitated patient as described in s. 893.0551 who, for the purpose of verifying the accuracy of the

database information, submits a written and notarized request that includes the patient's full name, address, and date of birth~~, and includes the same information if the legal guardian or health care surrogate submits the request~~. If the patient's legal guardian or health care surrogate is the requestor, the request shall be validated by the department to verify the identity of the patient and the legal guardian or health care surrogate~~, if the patient's legal guardian or health care surrogate is the requestor~~. Such verification is also required for any request to change a patient's prescription history or other information related to his or her information in the electronic database.

(c) Information in or released from the prescription drug monitoring program database ~~for the electronic prescription drug monitoring system~~ is not discoverable or admissible in any civil or administrative action~~,~~ except in an investigation and disciplinary proceeding by the department or the appropriate regulatory board. Information shared with a state attorney pursuant to s. 893.0551(3)(a) or (c) may be released only in response to a discovery demand if such information is directly related to the criminal case for which the information was requested. If additional information is shared with the state attorney which is not directly related to the criminal case, the state attorney shall inform the inquirer that such information exists. Unrelated information may not be released except upon an order of a court of competent jurisdiction.

(d) The department shall adopt a user agreement by rule. Before releasing any information pursuant to subparagraph (b)3., the department shall enter into a user agreement with the law

121548

enforcement agency requesting information from the prescription drug monitoring database. At a minimum, the user agreement must:

1. Provide for access control and information security in order to ensure the confidentiality of the information.

2. Contain training requirements.

3. Require each agency head to submit an annual attestation to the program manager that the user agreement is being complied with and to disclose any findings and actions taken to maintain compliance. Any findings of noncompliance must be reported immediately by the agency head to the program manager.

4. Require each agency that receives information from the database to electronically update the database semiannually with the status of the case for which the information was requested, in accordance with procedures established by department rule.

5. Require each agency head to appoint one agency administrator to be responsible for appointing authorized users to request and receive investigative reports on behalf of the agency to ensure the agency maintains compliance with the user agreement and laws governing access, use, and dissemination of information received.

6. Require each authorized user to attest that each request for confidential information from the database is predicated on and related to an active investigation.

7. Require the agency to conduct annual audits of the administrator and of each authorized user to ensure the user agreement is being followed. Such audits must be conducted by an internal affairs, professional compliance, inspector general, or similarly situated unit within the agency which normally handles inspections or internal investigations for that agency. The

121548

review must include any allegations of noncompliance, potential security violations, and a report on the user's compliance with laws, rules, and the user agreement. The agency shall also conduct routine audits on access and dissemination of records. The results of each audit shall be submitted to the program manager within 7 days after completing the audit. By October 1, 2014, the department shall adopt rules to ensure that each agency is complying with the audit requirements pursuant to this subparagraph.

8. Allow the program manager to restrict, suspend, or terminate an administrator's or authorized user's access to information in the database if the department finds that the administrator or authorized user has failed to comply with the terms of the user agreement. If an agency does not comply with the department's rules on audit requirements, the program manager shall suspend the agency's access to information in the database until the agency comes into compliance with such rules.

(e) ~~(d)~~ Other than the program manager and his or her program or support staff as authorized in paragraph (f), department staff are~~, for the purpose of calculating performance measures pursuant to subsection (8), shall~~ not ~~be~~ allowed direct access to information in the prescription drug monitoring program database but may request from the program manager and, when authorized by the program manager, the program manager's program and support staff, information that does not contain ~~contains no~~ identifying information of any patient, physician, health care practitioner, prescriber, or dispenser and that is not confidential and exempt for the purpose of calculating performance measures pursuant to subsection (7).

121548

(f) The program manager and designated support staff, upon the direction of the program manager or as otherwise authorized during the program manager's absence, may access the prescription drug monitoring program database only to manage the program or to manage the program database and systems in support of the requirements of this section or as established by the department in rule pursuant to subparagraph (2)(c)4. The program manager, designated program and support staff who act at the direction of or in the absence of the program manager, and any individual who has similar access regarding the management of the database from the prescription drug monitoring program shall submit fingerprints to the department for background screening. The department shall follow the procedure established by the Department of Law Enforcement to request a statewide criminal history record check and to request that the Department of Law Enforcement forward the fingerprints to the Federal Bureau of Investigation for a national criminal history record check.

(g) If the program manager determines a pattern consistent with the rules established under subparagraph (2)(c)4., the department may provide:

1. A patient advisory report to an appropriate health care practitioner; and

2. Relevant information that does not contain personal identifying information to the applicable law enforcement agency. A law enforcement agency may use such information to determine whether an active investigation is warranted.

(h) ~~(e)~~ All transmissions of data required by this section

========== T I T L E A M E N D M E N T ==========

121548

And the title is amended as follows:

Delete lines 7 - 23

and insert:

Department of Health; providing requirements for the release of information shared with a state attorney in response to a discovery demand; providing procedures for the release of information to a law enforcement agency during an active investigation; requiring the department to adopt a user agreement by rule; requiring the department to enter into a user agreement with the law enforcement agency requesting the release of information; providing requirements for the user agreement; requiring a law enforcement agency under a user agreement to conduct annual audits; providing for the restriction, suspension, or termination of a user agreement; providing for access to the program database by the program manager and designated support staff; authorizing the department to provide a patient advisory report to the appropriate health care practitioner if the program manager determines that a specified pattern exists; authorizing the department to provide relevant information that does not contain personal identifying information to a law enforcement agency if the program manager determines that a specified pattern exists; authorizing the law enforcement agency to use such information to determine whether an active investigation is warranted; authorizing the

519832

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Thrasher) recommended the following:

Senate Amendment to Amendment (121548) (with title amendment)

Between lines 23 and 24
insert:
5. An impaired practitioner consultant who is retained by the department under s. 456.076 shall have access to information in the prescription drug monitoring program's database, in a manner established by the department, which relates to a practitioner who has agreed to be evaluated or monitored by the consultant, as needed for the purpose of reviewing the

519832

practitioner's controlled substance prescription history.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 131

and insert:

Department of Health; allowing impaired practitioner consultants retained by the department access to certain information; providing requirements for the

By the Committee on Health Policy

588-01653A-14 2014862__

A bill to be entitled

An act relating to prescription drug monitoring; amending s. 893.055, F.S.; defining and redefining terms; revising provisions relating to the comprehensive electronic database system and prescription drug monitoring program maintained by the Department of Health; requiring a law enforcement agency to submit a court order as a condition of direct access to information in the program; requiring that the court order be predicated upon a showing of reasonable suspicion of criminal activity, fraud, or theft regarding prescribed controlled substances; providing that the court order may be issued without notice to the affected patients, subscribers, or dispensers; authorizing the department to provide relevant information that does not contain personal identifying information if the program manager determines a specified pattern exists; authorizing the department to provide a patient advisory report to any appropriate health care practitioner if the program manager determines a specified pattern exists; authorizing the law enforcement agency to use such information to support a court order; authorizing the department to fund the program with up to $500,000 of funds generated under ch. 465, F.S.; authorizing the department to seek federal or private funds to support the program; repealing language creating a direct-support organization to fund the program; deleting obsolete provisions; providing an effective date.

588-01653A-14 2014862__

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 893.055, Florida Statutes, is amended to read:

893.055 Prescription drug monitoring program.—

(1) As used in this section, the term:

(a) "Patient advisory report" or "advisory report" means information provided by the department ~~in writing, or as determined by the department,~~ to a prescriber, dispenser, pharmacy, or patient concerning the dispensing of controlled substances. ~~All~~ Advisory reports are for informational purposes only and do not impose any obligation ~~no obligations of any nature~~ or ~~any~~ legal duty on a prescriber, dispenser, pharmacy, or patient. An advisory report ~~The patient advisory report shall be provided in accordance with s. 893.13(7)(a)8. The advisory reports~~ issued by the department is ~~are~~ not subject to discovery or introduction into evidence in a ~~any~~ civil or administrative action against a prescriber, dispenser, pharmacy, or patient arising out of matters that are the subject of the report. A department employee~~; and a person~~ who participates in preparing, reviewing, issuing, or any other activity related to an advisory report is ~~may~~ not allowed ~~be permitted~~ or required to testify in any such civil action as to any findings, recommendations, evaluations, opinions, or other actions taken in connection with preparing, reviewing, or issuing such a report.

(b) "Controlled substance" means a controlled substance listed in Schedule II, Schedule III, or Schedule IV in s. 893.03.

(c) "Dispenser" means a pharmacy, dispensing pharmacist, or dispensing health care practitioner, and includes a pharmacy, dispensing pharmacist, or health care practitioner that is not located in this state but is otherwise subject to the jurisdiction of this state as to a particular dispensing transaction.

(d) "Health care practitioner" or "practitioner" means a ~~any~~ practitioner who is subject to licensure or regulation by the department under chapter 458, chapter 459, chapter 461, chapter 462, chapter 463, chapter 464, chapter 465, or chapter 466.

(e) "Health care regulatory board" means a ~~any~~ board for a practitioner or health care practitioner who is licensed or regulated by the department.

(f) "Pharmacy" means a ~~any~~ pharmacy that is subject to licensure or regulation by the department under chapter 465 and that dispenses or delivers a controlled substance to an individual or address in this state.

(g) "Prescriber" means a prescribing physician, prescribing practitioner, or other prescribing health care practitioner.

(h) "Active investigation" means an investigation that is being conducted with a reasonable, good faith belief that it will ~~could~~ lead to the filing of administrative, civil, or criminal proceedings~~,~~ or an investigation that is ongoing and continuing and for which there is a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.

(i) "Law enforcement agency" means the Department of Law Enforcement, a Florida sheriff's department, a Florida police

department, or a law enforcement agency of the Federal Government which enforces the laws of this state or the United States relating to controlled substances, and whose ~~which its~~ agents and officers are empowered by law to conduct criminal investigations and make arrests.

(j) "Program manager" means an employee of or a person contracted by the Department of Health who is designated to ensure the integrity of the prescription drug monitoring program in accordance with the requirements established in paragraphs (2)(a) and (b).

(k) "Dispense" or "dispensing" means the transfer of possession of one or more doses of a medicinal drug by a health care practitioner to the ultimate consumer or to the ultimate consumer's agent, including, but not limited to, a transaction with a dispenser pursuant to chapter 465 and a dispensing transaction to an individual or address in this state with a dispenser that is located outside this state but is otherwise subject to the jurisdiction of this state as to that dispensing transaction.

(2)(a) The department shall maintain ~~design and establish~~ a comprehensive electronic database system in order to collect and store specified information from dispensed ~~that has~~ controlled substance prescriptions and shall release information to authorized recipients in accordance with subsection (6) and s. 893.0551 ~~provided to it and that provides prescription information to a patient's health care practitioner and pharmacist who inform the department that they wish the patient advisory report provided to them~~. ~~Otherwise, the patient advisory report will not be sent to the practitioner, pharmacy,~~

~~or pharmacist.~~ The system must ~~shall be designed to provide information regarding dispensed prescriptions of controlled substances and shall~~ not infringe upon the legitimate prescribing or dispensing of a controlled substance by a prescriber or dispenser acting in good faith and in the course of professional practice and must~~. The system shall~~ be consistent with standards of the American Society for Automation in Pharmacy (ASAP). The ~~electronic~~ system must ~~shall~~ also comply with the Health Insurance Portability and Accountability Act (HIPAA) as it pertains to protected health information (PHI), electronic protected health information (EPHI), and ~~all~~ other relevant state and federal privacy and security laws and regulations. ~~The department shall establish policies and procedures as appropriate regarding the reporting, accessing the database, evaluation, management, development, implementation, operation, storage, and security of information within the system. The reporting of prescribed controlled substances shall include a dispensing transaction with a dispenser pursuant to chapter 465 or through a dispensing transaction to an individual or address in this state with a pharmacy that is not located in this state but that is otherwise subject to the jurisdiction of this state as to that dispensing transaction. The reporting of patient advisory reports refers only to reports to patients, pharmacies, and practitioners. Separate reports that contain patient prescription history information and that are not patient advisory reports are provided to persons and entities as authorized in paragraphs (7)(b) and (c) and s. 893.0551.~~

(b) The department shall maintain the electronic system so that a patient's health care practitioner or pharmacist is able

to receive a patient advisory report upon request~~, when the direct support organization receives at least $20,000 in nonstate moneys or the state receives at least $20,000 in federal grants for the prescription drug monitoring program, shall adopt rules as necessary concerning the reporting, accessing the database, evaluation, management, development, implementation, operation, security, and storage of information within the system, including rules for when patient advisory reports are provided to pharmacies and prescribers. The patient advisory report shall be provided in accordance with s. 893.13(7)(a)8. The department shall work with the professional health care licensure boards, such as the Board of Medicine, the Board of Osteopathic Medicine, and the Board of Pharmacy; other appropriate organizations, such as the Florida Pharmacy Association, the Florida Medical Association, the Florida Retail Federation, and the Florida Osteopathic Medical Association, including those relating to pain management; and the Attorney General, the Department of Law Enforcement, and the Agency for Health Care Administration to develop rules appropriate for the prescription drug monitoring program.~~

(c) The department shall:

1. Establish policies and procedures and adopt rules necessary to provide for access to and evaluation, management, and operation of the electronic system.

2. Establish policies and procedures and adopt rules necessary to provide for the reporting, storage, and security of information within the electronic system, including:

a. Any additional information, other than the information listed in subsection (3), which must be reported to the system.

b. The process by which dispensers must provide the required information concerning each controlled substance that it has dispensed in a secure methodology and format. Such approved formats may include, but are not limited to, submission via the Internet, on a disc, or by use of regular mail.

c. The process by which the department may approve an extended period of time for a dispenser to report a dispensed prescription to the system.

d. Procedures providing for reporting during a state-declared or nationally declared disaster.

e. Procedures for determining when a patient advisory report is required to be provided to a pharmacy or prescriber.

f. Procedures for determining whether a request for information under paragraph (6)(b) is authentic and authorized by the requesting agency.

3. Cooperate with professional health care licensure boards, such as the Board of Medicine, the Board of Osteopathic Medicine, and the Board of Pharmacy; other appropriate organizations, such as the Florida Pharmacy Association, the Florida Medical Association, the Florida Retail Federation, the Florida Osteopathic Medical Association, and those relating to pain management; and the Attorney General, the Department of Law Enforcement, and the Agency for Health Care Administration to develop rules appropriate for the prescription drug monitoring program ~~All dispensers and prescribers subject to these reporting requirements shall be notified by the department of the implementation date for such reporting requirements~~.

4.~~(d)~~ Cooperate ~~The program manager shall work~~ with professional health care licensure boards and the stakeholders

listed in subparagraph 3. ~~paragraph (b)~~ to develop rules appropriate for identifying indicators of controlled substance abuse.

(3) The dispenser of ~~The pharmacy dispensing the controlled substance and each prescriber who directly dispenses~~ a controlled substance shall submit to the electronic system, by a procedure and in a format established by the department and consistent with an ASAP-approved format, the following information for each prescription dispensed ~~inclusion in the database~~:

(a) The name of the prescribing practitioner, the practitioner's federal Drug Enforcement Administration registration number, the practitioner's National Provider Identification (NPI) or other appropriate identifier, and the date of the prescription.

(b) The date the prescription was filled and the method of payment, such as cash by an individual, insurance coverage through a third party, or Medicaid payment. This paragraph does not authorize the department to include individual credit card numbers or other account numbers in the database.

(c) The full name, address, and date of birth of the person for whom the prescription was written.

(d) The name, national drug code, quantity, and strength of the controlled substance dispensed.

(e) The full name, federal Drug Enforcement Administration registration number, and address of the pharmacy or other location from which the controlled substance was dispensed. If the controlled substance was dispensed by a practitioner other than a pharmacist, the practitioner's full name, federal Drug

Enforcement Administration registration number, and address.

(f) The name of the pharmacy or practitioner, other than a pharmacist, dispensing the controlled substance and the practitioner's National Provider Identification (NPI).

(g) Other appropriate identifying information as determined by department rule.

(4) Each time a controlled substance is dispensed to an individual, the information specified in subsection (3) ~~controlled substance~~ shall be reported by the dispenser to the department through the system using a department-approved process as soon thereafter as possible, but not more than 7 days after the date the controlled substance is dispensed unless an extension is approved by the department. Costs to the dispenser for submitting the information required by this section may not be material or extraordinary. Costs not considered to be material or extraordinary include, but are not limited to, regular postage, electronic media, regular electronic mail, and facsimile charges. A person who willfully and knowingly fails to report the dispensing of a controlled substance as required by this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083 ~~for cause as determined by rule~~. ~~A dispenser must meet the reporting requirements of this section by providing the required information concerning each controlled substance that it dispensed in a department-approved, secure methodology and format. Such approved formats may include, but are not limited to, submission via the Internet, on a disc, or by use of regular mail.~~

(5) ~~When the following acts of dispensing or administering~~

~~occur,~~ The following acts are exempt from the reporting ~~under~~ requirements of this section ~~for that specific act of dispensing or administration~~:

(a) The administration of ~~A health care practitioner when administering~~ a controlled substance directly to a patient by a health care practitioner if the amount of the controlled substance is adequate to treat the patient during that particular treatment session.

(b) The administration of ~~A pharmacist or health care practitioner when administering~~ a controlled substance by a health care practitioner to a patient or resident receiving care as a patient at a hospital, nursing home, ambulatory surgical center, hospice, or intermediate care facility for the developmentally disabled which is licensed in this state.

(c) The administration or dispensing of ~~A practitioner when administering or dispensing~~ a controlled substance by a health care practitioner within ~~in~~ the health care system of the Department of Corrections.

(d) The administration of ~~A practitioner when administering~~ a controlled substance by a health care practitioner in the emergency room of a licensed hospital.

(e) The administration or dispensing of ~~A health care practitioner when administering or dispensing~~ a controlled substance by a health care practitioner to a person under the age of 16.

(f) The ~~A pharmacist or a dispensing practitioner when~~ dispensing of a one-time, 72-hour emergency resupply of a controlled substance by a dispenser to a patient.

(6) Confidential and exempt information in the prescription

drug monitoring program's database may be released only as provided in this subsection and s. 893.0551 ~~The department may establish when to suspend and when to resume reporting information during a state-declared or nationally declared disaster~~.

~~(7)(a) A practitioner or pharmacist who dispenses a controlled substance must submit the information required by this section in an electronic or other method in an ASAP format approved by rule of the department unless otherwise provided in this section. The cost to the dispenser in submitting the information required by this section may not be material or extraordinary. Costs not considered to be material or extraordinary include, but are not limited to, regular postage, electronic media, regular electronic mail, and facsimile charges.~~

(a) ~~(b)~~ A pharmacy, prescriber, or dispenser shall have access to information in the prescription drug monitoring program's database which relates to a patient of that pharmacy, prescriber, or dispenser in a manner established by the department as needed for the purpose of reviewing the patient's controlled substance prescription history. A prescriber or dispenser acting in good faith is immune from any civil, criminal, or administrative liability that might otherwise be incurred or imposed for receiving or using information from the prescription drug monitoring program. This subsection does not create a private cause of action, and a person may not recover damages against a prescriber or dispenser authorized to access information under this subsection for accessing or failing to access such information ~~Other access to the program's database~~

~~shall be limited to the program's manager and to the designated program and support staff, who may act only at the direction of the program manager or, in the absence of the program manager, as authorized. Access by the program manager or such designated staff is for prescription drug program management only or for management of the program's database and its system in support of the requirements of this section and in furtherance of the prescription drug monitoring program. Confidential and exempt information in the database shall be released only as provided in paragraph (c) and s. 893.0551. The program manager, designated program and support staff who act at the direction of or in the absence of the program manager, and any individual who has similar access regarding the management of the database from the prescription drug monitoring program shall submit fingerprints to the department for background screening. The department shall follow the procedure established by the Department of Law Enforcement to request a statewide criminal history record check and to request that the Department of Law Enforcement forward the fingerprints to the Federal Bureau of Investigation for a national criminal history record check.~~

(b) ~~(c)~~ The following entities are ~~shall~~ not ~~be~~ allowed direct access to information in the prescription drug monitoring program database but may request from the program manager and, when authorized by the program manager, the program manager's program and support staff, information that is confidential and exempt under s. 893.0551. Before ~~Prior to~~ release, the request by the following entities shall be verified as authentic and authorized with the requesting organization by the program manager or~~,~~ the program manager's program and support staff~~, or~~

~~as determined in rules by the department as being authentic and as having been authorized by the requesting entity~~:

1. The department or its relevant health care regulatory boards responsible for the licensure, regulation, or discipline of practitioners, pharmacists, or other persons who are authorized to prescribe, administer, or dispense controlled substances and who are involved in a specific controlled substance investigation involving a designated person for one or more prescribed controlled substances.

2. The Attorney General for Medicaid fraud cases involving prescribed controlled substances.

3. A law enforcement agency during active investigations and pursuant to the submission of a court order issued by a court of competent jurisdiction upon a showing of reasonable suspicion of ~~regarding~~ potential criminal activity, fraud, or theft regarding prescribed controlled substances. The court order may be issued without notice to the affected patients, prescribers, or dispensers.

4. A patient or the legal guardian or designated health care surrogate of an incapacitated patient as described in s. 893.0551 who, for the purpose of verifying the accuracy of the database information, submits a written and notarized request that includes the patient's full name, address, and date of birth~~, and includes the same information if the legal guardian or health care surrogate submits the request~~. If the patient's legal guardian or health care surrogate is the requestor, the request shall be validated by the department to verify the identity of the patient and the legal guardian or health care surrogate~~, if the patient's legal guardian or health care~~

~~surrogate is the requestor~~. Such verification is also required for any request to change a patient's prescription history or other information related to his or her information in the electronic database.

Information in or released from the prescription drug monitoring program database ~~for the electronic prescription drug monitoring system~~ is not discoverable or admissible in any civil or administrative action~~,~~ except in an investigation and disciplinary proceeding by the department or the appropriate regulatory board.

(c) ~~(d)~~ Other than the program manager and his or her program or support staff as authorized in paragraph (d), department staff are~~, for the purpose of calculating performance measures pursuant to subsection (8), shall~~ not ~~be~~ allowed direct access to information in the prescription drug monitoring program database but may request from the program manager and, when authorized by the program manager, the program manager's program and support staff, information that does not contain ~~contains no~~ identifying information of any patient, physician, health care practitioner, prescriber, or dispenser and that is not confidential and exempt for the purpose of calculating performance measures pursuant to subsection (7).

(d) The program manager and designated support staff, upon the direction of the program manager or as otherwise authorized during the program manager's absence, may access the prescription drug monitoring program database only to manage the program or to manage the program database and systems in support of the requirements of this section or as established by the

department in rule pursuant to subparagraph (2)(c)4. The program manager, designated program and support staff who act at the direction of or in the absence of the program manager, and any individual who has similar access regarding the management of the database from the prescription drug monitoring program shall submit fingerprints to the department for background screening. The department shall follow the procedure established by the Department of Law Enforcement to request a statewide criminal history record check and to request that the Department of Law Enforcement forward the fingerprints to the Federal Bureau of Investigation for a national criminal history record check.

(e) If the program manager determines a pattern consistent with the rules established under subparagraph (2)(c)4., the department may provide:

1. A patient advisory report to an appropriate health care practitioner; and

2. Relevant information that does not contain personal identifying information to the applicable law enforcement agency. A law enforcement agency may use such information to support a court order pursuant to subparagraph (b)3.

(f) ~~(e)~~ All transmissions of data required by this section must comply with relevant state and federal privacy and security laws and regulations. However, an ~~any~~ authorized agency or person under s. 893.0551 receiving such information as allowed by s. 893.0551 may maintain the information received for up to 24 months before purging it from his or her records or maintain it for longer than 24 months if the information is pertinent to ongoing health care or an active law enforcement investigation or prosecution.

~~(f) The program manager, upon determining a pattern consistent with the rules established under paragraph (2)(d) and having cause to believe a violation of s. 893.13(7)(a)8., (8)(a), or (8)(b) has occurred, may provide relevant information to the applicable law enforcement agency.~~

(7) ~~(8)~~ To assist in fulfilling program responsibilities, performance measures shall be reported annually to the Governor, the President of the Senate, and the Speaker of the House of Representatives by the department each December 1~~, beginning in 2011~~. Data that does not contain patient, physician, health care practitioner, prescriber, or dispenser identifying information may be requested during the year by department employees so that the department may undertake public health care and safety initiatives that take advantage of observed trends. Performance measures may include, but are not limited to, efforts to achieve the following outcomes:

(a) Reduction of the rate of inappropriate use of prescription drugs through department education and safety efforts.

(b) Reduction of the quantity of pharmaceutical controlled substances obtained by individuals attempting to engage in fraud and deceit.

(c) Increased coordination among partners participating in the prescription drug monitoring program.

(d) Involvement of stakeholders in achieving improved patient health care and safety and reduction of prescription drug abuse and prescription drug diversion.

~~(9) Any person who willfully and knowingly fails to report the dispensing of a controlled substance as required by this~~

~~section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.~~

(8) ~~(10)~~ Notwithstanding s. 456.025 and subject to the General Appropriations Act, up to $500,000 of ~~all~~ costs incurred by the department in administering the prescription drug monitoring program may ~~shall~~ be funded through funds available in the Medical Quality Assurance Trust Fund that are related to the regulation of the practice of pharmacy under chapter 465. The department also may apply for and receive federal grants or private funding to fund the prescription drug monitoring program except that the department may not receive funds provided, directly or indirectly, by prescription drug manufacturers ~~applied for or received by the state~~. The department may not commit state funds for the monitoring program if such funds are necessary for the department's regulation of the practice of pharmacy under chapter 465 ~~without ensuring funding is available~~. ~~The prescription drug monitoring program and the implementation thereof are contingent upon receipt of the nonstate funding. The department and state government shall cooperate with the direct-support organization established pursuant to subsection (11) in seeking federal grant funds, other nonstate grant funds, gifts, donations, or other private moneys for the department if the costs of doing so are not considered material. Nonmaterial costs for this purpose include, but are not limited to, the costs of mailing and personnel assigned to research or apply for a grant.~~ Notwithstanding the exemptions to competitive-solicitation requirements under s. 287.057(3)(e), the department shall comply with the competitive-solicitation requirements under s. 287.057 for the procurement

of any goods or services required by this section. ~~Funds provided, directly or indirectly, by prescription drug manufacturers may not be used to implement the program.~~

~~(11) The department may establish a direct-support organization that has a board consisting of at least five members to provide assistance, funding, and promotional support for the activities authorized for the prescription drug monitoring program.~~

~~(a) As used in this subsection, the term "direct-support organization" means an organization that is:~~

~~1. A Florida corporation not for profit incorporated under chapter 617, exempted from filing fees, and approved by the Department of State.~~

~~2. Organized and operated to conduct programs and activities; raise funds; request and receive grants, gifts, and bequests of money; acquire, receive, hold, and invest, in its own name, securities, funds, objects of value, or other property, either real or personal; and make expenditures or provide funding to or for the direct or indirect benefit of the department in the furtherance of the prescription drug monitoring program.~~

~~(b) The direct-support organization is not considered a lobbying firm within the meaning of s. 11.045.~~

~~(c) The State Surgeon General shall appoint a board of directors for the direct-support organization. Members of the board shall serve at the pleasure of the State Surgeon General. The State Surgeon General shall provide guidance to members of the board to ensure that moneys received by the direct-support organization are not received from inappropriate sources.~~

~~Inappropriate sources include, but are not limited to, donors, grantors, persons, or organizations that may monetarily or substantively benefit from the purchase of goods or services by the department in furtherance of the prescription drug monitoring program.~~

~~(d) The direct-support organization shall operate under written contract with the department. The contract must, at a minimum, provide for:~~

~~1. Approval of the articles of incorporation and bylaws of the direct-support organization by the department.~~

~~2. Submission of an annual budget for the approval of the department.~~

~~3. Certification by the department that the direct-support organization is complying with the terms of the contract in a manner consistent with and in furtherance of the goals and purposes of the prescription drug monitoring program and in the best interests of the state. Such certification must be made annually and reported in the official minutes of a meeting of the direct-support organization.~~

~~4. The reversion, without penalty, to the state of all moneys and property held in trust by the direct-support organization for the benefit of the prescription drug monitoring program if the direct-support organization ceases to exist or if the contract is terminated.~~

~~5. The fiscal year of the direct-support organization, which must begin July 1 of each year and end June 30 of the following year.~~

~~6. The disclosure of the material provisions of the contract to donors of gifts, contributions, or bequests,~~

~~including such disclosure on all promotional and fundraising publications, and an explanation to such donors of the distinction between the department and the direct-support organization.~~

~~7. The direct-support organization's collecting, expending, and providing of funds to the department for the development, implementation, and operation of the prescription drug monitoring program as described in this section and s. 2, chapter 2009-198, Laws of Florida, as long as the task force is authorized. The direct-support organization may collect and expend funds to be used for the functions of the direct-support organization's board of directors, as necessary and approved by the department. In addition, the direct-support organization may collect and provide funding to the department in furtherance of the prescription drug monitoring program by:~~

~~a. Establishing and administering the prescription drug monitoring program's electronic database, including hardware and software.~~

~~b. Conducting studies on the efficiency and effectiveness of the program to include feasibility studies as described in subsection (13).~~

~~c. Providing funds for future enhancements of the program within the intent of this section.~~

~~d. Providing user training of the prescription drug monitoring program, including distribution of materials to promote public awareness and education and conducting workshops or other meetings, for health care practitioners, pharmacists, and others as appropriate.~~

~~e. Providing funds for travel expenses.~~

~~f. Providing funds for administrative costs, including personnel, audits, facilities, and equipment.~~

~~g. Fulfilling all other requirements necessary to implement and operate the program as outlined in this section.~~

~~(c) The activities of the direct-support organization must be consistent with the goals and mission of the department, as determined by the department, and in the best interests of the state. The direct-support organization must obtain a written approval from the department for any activities in support of the prescription drug monitoring program before undertaking those activities.~~

~~(f) The department may permit, without charge, appropriate use of administrative services, property, and facilities of the department by the direct-support organization, subject to this section. The use must be directly in keeping with the approved purposes of the direct-support organization and may not be made at times or places that would unreasonably interfere with opportunities for the public to use such facilities for established purposes. Any moneys received from rentals of facilities and properties managed by the department may be held in a separate depository account in the name of the direct-support organization and subject to the provisions of the letter of agreement with the department. The letter of agreement must provide that any funds held in the separate depository account in the name of the direct-support organization must revert to the department if the direct-support organization is no longer approved by the department to operate in the best interests of the state.~~

~~(g) The department may adopt rules under s. 120.54 to~~

~~govern the use of administrative services, property, or facilities of the department or office by the direct-support organization.~~

~~(h) The department may not permit the use of any administrative services, property, or facilities of the state by a direct-support organization if that organization does not provide equal membership and employment opportunities to all persons regardless of race, color, religion, gender, age, or national origin.~~

~~(i) The direct-support organization shall provide for an independent annual financial audit in accordance with s. 215.981. Copies of the audit shall be provided to the department and the Office of Policy and Budget in the Executive Office of the Governor.~~

~~(j) The direct-support organization may not exercise any power under s. 617.0302(12) or (16).~~

~~(12) A prescriber or dispenser may have access to the information under this section which relates to a patient of that prescriber or dispenser as needed for the purpose of reviewing the patient's controlled drug prescription history. A prescriber or dispenser acting in good faith is immune from any civil, criminal, or administrative liability that might otherwise be incurred or imposed for receiving or using information from the prescription drug monitoring program. This subsection does not create a private cause of action, and a person may not recover damages against a prescriber or dispenser authorized to access information under this subsection for accessing or failing to access such information.~~

(9)~~(13)~~ To the extent that funding is provided for such

purpose through federal or private grants or gifts and other types of available moneys, the department shall study the feasibility of enhancing the prescription drug monitoring program for the purposes of public health initiatives and statistical reporting that respects the privacy of the patient, the prescriber, and the dispenser. Such a study shall be conducted in order to further improve the quality of health care services and safety by improving the prescribing and dispensing practices for prescription drugs, taking advantage of advances in technology, reducing duplicative prescriptions and the overprescribing of prescription drugs, and reducing drug abuse. The requirements of the National All Schedules Prescription Electronic Reporting (NASPER) Act are authorized in order to apply for federal NASPER funding. ~~In addition, the direct-support organization shall provide funding for the department to conduct training for health care practitioners and other appropriate persons in using the monitoring program to support the program enhancements.~~

(10)~~(14) A pharmacist, pharmacy, or dispensing health care practitioner or his or her agent,~~ Before releasing a controlled substance to any person not known to him or her ~~such dispenser~~, the dispenser shall require the person purchasing, receiving, or otherwise acquiring the controlled substance to present valid photographic identification or other verification of his or her identity ~~to the dispenser~~. If the person does not have proper identification, the dispenser may verify the validity of the prescription and the identity of the patient with the prescriber or his or her authorized agent. Verification of health plan eligibility through a real-time inquiry or adjudication system

is ~~will be~~ considered to be proper identification. This subsection does not apply in an institutional setting or to a long-term care facility, including, but not limited to, an assisted living facility or a hospital to which patients are admitted. As used in this subsection, the term "proper identification" means an identification that is issued by a state or the Federal Government containing the person's photograph, printed name, and signature or a document considered acceptable under 8 C.F.R. s. 274a.2(b)(1)(v)(A) and (B).

~~(15) The Agency for Health Care Administration shall continue the promotion of electronic prescribing by health care practitioners, health care facilities, and pharmacies under s. 408.0611.~~

~~(16) The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 to administer the provisions of this section, which shall include as necessary the reporting, accessing, evaluation, management, development, implementation, operation, and storage of information within the monitoring program's system.~~

Section 2. This act shall take effect July 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 976
INTRODUCER:	Health Policy Committee and Senator Bean
SUBJECT:	Nurse Registries
DATE:	March 31, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall	HP	**Fav/CS**
2.	Munroe	Cibula	JU	**Pre-meeting**
3.			AHS	
4.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 976 amends s. 400.506, F.S., to clarify that a registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide that is referred by a nurse registry is an independent contractor and not an employee of that nurse registry regardless of the regulatory obligation imposed on the nurse registry under chapter 400, F.S.

The bill also clarifies that a nurse registry is not responsible for monitoring, supervising, managing, or training the nurses, companions or homemakers, and home health aides it refers or for reviewing or acting on any records required to be filed with it by chapter 400, F.S., and maintained under the Agency for Health Care Administration (Agency) rule.

The bill requires that if a nurse registry becomes aware of a violation of law, misconduct, or a deficiency in credentials of a nurse, companion or homemaker, or home health aide, then it must advise the patient to terminate the referred person's contract along with a reason for the recommendation, cease referring the contractor to other patients or facilities, and notify the applicable licensing board if practice violations are involved.

II. Present Situation:

A nurse registry is defined to mean "any person that procures, offers, promises, or attempts to secure health care-related contracts for registered nurses, licensed practical nurses, certified

nursing assistants, home health aides, companions, or homemakers, who are compensated by fees as independent contractors, including but not limited to, contracts for the provision of services to patients and contracts to provide private duty or staffing services to health care facilities licensed under ch. 395, [ch. 400], or ch. 429 or other business entities."[1] Nurse registries operate by referring qualified health care workers to patients, health care facilities, or other business entities who hire such health care workers as independent contractors.[2]

Nurse registries are regulated under the Home Health Services Act found in part III of ch. 400, F.S., specifically s. 400.506, F.S., and part II of ch. 408, F.S., the general licensing provisions for health care facilities regulated by the Agency. A license issued by the Agency is required to operate a nurse registry. As of February 27, 2014, 518 nurse registries were licensed with the Agency.[3,4]

Some of the responsibilities of a nurse registry as established in statute and rule include:

- Referring independent contractors capable of delivering services as defined in a specific medical plan of treatment for a patient or services requested by a client;[5]
- Keeping clinical records received from the independent contractors for 5 years following the termination of that contractor's service;[6]
- Disseminating to the independent contractors the procedures governing the administration of drugs and biologicals to patients required by ch. 464, F.S., and Agency rules, as well as all the information required by 59A-18.005(1), F.A.C.;[7]
- Initially confirming and annually reconfirming the licensure or certification of applicable independent contractors;[8]
- Annually requesting performance outcome evaluations from the health care facilities where the independent contractor provided services and maintaining those evaluations in that independent contractor's file;[9]
- Establishing a system for recording a following-up on complaints involving independent contractors referred by the nurse registry;[10]
- Informing a health care facility or other business entity that a referred independent contractor is on probation with his or her professional licensing board or certifying agency or has had other restrictions placed on his or her license or certification when the nurse registry has received such information;[11]
- Preparing and maintaining a written comprehensive emergency management plan;[12] and

[1] Section 400.462(21), F.S.
[2] Agency for Health Care Administration, *2014 Agency Legislative Bill Analysis for SB 976* (February 13, 2014) (on file with the Senate Judiciary Committee).
[3] Multiple nurse registries that are located in the same county may be included in one license and each operational site must be listed on the license.
[4] On-line report of active nurse registries generated from the FloridaHealthFinder.gov website available at: http://www.floridahealthfinder.gov/facilitylocator/ListFacilities.aspx, (Last visited March 19, 2014).
[5] Rule 59A-18.010(2), F.A.C.
[6] Rule 59A-18.012(7), F.A.C.
[7] Rule 59A-18.013(1), F.A.C.
[8] Rule 59A-18.005(3) and (4), F.A.C.
[9] Rule 59A-18.017, F.A.C.
[10] *Id.*
[11] *Id.*
[12] 59A-18.018(1), F.A.C.

- Complying with the background screening requirements in s. 400.512, F.S., requiring a level II background check for all employees and contractors.[13]

Because nurse registries operate as referral services with the referred health care workers working as independent contractors for a patient or facility that is responsible for hiring, firing, and paying the referred health care workers, nurse registries are not required to meet the minimum wage and overtime requirements for employers as set out in the federal Fair Labor Standards Act (FLSA). Nonetheless, it is possible for a nurse registry to be considered an employer for the purposes of the FLSA under certain circumstances.[14,15] Currently, even if a nurse registry is found to be an employer, it is still exempt from the requirements of the FLSA relating to minimum wage and overtime due to an exception made for the provision of companionship services.[16] Companionship services have been interpreted to include "essentially all workers providing services in the home to elderly people or people with illnesses, injuries, or disabilities regardless of the skill the duties performed require."[17]

Under a pending change to federal regulation that will take effect on January 1, 2015, the definition of companionship services will be significantly narrowed to specifically exclude "the performance of medically related services."[18] If a nurse registry is found to be an employer after January 1, 2015, it would have to comply with the requirements of the FLSA relating to minimum wage and overtime or be in violation of federal law.

III. Effect of Proposed Changes:

The bill clarifies the role of a nurse registry to reduce the likelihood that it would be deemed an employer under the FLSA, as follows:

- A registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide referred for contract by a nurse registry is an independent contractor and not an employee of that nurse registry regardless of the regulatory obligations imposed on the nurse registry by ch. 400, F.S., and Agency rule.
- A nurse registry is not obligated to monitor, supervise, manage, or train a registered nurse, licensed practical nurse, certified nursing assistant, or home health aide it refers.
- If a nurse registry becomes aware of a violation of law, misconduct, or a deficiency in the credentials of a registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide it refers, the registry has the obligation to

[13] Section 400.506(9), F.S.
[14] In order to determine whether or not employment or joint employment exists, a person must look at all the facts in a particular case and assess the economic reality of the work relationship. Factors to consider may include whether an employer has the power to direct, control, or supervise the worker(s) or the work performed; whether an employer has the power to hire or fire, modify the employment conditions or determine the pay rates or the methods of wage payment for the worker(s); the degree of permanency and duration of the relationship; where the work is performed and whether the tasks performed require special skills; whether the work performed is an integral part of the overall business operation; whether an employer undertakes responsibilities in relation to the worker(s) which are commonly performed by employers; whose equipment is used; and who performs payroll and similar functions. See *Federal Register, Vol. 78, No. 190*, October 1, 2013, at 60483.
[15] Currently, AHCA rule 59A-18.005(8)(d) requires a nurse registry to record and follow up on complaints that are filed involving individuals it refers. This oversight may meet the supervisory test as stated in note 4.
[16] 29 CFR 552.6.
[17] *Supra* n. 14 at 60455.
[18] *Id.*

advise the patient to terminate the referred person's contract and provide a reason to the patient for the recommended termination, cease referring that contractor to other patients or facilities, and notify the appropriate licensing board if practice violations are involved.

- Records required to be filed with the nurse registry by ch. 400, F.S., must be kept in accordance with Agency rules solely as a repository of records and the nurse registry has no obligation to review or act upon such records other than as detailed above.

The effective date of the bill is July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 400.506 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Policy on March 5, 2014:
The CS amends SB 976 to include companions and homemakers in the clarifications made to a nurse registry's duties. The amendment also adds to the duties of a nurse registry when it becomes aware of illegal activity, misconduct, or a deficiency in credentials of one of its independent contractors by requiring the registry to provide a reason for the suggested termination, to cease referring that contractor, and to notify the licensing board if practice violations are involved.

B. Amendments:

None.

667992

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Thrasher) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Paragraph (a) of subsection (6) of section 400.506, Florida Statutes, is amended, and paragraphs (d) and (e) are added to that subsection, and subsections (19) and (20) are added to that section, to read:

400.506 Licensure of nurse registries; requirements; penalties.—

(6)(a) A nurse registry may refer for contract in private


667992

residences registered nurses and licensed practical nurses registered and licensed under part I of chapter 464, certified nursing assistants certified under part II of chapter 464, home health aides who present documented proof of successful completion of the training required by rule of the agency, and companions or homemakers for the purposes of providing those services authorized under s. 400.509(1). A licensed nurse registry shall ensure that each certified nursing assistant referred for contract by the nurse registry and each home health aide referred for contract by the nurse registry has presented credentials demonstrating that he or she is adequately trained to perform the tasks of a home health aide in the home setting. Each person referred by a nurse registry must provide current documentation that he or she is free from communicable diseases.

(d) A registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide referred for contract under this chapter by a nurse registry shall be deemed an independent contractor and not an employee of the nurse registry regardless of the obligations imposed on a nurse registry under this chapter or chapter 408.

(e) Upon referral of a registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide for contract in a private residence or facility, the nurse registry shall advise the patient or the patient's family, or any other person acting on behalf of the patient that at the time of the contract for services that the caregiver referred by the nurse registry is an independent contractor and that it is not the obligation of a nurse registry to monitor, supervise, manage, or train a caregiver referred for

667992

contract under this chapter.

(19) It is not the obligation of a nurse registry to monitor, supervise, manage, or train a registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide referred for contract under this chapter. In the event of a violation of this chapter or a violation of any other law of this state by a referred registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide, or a deficiency in credentials which comes to the attention of the nurse registry, the nurse registry shall advise the patient to terminate the referred person's contract, providing the reason for the suggested termination; cease referring the individual to other patients or facilities; and, if practice violations are involved, notify the licensing board. This section does not affect or negate any other obligations imposed on a nurse registry under chapter 408.

(20) Records required under this chapter to be filed with the nurse registry as a repository of records must be kept in accordance with rules adopted by the agency, and the nurse registry has no obligation to review and act upon such records except as specified in subsection (19).

Section 2. This act shall take effect July 1, 2014.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

667992

An act relating to nurse registries; amending s. 400.506, F.S.; requiring a licensed nurse registry to ensure that each certified nursing assistant and home health aide referred by the registry present certain credentials; providing that registered nurses, licensed practical nurses, certified nursing assistants, companions or homemakers, and home health aides are independent contractors and not employees of the nurse registries that referred them; requiring a nurse registry to inform the patient, the patient's family, or a person acting on behalf of the patient that the a referred caregiver is an independent contractor and that the nurse registry is not required to monitor, supervise, manage, or train a registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide referred by the nurse registry; providing the duties of the nurse registry for a violation of certain laws by an individual referred by the nurse registry; requiring that certain records be kept in accordance with rules set by the Agency for Health Care Administration; providing that a nurse registry does not have an obligation to review and act upon such records except under certain circumstances; providing an effective date.

660168

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Soto) recommended the following:

Senate Amendment to Amendment (667992) (with title amendment)

Between lines 4 and 5
insert:

Section 1. Paragraph (h) of subsection (2) of section 400.471, Florida Statutes, is amended to read:

400.471 Application for license; fee.—

(2) In addition to the requirements of part II of chapter 408, the initial applicant must file with the application satisfactory proof that the home health agency is in compliance

660168

with this part and applicable rules, including:

(h) In the case of an application for initial licensure, documentation of accreditation, or an application for accreditation, from an accrediting organization that is recognized by the agency as having standards comparable to those required by this part and part II of chapter 408. A home health agency that is not Medicare or Medicaid certified and does not provide skilled care is exempt from this paragraph.

Notwithstanding s. 408.806, an applicant that has applied for accreditation must provide proof of accreditation that is not conditional or provisional within 120 days after the date of the agency's receipt of the application for licensure or the application shall be withdrawn from further consideration. Such accreditation must be maintained by the home health agency to maintain licensure. The agency shall accept, in lieu of its own periodic licensure survey, the submission of the survey of an accrediting organization that is recognized by the agency if the accreditation of the licensed home health agency is not provisional and if the licensed home health agency authorizes releases of, and the agency receives the report of, the accrediting organization.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 70

and insert:

An act relating to home health care; amending s. 400.471, F.S.; exempting certain home health agencies

660168

from specified licensure application requirements;
amending s.

169472

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Soto) recommended the following:

Senate Amendment (with title amendment)

Before line 24

insert:

Section 1. Paragraph (h) of subsection (2) of section 400.471, Florida Statutes, is amended to read:

400.471 Application for license; fee.—

(2) In addition to the requirements of part II of chapter 408, the initial applicant must file with the application satisfactory proof that the home health agency is in compliance with this part and applicable rules, including:

(h) In the case of an application for initial licensure, documentation of accreditation, or an application for accreditation, from an accrediting organization that is recognized by the agency as having standards comparable to those required by this part and part II of chapter 408. A home health agency that is not Medicare or Medicaid certified and does not provide skilled care is exempt from this paragraph.

Notwithstanding s. 408.806, an applicant that has applied for accreditation must provide proof of accreditation that is not conditional or provisional within 120 days after the date of the agency's receipt of the application for licensure or the application shall be withdrawn from further consideration. Such accreditation must be maintained by the home health agency to maintain licensure. The agency shall accept, in lieu of its own periodic licensure survey, the submission of the survey of an accrediting organization that is recognized by the agency if the accreditation of the licensed home health agency is not provisional and if the licensed home health agency authorizes releases of, and the agency receives the report of, the accrediting organization.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 2

and insert:

An act relating to home health care; amending s. 400.471, F.S.; exempting certain home health agencies from specified licensure application requirements;

169472

41 amending s.

By the Committee on Health Policy; and Senator Bean

588-02180-14 2014976c1

A bill to be entitled

An act relating to nurse registries; amending s. 400.506, F.S.; providing that registered nurses, licensed practical nurses, certified nursing assistants, companions or homemakers, and home health aides are independent contractors and not employees of the nurse registries that referred them; specifying that a nurse registry is not responsible for monitoring, supervising, managing, or training a registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide referred by the nurse registry; requiring that certain records be kept in accordance with rules set by the Agency for Health Care Administration; providing that a nurse registry does not have an obligation to review and act upon such records except under certain circumstances; providing the duties of the nurse registry for a violation of certain laws by an individual referred by the nurse registry; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (d) is added to subsection (6) of section 400.506, Florida Statutes, and subsections (19) and (20) are added to that section, to read:

400.506 Licensure of nurse registries; requirements; penalties.—

(6)

588-02180-14 2014976c1

(d) A registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide referred for contract under this chapter by a nurse registry shall be deemed an independent contractor and not an employee of the nurse registry regardless of the obligations imposed on a nurse registry under this chapter.

(19) It is not the obligation of a nurse registry to monitor, supervise, manage, or train registered nurses, licensed practical nurses, certified nursing assistants, companions or homemakers, or home health aides referred for contract under this chapter. In the event of a violation of this chapter, a violation of any other law of this state, or misconduct by a referred registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide, or a deficiency in credentials which comes to the attention of the nurse registry, the nurse registry shall advise the patient to terminate the referred person's contract, providing the reason for the suggested termination; cease referring the individual to other patients or facilities; and notify the licensing board if practice violations are involved.

(20) Records required to be filed with the nurse registry under this chapter must be kept in accordance with rules adopted by the agency solely as a repository of records, and the nurse registry has no obligation to review and act upon such records except as specified in subsection (19).

Section 2. This act shall take effect July 1, 2014.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 920
INTRODUCER:	Senator Dean
SUBJECT:	Protection of Crime Victims
DATE:	March 31, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	**Favorable**
2.	Munroe	Cibula	JU	**Pre-meeting**
3.			AP	

I. Summary:

SB 920 requires a private investigator or investigative agency to determine if the individual being investigated is a petitioner requesting notification of service of a protective injunction against domestic, repeat, dating, or sexual violence or a participant in the Address Confidentiality Program for domestic violence victims. The bill prohibits a private investigator from releasing that petitioner's or participant's personal identifying information. Violating this prohibition results in a first degree misdemeanor penalty and suspension or revocation of the investigator's license.

The bill also amends laws relating to injunctions for protection against domestic, repeat, dating, or sexual violence, stalking, or cyberstalking as follows:

- Provides for a temporary injunction to remain in effect until the final injunction is served on a respondent; and
- Provides that a respondent violates the terms of a final injunction against stalking or cyberstalking by possessing a firearm or ammunition (currently a first degree misdemeanor).

Finally, the bill expands the circumstances under which a law enforcement officer may conduct a warrantless arrest to include acts of stalking, cyberstalking, child abuse, and violations of a protective injunction for these acts.

II. Present Situation:

Regulation of Private Investigators

The profession of private investigation is regulated by the Department of Agriculture.[1] Private investigation is the investigation by a person for the purpose of obtaining information on any of the following matters:

- Crimes or threats against the United States or any state or territory of the United States, when operating under express written authority of the governmental official responsible for authorizing such investigation;
- The identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character of any society, person, or group of persons;
- The credibility of witnesses or other persons;
- The whereabouts of missing persons, owners of unclaimed property or escheated property, or heirs to estates;
- The location or recovery of lost or stolen property;
- The causes and origin of, or responsibility for, fires, libels, slanders, losses, accidents, damage, or injuries to real or personal property; or
- The business of securing evidence to be used before investigating committees or boards of award or arbitration or in the trial of civil or criminal cases.[2]

Every private investigator[3] must meet specified educational and training requirements and obtain a Class "C" license.[4] A Class "C" licensee may conduct investigations, own or manage a private investigation agency, carry a firearm, and perform bodyguard services.[5] A private investigator must comply with all regulations of the profession and is subject to specified disciplinary actions or criminal penalties for violating any provision of ch. 493, F.S.[6]

Address Confidentiality Program

Domestic violence victims may apply to the Office of the Attorney General (Attorney General) to have his or her address designated as confidential.[7] The application must meet specified requirements. For example, a sworn statement must be provided that there is good reason to believe the subject of the application is the victim of domestic violence and the subject fears for his or her safety, or the safety of the subject's children.[8] Once a properly completed application is filed, the Attorney General must certify the subject as a program participant, and designate an

[1] *See* ss. 493.6100 and 493.6101(1), F.S.
[2] Section 493.6101(17), F.S.
[3] Section 493.6101(16), F.S., defines "private investigator" to mean any individual who, for consideration, advertises as providing or performs private investigation.
[4] Sections 493.6201 and 493.6203, F.S.
[5] Section 493.6201(3), (5), (7), and (8), F.S.
[6] Sections 493.6118 and 493.6120, F.S.
[7] Section 741.403(1), F.S., states that any adult person, a parent or guardian acting on behalf of a minor, or a guardian acting on behalf of a person adjudicated incapacitated under ch. 744, F.S., may apply to the Attorney General.
[8] Section 741.403(1)(a), F.S.

address to serve as the victim's address.[9] The Attorney General becomes the agent for purposes of service of process and receipt of mail.[10]

Section 741.465, F.S., specifies that the addresses, telephone numbers, and social security numbers of Address Program participants are exempt from the public records requirements of s. 119.07(1), F.S., and Article I, Section 24(a) of the State Constitution. A limited number of specified instances are provided that allow the confidential information to be released. There is no criminal penalty for releasing a program participant's confidential information.

Injunctions for Protection against Specified Acts of Violence

Domestic Violence

Any person who is the victim of domestic violence[11] or who reasonably believes that he or she is in imminent danger of becoming the victim of domestic violence may file a petition for an injunction for protection against domestic violence.[12] The sworn petition must allege the existence of domestic violence and include specific facts and circumstances upon which relief is sought.[13] A hearing must be set at the earliest possible time after a petition is filed,[14] and the respondent must be personally served with a copy of the petition.[15] At the hearing, specified injunctive relief may be granted if the court finds that the petitioner is:

- The victim of domestic violence; or
- Has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence.[16]

If it appears to the court that an immediate and present danger of domestic violence exists when the petition is filed, the court may grant an ex parte temporary injunction.[17,18] Temporary injunctions are only effective for a fixed period of time that cannot exceed 15 days.[19] The hearing on the petition must be set for a date on or before the date when the temporary injunction expires.[20]

---

[9] Section 741.403(1) and (3), F.S. The certification is valid for 4 years, unless it is withdrawn or invalidated.
[10] Section 741.403(1)(b), F.S.
[11] Section 741.28, F.S., defines "domestic violence" as any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.
[12] Section 741.30, F.S.
[13] Section 741.30(3), F.S.
[14] Section 741.30(4), F.S.
[15] *Id*.
[16] Section 741.30(6), F.S. Either party may move the court to modify or dissolve an injunction at any time. Section 741.30(6)(c) and (10), F.S.
[17] The court may grant such relief as it deems proper, including an injunction restraining the respondent from committing any acts of domestic violence, awarding to the petitioner the temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner, and providing the petitioner a temporary parenting plan. Section 741.30(5), F.S.
[18] The only evidence admissible in the ex parte hearing is verified pleadings or affidavits, unless the respondent appears at the hearing *or* has received reasonable notice of the hearing. Section 741.30(5)(b), F.S.
[19] Section 741.30(5)(c), F.S.
[20] The court may grant a continuance of the hearing for good cause, which may include obtaining service of process. A temporary injunction must be extended, if necessary, during any period of continuance. Section 741.30(5)(c), F.S.

Repeat, Dating, and Sexual Violence

Section 784.046, F.S., governs the issuance of injunctions against repeat violence,[21] dating violence,[22] and sexual violence.[23] This statute largely parallels the provisions discussed above regarding domestic violence injunctions.

Stalking and Cyberstalking

Section 784.0485, F.S., governs the issuance of injunctions against stalking and cyberstalking. This statute largely parallels the provisions discussed above regarding domestic violence injunctions.

It is ambiguous whether a temporary injunction may remain in effect past the 15 day time limit to allow a final injunction that is issued by the court to be served on the respondent.

Violation of an Injunction against Specified Acts of Violence

A respondent violates the terms of an injunction against domestic, repeat, dating, or sexual violence, stalking, or cyberstalking if the respondent willfully:

- Refuses to vacate the dwelling that the parties share;[24]
- Goes to, or is within 500 feet of, the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;
- Commits an act of domestic, repeat, dating, or sexual violence, or stalking against the petitioner;
- Commits any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;
- Telephones, contacts, or otherwise communicates with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party;
- Knowingly and intentionally comes within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;
- Defaces or destroys the petitioner's personal property, including the petitioner's car; or

[21] Section 784.046(1)(b), F.S., defines "repeat violence" to mean two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner's immediate family member. Section 784.046(1)(a), F.S., defines "violence" to mean any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, or false imprisonment, or any criminal offense resulting in physical injury or death, by a person against any other person.
[22] Section 784.046(1)(d), F.S., defines "dating violence" to mean violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature. The following factors are considered when determining the existence of such a relationship: it must have existed within the past six months; it must have been characterized by the expectation of affection or sexual involvement between the parties; and it must have included that the persons be involved over time and on a continuous basis. (Dating violence does not include violence in a casual acquaintanceship or between individuals who have only engaged in ordinary fraternization.)
[23] Section 784.046(1)(c), F.S., defines "sexual violence" to mean any one incident of: sexual battery, lewd or lascivious act committed upon or in the presence of a person younger than 16 years of age, luring or enticing a child, sexual performance by a child, or any other forcible felony that involves a sexual act being attempted or committed. For purposes of this definition, it does not matter whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney.
[24] This action does not apply to an injunction against stalking or cyberstalking. Section 784.0487(4), F.S.

- Refuses to surrender firearms or ammunition if ordered to do so by the court.[25]

A court can enforce a violation of an injunction through civil or criminal contempt proceedings, or the state attorney may prosecute the violation as a first degree misdemeanor.[26,27]

Prohibition against Possessing a Firearm or Ammunition

Under the firearms statute, a person may not have in his or her care, custody, possession, or control any firearm or ammunition if he or she has been issued a final protective injunction restraining that person from committing acts of domestic violence, stalking, or cyberstalking (acts of repeat, dating, or sexual violence are not currently included).[28] Violation of the prohibition results in a first degree misdemeanor penalty under s. 790.233, F.S. This prohibition is mirrored in the domestic violence statute,[29] but not in the stalking or cyberstalking statute.

Warrantless Arrests

Section 901.15, F.S., prescribes when a law enforcement officer is authorized to conduct a warrantless arrest. Generally, the officer must witness a misdemeanor offense before making a warrantless arrest. If the officer does not witness it, he or she must first obtain an arrest warrant.[30]

There are certain exceptions to this rule, including when there is probable cause to believe that a person:

- Possesses a firearm or ammunition when the person is subject to a final injunction against domestic violence, stalking, or cyberstalking;[31]
- Commits a criminal act that violates the terms of an injunction against domestic, repeat, dating, or sexual violence;[32] or
- Commits an act of domestic or dating violence.[33]

Law enforcement officers acting in good faith and exercising due care in making a warrantless arrest are granted civil immunity when they believe a person has committed an act of domestic or dating violence, or violated the terms of an injunction against domestic, repeat, dating, or sexual violence.

[25] Sections 741.31(4)(a), 784.047, and 784.0487, F.S.
[26] A first degree misdemeanor is punishable by up to 1 year in county jail and a potential $1,000 fine. Sections 775.082 and 775.083, F.S.
[27] Sections 741.30(9), 784.046(9), and 784.0485(9), F.S.
[28] Section 790.233, F.S.
[29] Section 741.31(4)(b), F.S.
[30] Section 901.15, F.S.
[31] Section 901.15(6), F.S., in accordance with s. 790.233, F.S.
[32] This includes injunctions issued in accordance with ss. 741.30 or 784.046, F.S., or a foreign protection order accorded full faith and credit pursuant to s. 741.315, F.S. Additionally, the arrest may be made over the objection of the petitioner, if necessary. Section 901.15(6), F.S.
[33] Section 901.15(7), F.S., further provides that the arrest may be made without consent of the victim.

III. Effect of Proposed Changes:

Regulation of Private Investigators

The bill creates s. 493.6204, F.S., to require a licensed private investigator or investigative agency to determine if an individual being investigated is a petitioner requesting notification of service of a protective injunction against domestic, repeat, dating, or sexual violence or a participant in the Address Confidentiality Program for domestic violence victims. If the subject of the investigation is such a petitioner or participant, the bill prohibits private investigators, private investigative agencies, and their agents from releasing the petitioner's or participant's personal identifying information. Private investigators who violate this prohibition commit a first degree misdemeanor and are subject to suspension or revocation of their license.

Injunctions for Protection against Specified Acts of Violence

The bill amends ss. 741.30 and 741.31, F.S., (domestic violence), s. 784.046, F.S., (repeat, dating, or sexual violence), and s. 784.0485, F.S. (stalking and cyberstalking), to specify that a temporary injunction is effective for a fixed period of time that cannot exceed 15 days, unless a final injunction is issued. In such instances, the temporary injunction remains in effect until the final injunction is served on the respondent.

The bill also amends s. 784.0487, F.S., to make it a first degree misdemeanor for a person to violate a stalking or cyberstalking injunction by having in his or her care, custody, possession, or control any firearm or ammunition. This mirrors current provisions found in s. 790.233, F.S., the firearms statute, as well as s. 741.31, F.S., which addresses violations of domestic violence injunctions.

Warrantless Arrests

The bill amends s. 901.15, F.S., to permit a law enforcement officer to conduct a warrantless arrest when there is probable cause to believe that the person has committed:

- A criminal act that violates the terms of an injunction against stalking or cyberstalking, or an act of child abuse occurring after a protective investigation is initiated;[34] or
- An act of repeat or sexual violence, stalking, cyberstalking, or child abuse.[35]

Similarly, the bill broadens the civil immunity provision to include a law enforcement officer who makes a good faith arrest of a person believed to have committed any of the above acts.

The bill takes effect October 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[34] This injunction is governed by s. 39.504, F.S.
[35] As provided in s. 39.01, F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill could have a detrimental impact on private investigators.

C. Government Sector Impact:

There could be an indeterminate fiscal impact upon local jails to the extent that more persons are prosecuted and sent to jail for a first degree misdemeanor offense under the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 741.30, 741.31, 784.046, 784.0485, 784.0487, and 901.15.

This bill creates section 493.6204 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

417306

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Bradley) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Paragraph (c) of subsection (5) of section 741.30, Florida Statutes, is amended to read:

741.30 Domestic violence; injunction; powers and duties of court and clerk; petition; notice and hearing; temporary injunction; issuance of injunction; statewide verification system; enforcement; public records exemption.—

(5)

417306

(c) Any such ex parte temporary injunction is ~~shall be~~ effective for a fixed period not to exceed 15 days unless, after a full hearing, a final injunction is issued on the same case. In that instance, the temporary injunction, if served, remains in full force and effect until the final injunction is served upon the respondent.

(d) A full hearing, as provided by this section, shall be set for a date no later than the date when the ex parte temporary injunction ceases to be effective. The court may grant a continuance of the hearing before or during a hearing for good cause shown by any party. The need to obtain service of process constitutes good cause. A temporary~~, which shall include a continuance to obtain service of process. Any~~ injunction that is already served must ~~shall~~ be extended, if necessary, so that it remains ~~to remain~~ in full force and effect during any period of continuance.

Section 2. Paragraph (c) of subsection (6) of section 784.046, Florida Statutes, is amended to read:

784.046 Action by victim of repeat violence, sexual violence, or dating violence for protective injunction; dating violence investigations, notice to victims, and reporting; pretrial release violations; public records exemption.—

(6)

(c) Any such ex parte temporary injunction is ~~shall be~~ effective for a fixed period not to exceed 15 days~~. However~~, and an ex parte temporary injunction granted under subparagraph (2)(c)2. is effective for 15 days following the date the respondent is released from incarceration unless, after a full hearing, a final injunction is issued on the same case. In that

417306

instance, the temporary injunction, if served, remains in full force and effect until the final injunction is served upon the respondent.

(d) A full hearing, as provided by this section, shall be set for a date no later than the date when the ex parte temporary injunction ceases to be effective. The court may grant a continuance of the ~~ex parte injunction and the full~~ hearing before or during a hearing~~,~~ for good cause shown by any party. The need to obtain service of process constitutes good cause. A temporary injunction that is already served must be extended, if necessary, so that it remains in full force and effect during any period of continuance.

Section 3. Paragraph (c) of subsection (5) of section 784.0485, Florida Statutes, is amended to read:

784.0485 Stalking; injunction; powers and duties of court and clerk; petition; notice and hearing; temporary injunction; issuance of injunction; statewide verification system; enforcement.—

(5)

(c) Any such ex parte temporary injunction is effective for a fixed period not to exceed 15 days unless, after a full hearing, a final injunction is issued on the same case. In that instance, the temporary injunction, if served, remains in full force and effect until the final injunction is served upon the respondent.

(d) A full hearing, as provided in this section, shall be set for a date no later than the date when the ex parte temporary injunction ceases to be effective. The court may grant a continuance of the hearing before or during a hearing for good

417306

cause shown by any party. The need to obtain service of process constitutes good cause. A temporary~~, which shall include a continuance to obtain service of process. An~~ injunction that is already served must ~~shall~~ be extended, if necessary, so that it remains ~~to remain~~ in full force and effect during any period of continuance.

Section 4. Section 784.047, Florida Statutes, is amended to read:

784.047 Penalties for violating protective injunction against violators.—

(1) A person who willfully violates an injunction for protection against repeat violence, sexual violence, or dating violence, issued pursuant to s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, by:

(a) ~~(1)~~ Refusing to vacate the dwelling that the parties share;

(b) ~~(2)~~ Going to, or being within 500 feet of, the petitioner's residence, school, or place of employment, or a specified place frequented regularly by the petitioner or ~~and~~ any named family or household member;

(c) ~~(3)~~ Committing an act of repeat violence, sexual violence, or dating violence against the petitioner;

(d) ~~(4)~~ Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;

(e) ~~(5)~~ Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party;


417306

(f) ~~(6)~~ Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;

(g) ~~(7)~~ Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or

(h) ~~(8)~~ Refusing to surrender firearms or ammunition if ordered to do so by the court~~,~~

commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) A person who violates a final injunction for protection against repeat violence, sexual violence, or dating violence by having in his or her care, custody, possession, or control any firearm or ammunition violates s. 790.233 and commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 5. Subsection (4) of section 784.0487, Florida Statutes, is amended, and subsection (6) is added to that section, to read:

784.0487 Violation of an injunction for protection against stalking or cyberstalking.—

(4) A person who willfully violates an injunction for protection against stalking or cyberstalking issued pursuant to s. 784.0485, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, by:

(a) Going to, or being within 500 feet of, the petitioner's residence, school, or place of employment, or a specified place frequented regularly by the petitioner, ~~and~~ any named family members, or individuals closely associated with the petitioner;


417306

(b) Committing an act of stalking against the petitioner;

(c) Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;

(d) Telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly, unless the injunction specifically allows indirect contact through a third party;

(e) Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;

(f) Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or

(g) Refusing to surrender firearms or ammunition if ordered to do so by the court,

commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(6) A person who violates a final injunction for protection against stalking or cyberstalking by having in his or her care, custody, possession, or control any firearm or ammunition violates s. 790.233 and commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 6. Section 790.233, Florida Statutes, is amended to read:

790.233 Possession of firearm or ammunition prohibited when person is subject to an injunction against committing acts of domestic violence, repeat violence, dating violence, sexual violence, stalking, or cyberstalking; penalties.—

417306

(1) A person may not have in his or her care, custody, possession, or control any firearm or ammunition if the person has been issued a final injunction that is currently in force and effect, restraining that person from committing acts of:

(a) Domestic violence, as issued under s. 741.30;

(b) Repeat violence, dating violence, or sexual violence, as issued under s. 784.046; or ~~from committing acts of~~

(c) Stalking or cyberstalking, as issued under s. 784.0485.

(2) A person who violates subsection (1) commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) It is the intent of the Legislature that the disabilities regarding possession of firearms and ammunition are consistent with federal law. Accordingly, this section does not apply to a state or local officer as defined in s. 943.10(14), holding an active certification, who receives or possesses a firearm or ammunition for use in performing official duties on behalf of the officer's employing agency, unless otherwise prohibited by the employing agency.

Section 7. Subsections (6) and (7) of section 901.15, Florida Statutes, are amended to read:

901.15 When arrest by officer without warrant is lawful.—A law enforcement officer may arrest a person without a warrant when:

(6) There is probable cause to believe that the person has committed a criminal act according to s. 790.233 or according to s. 39.504, s. 741.31, ~~or~~ s. 784.047, or s. 784.0487 which violates an injunction for protection entered pursuant to s. 39.504, s. 741.30, ~~or~~ s. 784.046, or s. 784.0485, or a foreign

417306

protection order accorded full faith and credit pursuant to s. 741.315, over the objection of the petitioner, if necessary.

(7) There is probable cause to believe that the person has committed an act of child abuse as provided in s. 39.01; an act of domestic violence~~,~~ as defined in s. 741.28; an act of~~, or~~ dating violence, repeat violence, or sexual violence as provided in s. 784.046; or an act of stalking or cyberstalking as provided in s. 784.0485. The decision to arrest does ~~shall~~ not require consent of the victim or consideration of the relationship of the parties. It is the public policy of this state to strongly discourage arrest and charges of both parties for domestic violence or dating violence on each other and to encourage training of law enforcement and prosecutors in these areas. A law enforcement officer who acts in good faith and exercises due care in making an arrest under this subsection, under s. 39.504, s. 741.31(4), ~~or~~ s. 784.047, or s. 784.0487, or pursuant to a foreign order of protection accorded full faith and credit pursuant to s. 741.315, is immune from civil liability that otherwise might result by reason of his or her action.

Section 8. This act shall take effect October 1, 2014.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to protective orders; amending ss. 741.30, 784.046, and 784.0485, F.S.; extending the

417306

effectiveness of certain temporary injunctions in domestic violence, repeat violence, sexual violence, dating violence, or stalking proceedings in certain circumstances; amending ss. 784.047 and 784.0487, F.S.; providing that it is unlawful for a person to violate a final injunction for protection against repeat violence, dating violence, sexual violence, stalking, or cyberstalking by having in his or her care, custody, possession, or control any firearm or ammunition; providing penalties; amending s. 790.233, F.S.; conforming provisions to changes made by the act; amending s. 901.15, F.S.; expanding situations in which an arrest without a warrant is lawful to include probable cause of repeat violence, sexual violence, stalking, cyberstalking, or child abuse; providing an effective date.

By Senator Dean

5-00547A-14 2014920__

A bill to be entitled

An act relating to the protection of crime victims; creating s. 493.6204, F.S.; requiring a licensed private investigator and private investigative agency to determine if an individual being investigated is a petitioner requesting notification of service of an injunction for protection against domestic violence, repeat violence, sexual violence, or dating violence or is a participant in the Address Confidentiality Program for Victims of Domestic Violence within the Office of the Attorney General; prohibiting the private investigator, the private investigative agency, and their agents from releasing such petitioner's or participant's personal identifying information; providing penalties; amending s. 741.30, F.S.; revising the effective period of an ex parte temporary injunction for protection against domestic violence; amending s. 741.31, F.S.; making technical changes; amending s. 784.046, F.S.; revising the effective period of an ex parte temporary injunction for protection against repeat violence, sexual violence, or dating violence; amending s. 784.0485, F.S.; revising the effective period of an ex parte temporary injunction for protection against stalking; amending s. 784.0487, F.S.; providing that a person commits a misdemeanor of the first degree if he or she violates a final injunction for protection against stalking or cyberstalking by having in his or her care, custody, possession, or control any firearm or

5-00547A-14 2014920__

ammunition; providing penalties; making technical changes; amending s. 901.15, F.S.; conforming provisions to changes made by the act; expanding situations in which an arrest without a warrant is lawful to include probable cause for stalking, cyberstalking, child abuse, or failing to comply with certain protective injunctions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 493.6204, Florida Statutes, is created to read:

493.6204 Prohibition against releasing information.—If a private investigator licensed under this chapter or a private investigative agency licensed under this chapter is hired to investigate an individual, the private investigator or the private investigative agency shall determine if the individual is a petitioner requesting notification of service of an injunction for protection against domestic violence under s. 741.30(8)(c) or against repeat violence, sexual violence, or dating violence under s. 784.046(8)(c) or if the individual is a participant in the Address Confidentiality Program for Victims of Domestic Violence under s. 741.465. If the individual is such a petitioner or participant, the private investigator, the private investigative agency, or their agents may not release to anyone the individual's name, social security number, home address, employment address, home telephone number, employment telephone number, cellular telephone number, or e-mail address

or other electronic means of locating or identifying the individual. A violation of this section is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, and the license of such private investigator or private investigative agency is subject to suspension or revocation as provided in this chapter.

Section 2. Paragraph (c) of subsection (5) of section 741.30, Florida Statutes, is amended to read:

741.30 Domestic violence; injunction; powers and duties of court and clerk; petition; notice and hearing; temporary injunction; issuance of injunction; statewide verification system; enforcement; public records exemption.—

(5)

(c) Any such ex parte temporary injunction is ~~shall be~~ effective for a fixed period not to exceed 15 days unless a final injunction is issued for the same case which extends the effectiveness of the ex parte temporary injunction until the final injunction is served. A full hearing, as provided by this section, shall be set for a date no later than the date when the temporary injunction ceases to be effective. The court may grant a continuance of the hearing before or during a hearing for good cause shown by any party, which must ~~shall~~ include a continuance to obtain service of process. An ~~Any~~ injunction shall be extended, if necessary, so that it remains ~~to remain~~ in full force and effect during any period of continuance.

Section 3. Subsection (4) of section 741.31, Florida Statutes, is amended to read:

741.31 Violation of an injunction for protection against domestic violence.—

(4)(a) A person who willfully violates an injunction for protection against domestic violence issued pursuant to s. 741.30, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, by:

1. Refusing to vacate the dwelling that the parties share;

2. Going to, or being within 500 feet of, the petitioner's residence, school, or place of employment~~,~~ or a specified place frequented regularly by the petitioner and any named family or household member;

3. Committing an act of domestic violence against the petitioner;

4. Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;

5. Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party;

6. Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;

7. Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or

8. Refusing to surrender firearms or ammunition if ordered to do so by the court,

commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b)1. A person who violates a final injunction for protection against domestic violence by having in his or her

care, custody, possession, or control any firearm or ammunition violates ~~It is a violation of~~ s. 790.233~~,~~ and commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083~~, for a person to violate a final injunction for protection against domestic violence by having in his or her care, custody, possession, or control any firearm or ammunition~~.

2. It is the intent of the Legislature that the disabilities regarding possession of firearms and ammunition are consistent with federal law. Accordingly, this paragraph does ~~shall~~ not apply to a state or local officer as defined in s. 943.10(14), holding an active certification, who receives or possesses a firearm or ammunition for use in performing official duties on behalf of the officer's employing agency, unless otherwise prohibited by the employing agency.

Section 4. Paragraph (c) of subsection (6) of section 784.046, Florida Statutes, is amended to read:

784.046 Action by victim of repeat violence, sexual violence, or dating violence for protective injunction; dating violence investigations, notice to victims, and reporting; pretrial release violations; public records exemption.—

(6)

(c) Any such ex parte temporary injunction is ~~shall be~~ effective for a fixed period not to exceed 15 days unless a final injunction is issued for the same case which extends the effectiveness of the temporary injunction until the final injunction is served. However, an ex parte temporary injunction granted under subparagraph (2)(c)2. is effective for 15 days following the date the respondent is released from incarceration

unless a final injunction is issued for the same case which extends the effectiveness of the ex parte temporary injunction until the final injunction is served. A full hearing, as provided by this section, shall be set for a date no later than the date when the temporary injunction ceases to be effective. The court may grant a continuance of the ex parte injunction and the full hearing before or during a hearing, for good cause shown by any party.

Section 5. Paragraph (c) of subsection (5) of section 784.0485, Florida Statutes, is amended to read:

784.0485 Stalking; injunction; powers and duties of court and clerk; petition; notice and hearing; temporary injunction; issuance of injunction; statewide verification system; enforcement.—

(5)

(c) Any such ex parte temporary injunction is effective for a fixed period not to exceed 15 days unless a final injunction is issued for the same case which extends the effectiveness of the ex parte temporary injunction until the final injunction is served. A full hearing, as provided in this section, shall be set for a date no later than the date when the temporary injunction ceases to be effective. The court may grant a continuance of the hearing before or during a hearing for good cause shown by any party, which must ~~shall~~ include a continuance to obtain service of process. An injunction shall be extended, if necessary, so that it remains ~~to remain~~ in full force and effect during any period of continuance.

Section 6. Subsection (4) of section 784.0487, Florida Statutes, is amended, and subsection (6) is added to that

section, to read:

784.0487 Violation of an injunction for protection against stalking or cyberstalking.—

(4) A person who willfully violates an injunction for protection against stalking or cyberstalking issued pursuant to s. 784.0485, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, by:

(a) Going to, or being within 500 feet of, the petitioner's residence, school, or place of employment~~,~~ or a specified place frequented regularly by the petitioner and any named family members or individuals closely associated with the petitioner;

(b) Committing an act of stalking against the petitioner;

(c) Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;

(d) Telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly, unless the injunction specifically allows indirect contact through a third party;

(e) Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;

(f) Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or

(g) Refusing to surrender firearms or ammunition if ordered to do so by the court,

commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(6) A person who violates a final injunction for protection against stalking or cyberstalking by having in his or her care, custody, possession, or control any firearm or ammunition violates s. 790.233 and commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 7. Subsections (6) and (7) of section 901.15, Florida Statutes, are amended to read:

901.15 When arrest by officer without warrant is lawful.—A law enforcement officer may arrest a person without a warrant when:

(6) There is probable cause to believe that the person has committed a criminal act according to s. 790.233 or according to s. 39.504, s. 741.31, ~~or~~ s. 784.047, or s. 784.0487 which violates an injunction for protection entered pursuant to s. 39.504, s. 741.30, ~~or~~ s. 784.046, or s. 784.0485, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, over the objection of the petitioner, if necessary.

(7) There is probable cause to believe that the person has committed an act of domestic violence~~,~~ as defined in s. 741.28;~~,~~ ~~or~~ dating violence, repeat violence, or sexual violence as defined ~~provided~~ in s. 784.046; stalking or cyberstalking as defined in s. 784.048; or abuse as defined in s. 39.01. The decision to arrest does ~~shall~~ not require consent of the victim or consideration of the relationship of the parties. It is the public policy of this state to strongly discourage arrest and charges of both parties for domestic violence or dating violence on each other and to encourage training of law enforcement and prosecutors in these areas. A law enforcement officer who acts in good faith and exercises due care in making an arrest under

this subsection, under s. 39.504, s. 741.31(4), ~~or~~ s. 784.047, or s. 784.0487, or pursuant to a foreign order of protection accorded full faith and credit pursuant to s. 741.315~~,~~ is immune from civil liability that otherwise might result by reason of his or her action.

Section 8. This act shall take effect October 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 972
INTRODUCER:	Children, Families, and Elder Affairs Committee and Senators Galvano and Bradley
SUBJECT:	Attorneys for Dependent Children with Disabilities
DATE:	March 31, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sanford	Hendon	CF	**Fav/CS**
2.	Brown	Cibula	JU	**Pre-meeting**
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 972 requires the court to appoint an attorney for any dependent child who has a disability provided that certain criteria is met.

This bill applies to dependent children with disabilities who:
- Already live in, or are being considered for placement in a skilled nursing facility;
- Are prescribed a psychotropic medication but do not want to take it;
- Have a suspected or known diagnosis of developmental disability;
- Already live in, or are being considered for placement in a residential treatment center; or
- Are victims of human trafficking.

The bill requires written court orders appointing attorneys for dependent children. The bill directs the attorney representing the child to provide the complete range of legal services from removal from the home or initial appointment through all appellate proceedings. With court permission, the attorney is authorized to arrange for supplemental or separate counsel to handle appellate matters.

The bill requires that, except for attorneys working pro bono, adequate compensation must be provided to attorneys appointed to represent dependent children with disabilities and access to funding for expert witnesses, depositions, and other costs of litigation. Payment of attorneys is subject to appropriation and to review by the Justice Administrative Commission (JAC) for

reasonableness. Fees are capped at $3,000 per child per year. The bill authorizes the JAC to contract with attorneys selected by the Guardian ad Litem program to fulfill this function.

The bill preserves the power of the court to appoint an attorney for any dependent child under chapter 39, F.S.

II. Present Situation:

Dependent Children

A child that is determined by a court to be a dependent child is a child who is dependent on the state for care and protection.[1] A child that the court finds dependent is a child found:

- To have been abandoned, abused, or neglected by parents or legal custodians;
- To have been surrendered to the Department of Children & Family Services (DCF) or a licensed child-placing agency for adoption;
- To have been voluntarily placed with a licensed child-placing agency for adoption;
- To have been voluntarily placed with a licensed child-caring agency, a licensed child-placing agency, an adult relative, or the DCF, and after being placed a case plan expired and the parents or legal custodian failed to substantially comply with the plan;
- To have been voluntarily placed with a licensed child-placing agency for adoption and a parent or parents have signed a consent;
- To have no parent or legal custodians capable of providing supervision and care;
- To be at substantial risk of imminent abuse, abandonment or neglect by the parents or legal custodians; or
- To have been sexually exploited and to have no parent, legal custodian, or responsible adult relative currently known and capable of providing necessary and appropriate supervision and care.[2]

The dependency process in Florida begins with a call to the Florida Abuse Hotline (hotline).[3] If accepted by the hotline, the call is referred to a child protective investigator, who conducts on on-site investigation of the allegations of abuse, neglect, or abandonment.[4] If warranted, a dependency petition is filed with the court by DCF.[5] A child may be taken into custody and placed in a shelter without a prior hearing if there is probable cause of imminent danger or injury to the child, the parent or legal custodian, responsible adult relative has materially violated a condition of placement, or the child has no parent, legal custodian, or responsible adult relative immediately known and able to provide supervision and care.[6] In that instance, a judicial hearing must be held within 24 hours after removal of the child from the home.[7] A Guardian ad Litem

[1] *See In re M.F.*, 770 So. 2d 1189, 1193 (Fla. 2000) (stating that the "purpose of a dependency proceeding is not to punish the offending parent but to protect and care for a child who has been neglected, abandoned, or abused").
[2] Section 39.01(15), F.S.
[3] Section 39.201(2)(a), F.S.
[4] Section 39.301(1), F.S.
[5] Section 39.501(1) and (3)(c), F.S.
[6] Section 39.402(1), F.S.
[7] Section 39.402(8)(a), F.S.

(GAL) must be appointed at the time of the shelter hearing.[8] If needed, an Attorney ad Litem (AAL) may be appointed at this time as well.[9]

If a petition for dependency is filed, whether or not the child is taken into custody, the circuit court assigned to hear dependency cases (dependency court) will schedule an adjudicatory hearing to determine whether the child is dependent, based on a preponderance of the evidence.[10] If a court finds a child dependent, a disposition hearing is held to determine appropriate services and placement settings for the child.[11] At this hearing, the court also reviews and approves a case plan outlining services and desired goals for the child.[12]

The dependency court holds periodic judicial reviews to determine the child's status, progress in following the case plan, and the status of the goals and objectives of the case plan. These reviews will generally occur every 6 months.[13] If after 12 months, case plan goals have not been met, the court holds a permanency hearing to determine the child's permanent placement goal.[14]

Lawyers for Children in the Dependency System

While all parents in dependency court are entitled to counsel, and indigent parents are entitled to appointed counsel,[15] no provision in Florida law or rule requires appointment of counsel for dependent children, with a few exceptions, including children placed in a skilled nursing facility[16] and children facing involuntary commitment for mental health treatment under the Baker Act.[17] Unlike parents, children have been found to have no constitutional right to representation by counsel in dependency court.[18]

In general, the federal and state approach to safeguarding the legal needs of children in the dependency system relies upon the appointment of guardian ad litems or attorney ad litems. The Federal Child Abuse Prevention and Treatment Act (CAPTA) requires states to document in their case plans provisions for appointing guardian ad litem to represent the child's best interest in every case of child abuse or neglect which results in a judicial proceeding.[19] The funds of the Florida guardian ad litem program support both lay volunteers who assist children in dependency proceedings and attorneys ad litem. The guardian ad litem program has succeeded in recruiting attorneys who wish to satisfy their pro bono expectations by representing children with various legal needs in dependency court.[20] When there are insufficient pro bono lawyers available and

[8] Section 39.822(1), F.S.
[9] The term "ad Litem" means literally "for the suit." In practice, it means a representative, either lay (guardian) or lawyer (attorney) appointed for the limited purposes of a particular lawsuit.
[10] Section 39.507(1)(a) and (b), F.S.
[11] Section 39.521(1), F.S.
[12] Section 39.521(1)(a), F.S.
[13] Section 39.521(1)(d), F.S.
[14] Section 39.621(1), F.S.
[15] Section 39.013(1), F.S.
[16] Section 744, conference report on SB 1500 (2013 Reg. Session)
[17] Section 394.467(4), F.S. requires the appointment of the Office of the Public Defender to represent any person for whom involuntary placement is sought pursuant to ch. 394, known as the Baker Act (s. 394.451, F.S.)
[18] *In the Interest of D.B.*, 385 So. 2d. 83, 90-91 (Fla. 1980), *In the Interest of C.T.*, 503 So .2d 972, 973 (Fla. 4th DCA 1987).
[19] 42 U.S.C. ss. 5101 *et seq.*
[20] The Florida Bar has an expectation that its members perform *pro bono* services. This term literally means "for good," and is applied to services performed without compensation by lawyers.

there are sufficient resources to do so, the guardian ad litem program may contract with legal aid, other programs, or private attorneys for the provision of these services.[21]

Florida law requires the appointment of a guardian ad litem for every child who is the subject of a dependency proceeding.[22] While the guardian ad litem program has requested funds to allow it to meet this mandate, the guardian ad litem indicates that they have not been fully funded. As of November 2013, there were 29,285 dependent children under court supervision, of whom 22,281 (76 percent) had been appointed a guardian ad litem. The guardian ad litem program also funds the current attorney ad litem program. The guardian ad litem attorney is required by program standards to request the appointment of an attorney ad litem in any case where doing so would further the best interests of the child. In addition, the court on its own motion or upon motion of any party, including the child, can appoint an attorney ad litem at any point in the dependency process.[23] Common reasons for seeking appointment of an attorney ad litem in dependency court include cases in which a child needs legal guardianship or where special expertise is needed in areas such as immigration law, disability law, or administrative forums. No statewide tracking mechanism exists for the appointment of attorneys ad litem for dependent children, because attorneys are appointed at the court circuit level. The budget for the guardian ad litem program in FY 2012-2013 was $34.1 million dollars.[24] Last year, the guardian ad litem program spent approximately $360,000 in contracts for attorney ad litem services.[25] Each attorney ad litem is typically paid $500-$1,000 annually per child per year.[26]

In addition to the services of the attorneys ad litem through the guardian ad litem program, other options exist for legal services for children. The Florida Bar Foundation provides grants to legal service providers, several law schools have clinics that serve children, and several Children's Councils[27] fund lawyers for children. Notable among efforts to provide legal services is the Foster Children's Project in Palm Beach County. This project, administered by the Legal Aid Society of Palm Beach County and funded by the Children's Services Council of Palm Beach County and the guardian ad litem program, provides every child in the foster care system between birth and 12 years of age, and their siblings, with an attorney to represent them in all court matters and to advocate for them to achieve permanency within 12 months. The project has recently been authorized to expand its representation to children zero to 5 years of age in relative placements.

---

[21] Office of the Florida Guardian ad Litem, email, (March 13, 2014) (on file with the Senate Committee on Children, Families, and Elder Affairs).
[22] Section 39.402(8)(c)1, s. 39.807(2), s. 39.822(1), F.S.
[23] Fla. R. Juv. P. 8.217(a).
[24] Office of the Florida Guardian ad Litem, *supra* note 20.
[25] Proviso language in the budget last year included funds appropriated for contracts with AALs, to be selected and contracted with by the GAL.
[26] Office of Florida Guardian ad Litem, *supra* note 20.
[27] Florida Children's Councils, or Children's Services Councils, are locally established special taxing districts designed to provide services to children and families. Chapter 125, F.S., governs their creation and operation. The first Council was approved in 1946 in Pinellas County. There are currently Councils (with slight variances in names) in Broward, Duval, Hillsborough, Martin, Miami-Dade, Palm Beach, and St. Lucie counties. http://flchildrenscouncil.org/about-the-council/overview/ and http://flchildrenscouncil.org/about-cscs/member-cscs/ (last visited March 27, 2014).

The DCF estimates that the number of children who would qualify for the appointment of attorneys under the provisions of this bill at 3,915.[28] This number is approximately 21 percent of all children in out-of-home care.[29]

Dependent Children in Nursing Homes

The state is currently party to a lawsuit related to the placement of medically complex children in more restrictive settings such as nursing homes. The United States Department of Justice joined the lawsuit that alleges that the state violated the Americans with Disabilities Act (ADA).[30] The Agency for Health Care Administration (AHCA) has worked with the families of over 200 children in nursing homes under the Medicaid program to ensure they are aware of and provided in home health services. In addition, the DCF and the Agency for Persons with Disabilities have worked with medically complex children and their families that they serve to ensure the least restrictive placement.

The DCF reports that currently 11 dependent children reside in nursing homes.[31] According to the guardian ad litem program, counsel currently represent all of these children.

Dependent Children and Psychotropic Drugs

Florida law requires DCF to obtain consent from parents or a court order before administering psychotropic drugs to a child, barring an emergency.[32] The statute directs that, unless parental rights have been terminated, parents should be involved in decision-making regarding administration of these drugs. By rule, when a child of sufficient age, understanding, and maturity refuses psychotropic medication, the dependency case manager or child protective investigator must request that Children's Legal Services request an attorney for the child.[33]

Dependent Children and Residential Treatment Facilities

No information is available about the number of children being considered for placement in a residential treatment facility. Placement of a dependent child in a residential treatment facility is governed by the provisions of s. 39.407(6), F.S. This section provides that placement must be the least restrictive alternative for the child and requires an immediate appointment of a guardian ad litem for the child if a guardian ad litem is not already provided. In addition, the Florida Rules of Juvenile Procedure require that if a child does not agree with placement in a residential treatment facility, the court appoint an attorney for the child, if one has not already been appointed.[34]

---

[28] This number does not include those children with an unknown disability, children in in-home placements, children in extended foster care, or children being considered for placement in a residential treatment center.
[29] Department of Children and Families, *2014 Legislative Bill Analysis*, pg. 3 (February 18, 2014).
[30] *A.R. et al. v. Dudek et al, United States V. Florida*, Consolidated Case No. 0:12-cv-60460-RSR, U.S. District Court for the Southern District of Florida.
[31] Department of Children and Families, Informal communication (March 13, 2014) (on file with the Senate Committee on Children, Families, and Elder Affairs.)
[32] Section 39.407(3)(a)1., F.S.
[33] Rule 65C-35.005(3)(b), F.A.C.
[34] Fla. R. Juv. P. 8.350(6).

III. Effect of Proposed Changes:

CS/SB 972 requires the court to appoint an attorney for any dependent child who has a disability provided that certain criteria is met. Neither Florida law, nor the courts, currently guarantee legal counsel for dependent children with disabilities.

This bill applies to dependent children with disabilities who:

- Already live in, or are being considered for placement in a skilled nursing facility;
- Are prescribed a psychotropic medication but do not want to take it;
- Have a suspected or known diagnosis of developmental disability;
- Already live in, or are being considered for placement in a residential treatment center; or
- Are victims of human trafficking.

The bill requires written court orders appointing attorneys for dependent children. However, the bill does not describe how particular children will be identified to a court for the appointment of an attorney. The bill directs the attorney representing the child to provide the complete range of legal services from removal from the home or initial appointment through all appellate proceedings. With court permission, the attorney is authorized to arrange for supplemental or separate counsel to handle appellate matters.

The bill requires the court to provide, except for attorneys working pro bono, adequate compensation to attorneys appointed to represent dependent children with disabilities and access to funding for expert witnesses, depositions, and other costs of litigation. Payment of attorneys is subject to appropriation and to review by the Justice Administrative Commission (JAC) for reasonableness. Fees are capped at $3,000 per child per year. The bill authorizes the JAC to contract with attorneys selected by the Guardian ad Litem program to fulfill this function. The cap may be insufficient to provide adequate legal services in unusual cases; however, in practice courts have exceeded statutory caps for legal representation.

The bill preserves the power of the court to appoint an attorney for any dependent child under ch. 39, F.S.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill provides that the cost to the state will be limited to the amount specifically appropriated for this purpose. However, the state's experience in paying for court-appointed counsel in criminal cases, dependency cases, and for capital collateral counsel has shown that costs are difficult to control. While the Legislature may set rates to pay private attorneys and even require private attorneys to sign contracts agreeing to certain payment levels, the attorney can argue to the court that their individual case warrants higher reimbursement. Courts have in some instances awarded higher fees. The Florida Supreme Court has held that attorneys' fees and costs for court appointed counsel can exceed statutory limits in certain circumstances.[35]

The number of children in the dependency system that will qualify for appointed attorneys under the bill is unknown. The department reports currently 3,951 children with a known disability live in out-of-home care. This number does not include children in in-home care, children with an unidentified disability, children in extended foster care, children being considered for placement in a residential treatment facility, or children who may suffer from mental illness as the result of human trafficking. If all 3,951 children in out-of-home care with a known disability are provided attorneys, the attorney fees would cost the state $11.7 million each year. This amount does not include case-related costs such as transcripts, depositions, and expert witnesses. The $11.7 million figure also does not include the cost of additional services the state may be obligated to provide.

The bill is not limited by its terms to dependent children in out-of-home care (i.e., in the custody of the department or in relative or non-relative care). If all dependent children, including those remaining in the custody of their parents, those in relative care, and those placed with non-relatives are included, the number of children eligible for attorney appointments will be substantially higher.

---

[35] *Maas v. Olive*, 992 So. 2d 196 (Fla. 2008) (holding that the statutory cap on attorney fees for court-appointed attorneys in postconviction relief proceedings was unconstitutional even though defendants have no constitutional right to such representation). *Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986). Although this case only addressed the adequate representation of a criminal defendant based on the constitutional sixth amendment right to counsel; *Bd. of County Comm'rs of Hillsborough County v. Scruggs,* 545 So. 2d 910, 912 (Fla. 2d DCA 1989). This case applied the holding of expanding *Makemson* to attorney representation of parents in civil dependency and parental termination hearings: "Although the right to counsel in criminal cases emanates from the sixth amendment, and in civil dependency and termination of parental rights proceedings, from due process considerations, counsel is required in each case because fundamental constitutional interests are at stake. *Id*.

DCF reports that some expenditures may be required to modify the Florida Safe Families Network (FSFN) to accommodate requirements for appointed counsel.

The Office of State Courts Administrator (OSCA) indicates that fiscal impact cannot accurately be determined as insufficient data is available to quantify the increase in judicial workload. Still the OSCA expects an increase in workload from:

- The entry of orders of appointment or discharge;
- Longer hearings due to participation of attorneys;
- Additional motions and other filings from attorneys; and
- Hearings to determine a child's eligibility for counsel.[36]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 39.01305 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Children, Families, and Elder Affairs on March 18, 2014:
Recognizes the contributions of organizations and individuals already providing legal representation to children in the dependency system and expresses the legislative intent that the efforts of these organizations and individuals not be supplanted by the provisions of this bill;

- Replaces legislative intent regarding the appointment of attorneys for children with a directive that such attorneys be appointed for identified groups of children;
- Revises the description of the groups of dependent children for whom attorneys must be appointed;
- Provides that attorney fees are subject to review by the Justice Administration Commission for reasonableness;
- Authorizes the Justice Administration Commission to contract with attorneys selected by the GAL program; and
- Limits attorney fees to $3,000 per child per year.

[36] Office of State Courts Administrator, *2014 Judicial Impact Statement, CS/SB 972* (March 28, 2014); on file with the Senate Judiciary Committee.

B. Amendments:

None.

250360

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Judiciary (Lee) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. (1)(a) The Legislature finds that:

1. All children in proceedings under this chapter have important interests at stake, such as health, safety, and well-being and the need to obtain permanency.

2. A dependent child who has certain special needs has a particular need for an attorney to represent the dependent child in proceedings under this chapter, as well as in fair hearings

and appellate proceedings, so that the attorney may address the child's medical and related needs and the services and supports necessary for the child to live successfully in the community.

(b) The Legislature recognizes the existence of organizations that provide attorney representation to children in certain jurisdictions throughout the state. Further, the Statewide Guardian Ad Litem Program provides best interest representation for dependent children in every jurisdiction in accordance with state and federal law. The Legislature, therefore, does not intend that funding provided for representation under this section supplant proven and existing organizations representing children. Instead, the Legislature intends that funding provided for representation under this section be an additional resource for the representation of more children in these jurisdictions, to the extent necessary to meet the requirements of this chapter, with the cooperation of existing local organizations or through the expansion of those organizations. The Legislature encourages the expansion of pro bono representation for children. This section is not intended to limit the ability of a pro bono attorney to appear on behalf of a child.

Section 2. Section 39.01305, Florida Statutes, is created to read:

39.01305 Appointment of an attorney for a dependent child with certain special needs.—

(1) An attorney shall be appointed for a dependent child who:

(a) Resides in a skilled nursing facility or is being considered for placement in a skilled nursing home;

(b) Is prescribed a psychotropic medication but declines to assent to the psychotropic medication;

(c) Has a diagnosis of developmental disability as defined in s. 393.063;

(d) Is being placed in a residential treatment center or being considered for placement in a residential treatment center; or

(e) Is a victim of human trafficking as defined in s. 787.06(2)(d).

(2)(a) Before a court may appoint an attorney who may be compensated pursuant to this section, the court must request a recommendation from the Statewide Guardian Ad Litem Office for an attorney who is willing to represent a child without additional compensation. If such an attorney is available within 15 days after the court's request, the court must appoint that attorney. However, the court may appoint a compensated attorney within the 15-day period if the Statewide Guardian Ad Litem informs the court that it will not be able to recommend an attorney in that time period.

(b) After an attorney is appointed, the appointment continues in effect until the attorney is allowed to withdraw or is discharged by the court or until the case is dismissed. An attorney who is appointed to represent the child shall provide the complete range of legal services, from the removal from home or from the initial appointment through all available appellate proceedings. With the permission of the court, the attorney for the dependent child may arrange for supplemental or separate counsel to represent the child in appellate proceedings. A court order appointing an attorney under this section must be in

250360

writing.

(3) Except if the attorney has agreed to provide pro bono services, an appointed attorney or organization must be adequately compensated and provided with access to funding for expert witnesses, depositions, and other costs of litigation. Payment to an attorney is subject to appropriations and subject to review by the Justice Administrative Commission for reasonableness. The Justice Administrative Commission shall contract with attorneys appointed by the court. Attorney fees may not exceed $3,000 per child per year.

(4) The department shall develop procedures to identify a dependent child who has a special need specified under subsection (1) and to request that a court appoint an attorney for the child. The department may adopt rules to administer this section.

(5) This section does not limit the authority of the court to appoint an attorney for a dependent child in a proceeding under this chapter.

(6) Implementation of this section is subject to appropriations expressly made for that purpose.

Section 3. This act shall take effect July 1, 2014.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to attorneys for dependent children with special needs; providing legislative findings and

intent; creating s. 39.01305, F.S.; requiring appointment of an attorney to represent a dependent child who meets one or more specified criteria; requiring that a pro bono attorney be appointed if available; requiring that the appointment be in writing; requiring that the appointment continue in effect until the attorney is allowed to withdraw or is discharged by the court or until the case is dismissed; requiring that an attorney not acting in a pro bono capacity be adequately compensated for his or her services and have access to funding for certain costs; providing for financial oversight by the Justice Administrative Commission; requiring the Department of Children and Family Services to develop procedures to identify dependent children who qualify for an attorney; authorizing the department to adopt rules; providing a limit on attorney fees; providing applicability; providing an effective date.

By the Committee on Children, Families, and Elder Affairs; and Senators Galvano and Bradley

586-02751-14 2014972c1

A bill to be entitled

An act relating to attorneys for dependent children with disabilities; creating s. 39.01305, F.S.; providing legislative findings and intent; requiring appointment of an attorney to represent a dependent child who meets one or more specified criteria; requiring the appointment to be in writing; requiring that the appointment continue in effect until the attorney is allowed to withdraw or is discharged by the court or until the case is dismissed; requiring that an attorney not acting in a pro bono capacity be adequately compensated for his or her services and have access to funding for certain costs; providing for financial oversight by the Justice Administrative Commission; providing a limit on attorney fees; providing applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 39.01305, Florida Statutes, is created to read:

39.01305 Appointment of an attorney for a dependent child with disabilities.—

(1)(a) The Legislature finds that:

1. All children in proceedings under this chapter have important interests at stake, such as health, safety, and well-being and the need to obtain permanency.

2. A dependent child who has a suspected or known disability has a particular need for an attorney to represent

586-02751-14 2014972c1

the dependent child in proceedings under this chapter, as well as in fair hearings and appellate proceedings, so that the attorney may address the child's medical and related needs and the services and supports necessary for the child to live successfully in the community.

(b) The Legislature recognizes the existence of organizations that provide attorney representation to children in certain jurisdictions throughout the state. The Legislature finds that some of these organizations have proven effective, through independent rigorous evaluation, in producing significantly improved outcomes for children and that many have been embraced by their local jurisdictions. The Legislature, therefore, does not intend that funding provided for representation under this section supplant proven and existing organizations representing children. Instead, the Legislature intends that funding provided for representation under this section be an additional resource for the representation of more children in these jurisdictions, to the extent necessary to meet the requirements of this chapter, with the cooperation of existing local organizations or through the expansion of such organizations. The Legislature encourages the expansion of pro bono representation for children. This section is not intended to limit the ability of a pro bono attorney to appear on behalf of a child.

(2) An attorney shall be appointed for a dependent child who has a disability and meets one or more of the following criteria:

(a) A dependent child who resides in a skilled nursing facility or is being considered for placement in a skilled

nursing home;

(b) A dependent child who is prescribed a psychotropic medication but does not want to take the psychotropic medication;

(c) A dependent child who has a suspected or known diagnosis of developmental disability as defined in s. 393.063;

(d) A dependent child being placed in a residential treatment center or being considered for placement in a residential treatment center; or

(e) A dependent child who has been a victim of human trafficking.

(3) A court order appointing an attorney under this section must be in writing. The appointment continues in effect until the attorney is allowed to withdraw or is discharged by the court or until the case is dismissed. An attorney who is appointed to represent the child shall provide the complete range of legal services, from the removal from home or from the initial appointment through all available appellate proceedings. With the permission of the court, the attorney for the dependent child may arrange for supplemental or separate counsel to handle proceedings at an appellate hearing.

(4) Except if the attorney has agreed to provide pro bono services, an appointed attorney must be adequately compensated and provided with access to funding for expert witnesses, depositions, and other costs of litigation. Payment to an attorney is subject to appropriations and subject to review by the Justice Administrative Commission for reasonableness. The Justice Administrative Commission may contract with attorneys selected by the guardian ad litem program. Attorney fees may not

exceed $3,000 per child per year.

(5) This section does not limit the authority of the court to appoint an attorney for a dependent child in a proceeding under this chapter.

(6) Implementation of this section is subject to appropriations expressly made for that purpose.

Section 2. This act shall take effect July 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 104
INTRODUCER:	Senator Soto
SUBJECT:	Family Law
DATE:	March 31, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	**Pre-meeting**
2.			CF	
3.			RC	

I. Summary:

SB 104 revises the circumstances in which a court may deviate from or approve a request to deviate from the minimum amount of support required under child support guidelines. Either a court-ordered time-sharing schedule or the time-sharing schedule exercised by the parents may provide the basis for a deviation.

The bill also authorizes courts to take judicial notice in family cases of any court record in Florida or of the United States, when imminent danger is alleged. Although the exigency of the situation waives the requirement to provide a pre-hearing notice to the parties, the court must file a subsequent proper notice within 2 business days of the hearing. These provisions relate to family cases in which domestic violence is an issue.

II. Present Situation:

Child Support Guidelines

Child support guidelines are contained in s. 61.30(6), F.S., for the use of the court in determining child support. Guidelines take into account the combined monthly net income of the parents and the number of minor children of parties involved in a child support proceeding. The guidelines establish the minimum amount of support required for a child. These amounts may be increased for additional obligations, such as child care and health insurance costs of the children.[1] The court may also depart from the child support guidelines based on factors for deviation identified in law.[2] These are:

- Extraordinary medical, psychological, educational, or dental expenses.
- Independent income of a child or children.

[1] Sections 61.30(7) and (8), F.S.
[2] Section 61.30(11)(a), F.S.

- Documented financial support of a parent.
- Seasonal variation in income.
- The age of the child.
- Special needs.
- Total available assets of the obligee, obligor, and the child.
- The impact of federal tax treatment.
- An application of the child support guidelines schedule that requires a parent to pay another person more than 55 percent of his or her gross income for a current child support obligation.
- The parenting plan, such as where a child spends a significant amount of time, but less than 20 percent of overnight stays with a parent, or the refusal of a parent to participate in a child's activities.
- Any other adjustment needed to further equity for the parties.[3]

The First District Court of Appeal reviewed an administrative support order that provided for a deviation from the child support guidelines.[4] The administrative support order based its decision on one of the statutory factors for deviation from the guidelines. This factor allows deviation where a child spends less than 20 percent of overnight stays with a parent based on a parenting plan. The parents in the case, however, did not have a court-ordered parenting plan. Although Florida law would have required a formal parenting plan as part of a divorce proceeding, the couple never married. Instead, they "decided visitation among themselves."[5] In reversing the administrative order, the court indicated:

> a parenting plan is defined in section 61.046(14) as a court-approved parenting plan with a time-sharing arrangement that can be created through mediation and later approved by a court, or approved by a court where the parties cannot agree. Thus, the plain language of the statute prohibits a trial court from deviating from the guidelines based on a verbal visitation agreement even where equity compels the deviation.[6, 7]

A court is also required to adjust the allocation of the burden of a child support award on the parents if a child spends a substantial amount of time with each parent.[8] A child spends a substantial amount of time with a parent if a parent exercises time-sharing at least 20 percent of the overnights of the year.[9]

Judicial Notice

Florida's evidence code allows the court to take judicial notice[10]of:

---

[3] Section 61.30(11)(a)1. through 11., F.S.
[4] *Dept. of Rev. v. Daly*, 74 So. 3d 165, 166 (Fla. 1st DCA 2011).
[5] *Id.*
[6] *Id*. at 168.
[7] The parent's informal parenting agreement may have been an adequate basis for a court to deviate from the child support guidelines before s. 61.30, F.S., was amended in 2008. In 2008, the Legislature through s. 16, ch. 2008-61, L.O.F., replaced references to "shared parental arrangement" with "parenting plan."
[8] Section 61.30(11)(b), F.S.
[9] Section 61.30(11)(b)8. F.S.
[10] Judicial notice is defined as "A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact." BLACK'S LAW DICTIONARY (9th ed. 2009).

- Acts and resolutions of Congress and the Florida Legislature.
- Decisional, constitutional, and public statutory law of every of other state, territory, and jurisdiction of the U.S.
- Contents of the Federal Register.
- Records of any court of this state or of any court of record of the U.S. or any other U.S. state, territory, or jurisdiction.
- Rules of court of this state, the U.S., or any other U.S. state, territory, or jurisdiction.[11]

Temporary Injunction Hearings

Florida law prohibits the admission of evidence other than verified pleadings or affidavits at ex parte hearings for temporary injunctions.[12] These injunctions relate to underlying allegations of domestic violence; repeat violence, sexual violence, or dating violence; and stalking. Evidence other than verified pleadings or affidavits may be admitted only if the respondent appears at the hearing or has received reasonable notice of the hearing.

III. Effect of Proposed Changes:

This bill revises the circumstances in which a court may deviate from or approve a request to deviate from the minimum amount of support required under the child support guidelines. A court may deviate from the child support guidelines based on a child's visitation with a parent as provided in a court-ordered time-sharing schedule or the time-sharing schedule exercised by the parents.

This bill authorizes courts to take judicial notice in family cases of any court record in Florida, or of any court in a state, jurisdiction, or territory of the United States, when imminent danger is alleged, which precludes an opportunity to provide advance notice to the parties. If judicial notice is taken, the court must file proper notice of the matters judicially noticed within 2 business days. These provisions relate to family cases in which domestic violence is an issue. Family law cases include:

> dissolution of marriage, annulment, support unconnected with dissolution of marriage, paternity, child support, Uniform Interstate Family Support Act, custodial care of and access to children, proceedings for temporary or concurrent custody of minor children by extended family, adoption, name change, declaratory judgment actions related to premarital, marital, or postmarital agreements, civil domestic, repeat violence, dating violence, and sexual violence injunctions, juvenile dependency, termination of parental rights, juvenile delinquency, emancipation of a minor, CINS/FINS, truancy, and modification and enforcement of orders entered in these cases.[13]

This bill also provides a waiver to due process requirements for the admissibility of evidence at ex parte temporary injunction hearings. These hearings relate to temporary injunctions sought for

[11] Section 90.202, F.S.
[12] Sections 741.30(5)(b), 784.046(6)(b), and 784.0485, F.S.
[13] Rule 2.545(d)(2.), Rules of Jud. Admin.

domestic violence; repeat violence, sexual violence, or dating violence; and stalking. This bill will allow judicial notice to be taken of records other than verified pleadings or affidavits, without providing a respondent advance notice and an opportunity to be present.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of State Courts Administrator anticipates a potential fiscal impact resulting from the bill due to the following:

- Recognition of an informal time-sharing arrangement will impact judicial workload for administrative child support cases that are heard in the circuit court and family law cases in which the parties are pro se litigants. However, the impact is unquantifiable at this time.
- The waiver of due process requirements in temporary injunction cases will affect court workload to the extent that the court is subsequently required to file notice of the matters judicially noticed. However, fiscal impact is indeterminate.[14]

The Department of Children, Families and Elder Affairs does not expect a fiscal impact.[15]

[14] Office of State Courts Administrator, *2014 Judicial Impact Statement, SB 104* (November 18. 2013).
[15] Department of Children, Families and Elder Affairs, *2014 Agency Legislative Bill Analysis*/

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 2 of the bill provides that the provisions of SB 104 prevail if another bill passes during the 2014 legislative session which amends s. 61.30, F.S. Section 2, however, is an artifact of CS/CS SB 1210 (2013) which was included in that measure due to an error in another bill amending s 61.30, F.S. Accordingly, the Legislature may wish to amend the bill to avoid confusion about its interaction with other legislation.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 61.30, 90.204, 741.30, 784.046, and 784.0485.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

478058

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Soto) recommended the following:

Senate Amendment (with title amendment)

Delete lines 125 - 128.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 5 - 6

and insert:

the adjustment of awards of child support; amending s. 90.204, F.S.;

By Senator Soto

14-00054-14 2014104__

A bill to be entitled

An act relating to family law; amending s. 61.30, F.S.; providing for consideration of time-sharing schedules or time-sharing arrangements as a factor in the adjustment of awards of child support; providing legislative intent; amending s. 90.204, F.S.; authorizing judges in family cases to take judicial notice of certain court records without prior notice to the parties when imminent danger to persons or property has been alleged and it is impractical to give prior notice; providing for a deferred opportunity to present evidence; requiring a notice of taking such judicial notice to be filed within a specified period; providing that the term "family cases" has the same meaning as provided in the Rules of Judicial Administration; amending ss. 741.30, 784.046, and 784.0485, F.S.; creating an exception to a prohibition against using evidence other than the verified pleading or affidavit in an ex parte hearing for a temporary injunction for protection against domestic violence, repeat violence, sexual violence, dating violence, or stalking; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (11) of section 61.30, Florida Statutes, is amended to read:

61.30 Child support guidelines; retroactive child support.—

14-00054-14 2014104__

(11)(a) The court may adjust the total minimum child support award, or either or both parents' share of the total minimum child support award, based upon the following deviation factors:

1. Extraordinary medical, psychological, educational, or dental expenses.

2. Independent income of the child, not to include moneys received by a child from supplemental security income.

3. The payment of support for a parent which has been regularly paid and for which there is a demonstrated need.

4. Seasonal variations in one or both parents' incomes or expenses.

5. The age of the child, taking into account the greater needs of older children.

6. Special needs, such as costs that may be associated with the disability of a child, that have traditionally been met within the family budget even though fulfilling those needs will cause the support to exceed the presumptive amount established by the guidelines.

7. Total available assets of the obligee, obligor, and the child.

8. The impact of the Internal Revenue Service Child & Dependent Care Tax Credit, Earned Income Tax Credit, and dependency exemption and waiver of that exemption. The court may order a parent to execute a waiver of the Internal Revenue Service dependency exemption if the paying parent is current in support payments.

9. An application of the child support guidelines schedule that requires a person to pay another person more than 55

percent of his or her gross income for a child support obligation for current support resulting from a single support order.

10. The particular parenting plan, a court-ordered time-sharing schedule, or a time-sharing arrangement exercised by agreement of the parties, such as where the child spends a significant amount of time, but less than 20 percent of the overnights, with one parent, thereby reducing the financial expenditures incurred by the other parent; or the refusal of a parent to become involved in the activities of the child.

11. Any other adjustment that is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt. Such expense or debt may include, but is not limited to, a reasonable and necessary expense or debt that the parties jointly incurred during the marriage.

(b) Whenever a particular parenting plan, a court-ordered time-sharing schedule, or a time-sharing arrangement exercised by agreement of the parties provides that each child spend a substantial amount of time with each parent, the court shall adjust any award of child support, as follows:

1. In accordance with subsections (9) and (10), calculate the amount of support obligation apportioned to each parent without including day care and health insurance costs in the calculation and multiply the amount by 1.5.

2. Calculate the percentage of overnight stays the child spends with each parent.

3. Multiply each parent's support obligation as calculated in subparagraph 1. by the percentage of the other parent's

overnight stays with the child as calculated in subparagraph 2.

4. The difference between the amounts calculated in subparagraph 3. shall be the monetary transfer necessary between the parents for the care of the child, subject to an adjustment for day care and health insurance expenses.

5. Pursuant to subsections (7) and (8), calculate the net amounts owed by each parent for the expenses incurred for day care and health insurance coverage for the child.

6. Adjust the support obligation owed by each parent pursuant to subparagraph 4. by crediting or debiting the amount calculated in subparagraph 5. This amount represents the child support which must be exchanged between the parents.

7. The court may deviate from the child support amount calculated pursuant to subparagraph 6. based upon the deviation factors in paragraph (a), as well as the obligee parent's low income and ability to maintain the basic necessities of the home for the child, the likelihood that either parent will actually exercise the time-sharing schedule set forth in the parenting plan, a court-ordered time-sharing schedule, or a time-sharing arrangement exercised by agreement of the parties ~~granted by the court~~, and whether all of the children are exercising the same time-sharing schedule.

8. For purposes of adjusting any award of child support under this paragraph, "substantial amount of time" means that a parent exercises time-sharing at least 20 percent of the overnights of the year.

(c) A parent's failure to regularly exercise the time-sharing schedule set forth in the parenting plan, a court-ordered ~~or agreed~~ time-sharing schedule, or a time-sharing

arrangement exercised by agreement of the parties not caused by the other parent which resulted in the adjustment of the amount of child support pursuant to subparagraph (a)10. or paragraph (b) shall be deemed a substantial change of circumstances for purposes of modifying the child support award. A modification pursuant to this paragraph is retroactive to the date the noncustodial parent first failed to regularly exercise the court-ordered or agreed time-sharing schedule.

Section 2. If another bill passes in the 2014 legislative session which includes provisions amending s. 61.30, Florida Statutes, similar to those in this bill, it is the intent of the Legislature that the provisions of this bill shall prevail.

Section 3. Subsection (4) is added to section 90.204, Florida Statutes, to read:

90.204 Determination of propriety of judicial notice and nature of matter noticed.—

(4) In family cases, the court may take judicial notice of any matter described in s. 90.202(6) when imminent danger to persons or property has been alleged and it is impractical to give prior notice to the parties of the intent to take judicial notice. Opportunity to present evidence relevant to the propriety of taking judicial notice under subsection (1) may be deferred until after judicial action has been taken. If judicial notice is taken under this subsection, the court shall, within 2 business days, file a notice in the pending case of the matters judicially noticed. For purposes of this subsection, the term "family cases" has the same meaning as provided in the Rules of Judicial Administration.

Section 4. Paragraph (b) of subsection (5) of section

741.30, Florida Statutes, is amended to read:

741.30 Domestic violence; injunction; powers and duties of court and clerk; petition; notice and hearing; temporary injunction; issuance of injunction; statewide verification system; enforcement; public records exemption.—

(5)

(b) Except as provided in s. 90.204, in a hearing ex parte for the purpose of obtaining such ex parte temporary injunction, no evidence other than verified pleadings or affidavits shall be used as evidence, unless the respondent appears at the hearing or has received reasonable notice of the hearing. A denial of a petition for an ex parte injunction shall be by written order noting the legal grounds for denial. When the only ground for denial is no appearance of an immediate and present danger of domestic violence, the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. Nothing herein affects a petitioner's right to promptly amend any petition, or otherwise be heard in person on any petition consistent with the Florida Rules of Civil Procedure.

Section 5. Paragraph (b) of subsection (6) of section 784.046, Florida Statutes, is amended to read:

784.046 Action by victim of repeat violence, sexual violence, or dating violence for protective injunction; dating violence investigations, notice to victims, and reporting; pretrial release violations; public records exemption.—

(6)

(b) Except as provided in s. 90.204, in a hearing ex parte for the purpose of obtaining such temporary injunction, no evidence other than the verified pleading or affidavit shall be

used as evidence, unless the respondent appears at the hearing or has received reasonable notice of the hearing.

Section 6. Paragraph (b) of subsection (5) of section 784.0485, Florida Statutes, is amended to read:

784.0485 Stalking; injunction; powers and duties of court and clerk; petition; notice and hearing; temporary injunction; issuance of injunction; statewide verification system; enforcement.—

(5)

(b) Except as provided in s. 90.204, in a hearing ex parte for the purpose of obtaining such ex parte temporary injunction, evidence other than verified pleadings or affidavits may not be used as evidence, unless the respondent appears at the hearing or has received reasonable notice of the hearing. A denial of a petition for an ex parte injunction shall be by written order noting the legal grounds for denial. If the only ground for denial is no appearance of an immediate and present danger of stalking, the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. This paragraph does not affect a petitioner's right to promptly amend any petition, or otherwise be heard in person on any petition consistent with the Florida Rules of Civil Procedure.

Section 7. This act shall take effect July 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 798
INTRODUCER:	Regulated Industries Committee and Senator Ring
SUBJECT:	Residential Properties
DATE:	March 31, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Fav/CS**
2.	Munroe	Cibula	JU	**Pre-meeting**
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 798 relates to the operation and regulation of condominium associations, cooperative associations, homeowners' associations, and timeshare projects.

In regards to homeowners' associations, the bill clarifies the notice requirements for the preservation of association covenants and restrictions under the Marketable Record Title Act.

Regarding timeshares projects, the bill:

- Defines the term "timeshare project" to mean any timeshare property as defined in ch. 721, F.S., which is located in this state and that is also a transient public lodging establishment;
- Exempts timeshare projects from the definition of "public lodging establishment;"
- Provides that public lodging units that are classified as timeshare projects are not subject to the requirement of at least biannual inspections by the Division of Hotels and Restaurants of the Department of Business and Professional Regulation;
- Exempts timeshare projects from the requirements that public lodging establishments maintain public bathroom facilities, provide in the main public bathroom soap and clean towels or other approved hand-drying devices, and provide guests with clean pillowslips and under and top sheets; and
- Removes timeshare plans from the definition of a "vacation rental," and provides that a vacation rental is a transient public lodging establishment that is not a timeshare project.

In regards to the condominium associations, the bill:

- Provides that an amendment to an association's governing documents which prohibits unit owners from renting their units, alters the duration of the rental term, or specifies or limits the number of times unit owners are entitled to rent their units during a specified period does not apply to unit owners that vote against the amendment. However, the amendment applies to unit owners who consent to the amendment, fail to vote on the amendment, or acquire title after the effective date of the amendment;
- Authorizes the associations to enter an abandoned unit to inspect the unit and adjoining common elements, to make specific repairs, and to maintain the unit and permits the association to charge the unit owner for expenses incurred by the association;
- Provides that the insurance responsibility of the association or unit owners for reconstruction, repair, or replacement in the absence of an insurable event shall be determined by the provisions of the declaration or bylaws;
- Permits board and committee members to participate, including voting, in a meeting via telephone, real-time videoconferencing, or similar real-time electronic or video communication, and for such participation to count towards a quorum; and
- Extends the time period to be classified as a bulk buyer or bulk assignee from July 1, 2015 to July 1, 2016.

In regards to cooperative associations, the bill:

- Revises the financial reporting requirements by increasing to 90 from 60 days the time to prepare a financial statement, or to contract with a third party to prepare the financial statement;
- Specifies the type of financial reporting required based on the association's total annual revenue amounts;
- Limits the financial reporting requirement, for associations of fewer than 50 units, regardless of the association's annual revenues, to the preparation of a report of cash receipts and expenditures, unless otherwise required by the declaration or other recorded governing documents;
- Provides that persons who have been suspended or removed by the division or who are delinquent in the payment of any monetary obligation due to the association are not eligible to be a candidate for board membership and may not be listed on the ballot; and
- Provides for the removal from office of a director or officer charged by information or indictment with a felony theft or embezzlement offense involving the association's funds or property.

In regards to homeowners' associations, the bill provides that an association does not have to provide members with copies of an amendment to the governing documents after it is approved by the membership if a copy of the proposed amendment was previously provided to the members before the vote on the amendment and the proposed amendment was not changed before the vote. In lieu of providing copies of the amendment, the bill also specifies the notice that must be provided to members after an amendment has been adopted.

In regards to condominium and cooperative associations, the bill requires outgoing board or committee members to relinquish all official records and property of the association in their possession or control to the incoming board within 5 days after the election. The bill provides

that an outgoing board or committee member who violates this requirement is personally subject to a civil penalty by the Division of Florida Condominiums, Timeshares, and Mobile Homes. It also prohibits board member from voting by e-mail.

In regards to cooperative and homeowners' associations, the bill:

- Authorizes boards to exercise specified emergency powers in response to the declaration of a state of emergency, including the authority to implement a disaster plan, mitigate damages, and borrow money with the approval of the membership; and
- Limits the liability of associations for assessments that came due before the association acquired title through a foreclosure.

In regards to condominium, cooperative, and homeowners' associations, the bill:

- Provides that unit owners may consent in writing to the disclosure of contact information to which other owners are prohibited from having access;
- Provides that a unit owner is jointly and severally liable with the previous owner not only for all unpaid assessments, but also interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process.

The bill provides an effective date of July 1, 2014.

II. Present Situation:

Public Lodging Establishments

The Division of Hotels and Restaurants (division) within the Department of Business and Professional Regulation (department) is the state agency charged with enforcing the provisions of ch. 509, F.S., and all other applicable laws relating to the inspection and regulation of public lodging establishments and public food service establishments for the purpose of protecting the public health, safety, and welfare. According to the department, there are more than 37,155 licensed public lodging establishments, including hotels, motels, nontransient and transient rooming houses, and resort condominiums and dwellings.[1]

Section 509.013(4)(b)9., F.S., provides several exemptions from the definition of "public lodging establishment," including, in relevant part:

> Any roominghouse, boardinghouse, or other living or sleeping facility that may not be classified as a hotel, motel, vacation rental, nontransient apartment, bed and breakfast inn, or transient apartment under s. 509.242[, F.S].

Section 509.013(4)(a)1., F.S., defines a "transient public lodging establishment" to mean:

> any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests more than three times in a calendar

[1] *See Annual Report, Fiscal Year 2012-2013*, Division of Hotels and Restaurants, Department of Business and Professional Regulation. A copy is available at: http://www.myfloridalicense.com/dbpr/hr/reports/annualreports/documents/ar2012_13.pdf (Last visited March 8, 2014).

> year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests.

Section 509.013(4)(a)2., F.S., defines a "nontransient public lodging establishment" to mean:

> any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests for periods of at least 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests for periods of at least 30 days or 1 calendar month.

Section 509.242(1)(c), F.S., defines the term "vacation rental" to mean:

> A vacation rental is any unit or group of units in a condominium, cooperative, or timeshare plan or any individually or collectively owned single-family, two-family, three-family, or four-family house or dwelling unit that is also a transient public lodging establishment.

Timeshares

A timeshare interest is a form of ownership of real and personal property.[2] Timeshares are regulated by the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business and Professional Regulation (department) in accordance with ch. 721, F.S.

In a timeshare, the real property is typically a condominium unit or a cooperative unit. A timeshare property is typically a resort in which multiple parties hold the right to use the property. Each owner of a timeshare interest is allotted a period of time (typically one week) in which he or she may use the property.

Marketable Record Title Act

The Marketable Record Title Act (MRTA or act),[3] may cause covenants to lapse by operation of law if the covenants are silent as to expiration, or if the 30-year period in the act is shorter than the stated expiration time.

Sections 712.02, F.S., provides that:

> Any person having the legal capacity to own land in this state, who, alone or together with her or his predecessors in title, has been vested with any estate in land of record for 30 years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except the matters set forth as exceptions to marketability in s. 712.03[, F.S]. A person shall have a marketable record title when the public records disclosed a record title transaction

[2] *See* s. 721.05(36), F.S.
[3] Chapter 712, F.S.,

> affecting the title to the land which has been of record for not less than 30 years purporting to create such estate either in:
> (1) The person claiming such estate; or
> (2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate, with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

Sections 712.05 and 712.06, F.S., provide the process, including notice requirements, for the recording of interest in land and the preservation of covenants and restrictions for community associations which may be extinguished under operation of the act.

Section 712.05, F.S., requires that a written notice must be recorded to claim an interest in land and to preserve and protect from extinguishment any covenants or restrictions. Section 712.05(1), F.S., provides:

> Any person claiming an interest in land or a homeowners' association desiring to preserve any covenant or restriction may preserve and protect the same from extinguishment by the operation of this act by filing for record, during the 30-year period immediately following the effective date of the root of title, a notice, in writing, in accordance with the provisions hereof, which notice shall have the effect of so preserving such claim of right or such covenant or restriction or portion of such covenant or restriction for a period of no longer than 30 years after filing the same unless again filed as required herein. No disability or lack of knowledge of any kind on the part of anyone shall delay the commencement of or suspend the running of said 30-year period. Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is:
> (a) Under a disability,
> (b) Unable to assert a claim on his or her behalf, or
> (c) One of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.
>
> Such notice may be filed by a homeowners' association only if the preservation of such covenant or restriction or portion of such covenant or restriction is approved by at least two-thirds of the members of the board of directors of an incorporated homeowners' association at a meeting for which a notice, stating the meeting's time and place and containing the statement of marketable title action described in s. 712.06(1)(b),[F.S.,] was mailed or hand delivered to members of the homeowners' association not less than 7 days prior to such meeting.

For covenants that have expired, residents in these communities have the option to revive the covenants after the expiration by following the procedure in ss. 720.403 - 720.407, F.S. The covenant revitalization procedures in ss. 720.403 - 720.407, F.S., are not available to homeowners' associations not governed by ch. 720, F.S., e.g., associations governing communities that are comprised of property primarily intended for commercial, industrial, or other non-residential use.[4] Non-mandatory associations may not revive covenants pursuant to

[4] Section 720.301(8) and (11), F.S.

ss. 702.403 - 702.407, F.S., because ch. 720, F.S., relates to residential homeowners' associations where membership is a mandatory condition for the owners of property.

Section 712.06, F.S., specifies the contents of the notice required under s. 712.05, F.S. Section 712.06(3), F.S., also provides for the service of the notice by the clerk of the circuit court. Section 712.06(3), F.S., provides:

> (3) The person providing the notice referred to in s. 712.05[, F.S.,] shall:
> (a) Cause the clerk of the circuit court to mail by registered or certified mail to the purported owner of said property, as stated in such notice, a copy thereof and shall enter on the original, before recording the same, a certificate showing such mailing. For preparing the certificate, the claimant shall pay to the clerk the service charge as prescribed in s. 28.24(8)[, F.S.,] and the necessary costs of mailing, in addition to the recording charges as prescribed in s. 28.24(12)[, F.S]. If the notice names purported owners having more than one address, the person filing the same shall furnish a true copy for each of the several addresses stated, and the clerk shall send one such copy to the purported owners named at each respective address. Such certificate shall be sufficient if the same reads substantially as follows:
>
> I hereby certify that I did on this_____, mail by registered (or certified) mail a copy of the foregoing notice to each of the following at the address stated:
>
> _____
> (Clerk of the circuit court)
> of County, Florida,
> By (Deputy Clerk)
>
> The clerk of the circuit court is not required to mail to the purported owner of such property any such notice that pertains solely to the preserving of any covenant or restriction or any portion of a covenant or restriction; or
>
> (b) Publish once a week, for 2 consecutive weeks, the notice referred to in s. 712.05,[F.S.,] with the official record book and page number in which such notice was recorded, in a newspaper as defined in ch. 50[, F.S.,] in the county in which the property is located.

According to the Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL), s. 712.06(3), F.S., requires the clerk of court to mail and publish notice of the preservation of homeowners' association covenants and restrictions. According to RPPTL, compliance with the notice required under s. 712.06(3), F.S., in the context of the preservation of homeowners' association covenants and restrictions is impracticable because of the large amount of space required to publish the notice, which may include tens or hundreds of pages of recorded instruments.

Condominium

A condominium is a "form of ownership of real property created pursuant to [ch. 718, F.S.,] which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements."[5] A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.[6] A declaration is like a constitution in that it:

> Strictly governs the relationships among condominium unit owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.[7]

A declaration "may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property."[8] A declaration of condominium may be amended as provided in the declaration.[9] If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of not less than the owners of two-thirds of the units.[10] Condominiums are administered by a board of directors referred to as a "board of administration."[11]

Section 718.103(8), F.S., defines the term "common elements" to mean the portions of the condominium property not included in the units.

Section 718.103(12), F.S., defines the term "condominium parcel" to mean a unit, together with the undivided share in the common elements appurtenant to the unit.

Section 718.103(19), F.S., defines the term "limited common elements" to mean those common elements that are reserved for the use of a certain unit or units to the exclusion of all other units, as specified in the declaration.

Section 718.103(23), F.S., defines the term "residential condominium" to mean:

> a condominium consisting of two or more units, any of which are intended for use as a private temporary or permanent residence, except that a condominium is not a residential condominium if the use for which the units are intended is primarily commercial or industrial and not more than three units are intended to be used for private residence, and are intended to be used as housing for maintenance, managerial, janitorial, or other operational staff of the condominium. With respect to a condominium that is not a timeshare condominium, a residential unit includes a unit intended as a private temporary or permanent residence as well as a unit not

[5] Section 718.103(11), F.S.
[6] Section 718.104(2), F.S.
[7] *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003) (internal citations omitted).
[8] Section 718.104(5), F.S.
[9] See s. 718.110(1)(a), F.S.
[10] Section 718.110(1)(a), F.S. *But see*, s. 718.110(4) and (8), F.S., which provides exceptions to the subject matter and procedure for amendments to a declaration of condominium.
[11] Section 718.103(4), F.S.

> intended for commercial or industrial use. With respect to a timeshare condominium, the timeshare instrument as defined in s. 721.05(35)[, F.S.,] shall govern the intended use of each unit in the condominium. If a condominium is a residential condominium but contains units intended to be used for commercial or industrial purposes, then, with respect to those units which are not intended for or used as private residences, the condominium is not a residential condominium. A condominium which contains both commercial and residential units is a mixed-use condominium and is subject to the requirements of s. 718.404[, F.S].

Cooperative Associations

Section 719.103(12), F.S., defines a "cooperative" to mean:

> that form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property.

A cooperative differs from a condominium because, in a cooperative, no unit is individually owned. Instead, a cooperative unit's occupants receive an exclusive right to occupy the unit. The cooperative holds the legal title to the unit and all common elements. The cooperative association may assess costs for the maintenance of common expenses.[12]

Homeowners' Associations

Florida law provides statutory recognition to corporations that operate residential communities in this state and procedures for operating homeowners' associations. These laws protect the rights of association members without unduly impairing the ability of such associations to perform their functions.[13]

A "homeowners' association" is defined as a "Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel."[14] Unless specifically stated to the contrary, homeowners' associations are also governed by ch. 607, F.S., relating to for-profit corporations or by ch. 617, F.S., relating to not-for-profit corporations.[15]

Homeowners' associations are administered by a board of directors whose members are elected.[16] The powers and duties of homeowners' associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted

[12] *See* ss. 719.106(1)(g) and 719.107, F.S.
[13] *See* s. 720.302(1), F.S.
[14] Section 720.301(9), F.S.
[15] Section 720.302(5), F.S.
[16] *See* ss. 720.303 and 720.307, F.S.

amendments to these documents.[17] The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.[18]

Division of Florida Condominiums, Timeshares, and Mobile Homes

Condominiums are regulated division in accordance with ch. 718, F.S. The division is afforded complete jurisdiction to investigate complaints and enforce compliance with ch. 718, F.S. with respect to associations that are still under developer control.[19] The division also has the authority to investigate complaints against developers involving improper turnover or failure to turnover control to the association, pursuant to s. 718.301, F.S. After control of the condominium is transferred from the developer to the unit owners, the division's jurisdiction is limited to investigating complaints related to financial issues, elections, and unit owner access to association records pursuant to s. 718.111(12), F.S.[20]

As part of the division's authority to investigate complaints, s. 718.501(1), F.S., authorizes the division to subpoena witnesses, take sworn statements from witnesses, issue cease and desist orders, and impose civil penalties (fines) against developers and associations.

Chapters 718, 719, and 720, F.S.

Although condominiums and cooperatives are regulated by the division, homeowners' associations are not regulated. Chapter 718, F.S., relating to condominiums, ch. 719, F.S., relating to cooperatives, and ch. 720, F.S., relating to homeowners' associations, provide for requirements for the governance of these associations. For example, they delineate requirements for notices of meetings,[21] recordkeeping requirements, including which records are accessible to the members of the association,[22] and financial reporting.[23] Timeshare condominiums are generally governed by ch. 721, F.S., the "Florida Vacation Plan and Timesharing Act."

Rental of Condominium Units

Section 718.110(13), F.S., provides that any amendment of the declaration of condominium that prohibits unit owners from renting their units, alters the duration of the rental term, specifies or limits the number of times unit owners are entitled to rent their units during a specified period applies only to unit owners who consent to the amendment and unit owners who acquire title to their units after the effective date of that amendment.

[17] *See* ss. 720.301 and 720.303, F.S.
[18] Section 720.303(1), F.S.
[19] Section 718.501(1), F.S.
[20] Section 718.501(1), F.S. *See* Peter M. Dunbar, The Condominium Concept: *A Practical Guide for Officers, Owners, Realtors, Attorneys, and Directors of Florida Condominiums*, 12 ed. (2010-2011) s. 14.2.
[21] *See* s. 718.112(2), F.S., for condominiums, s. 719.106(2)(c), F.S., for cooperatives, and s. 720.303(2), F.S., for homeowners' associations.
[22] *See* s. 718.111(12), F.S., for condominiums, s. 719.104(2), F.S., for cooperatives, and s. 720.303(4), F.S., for homeowners' associations.
[23] *See* s. 718.111(13), F.S., for condominiums, s. 719.104(4), F.S., for cooperatives, and s. 720.303(7), F.S., for homeowners' associations.

Insurance – Condominiums

Section 718.111(11), F.S., sets forth the insurance responsibilities of condominium associations and unit owners. Section 718.111(11)(j), F.S., requires the association to reconstruct, repair, or replace as necessary, as a common expense, any portion of the condominium property that it must insure against property loss and is damaged by an insurable event. Section 718.111(11)(f), F.S., specifies the property of the condominium for which the association must provide primary coverage. This section provides:

> (f) Every property insurance policy issued or renewed on or after January 1, 2009, for the purpose of protecting the condominium must provide primary coverage for:
> 1. All portions of the condominium property as originally installed or replacement of like kind and quality, in accordance with the original plans and specifications.
> 2. All alterations or additions made to the condominium property or association property pursuant to s. 718.113(2)[, F.S].
> 3. The coverage must exclude all personal property within the unit or limited common elements, and floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing which are located within the boundaries of the unit and serve only such unit. Such property and any insurance thereupon is the responsibility of the unit owner.

Right of Access to Units – Condominiums and Cooperatives

Section 718.111(5), F.S., provides that condominium associations have an irrevocable right of access to each unit during reasonable hours. They have the right to access units when necessary to maintain, repair, or replace any common elements or of any portion of a unit that the association must maintain in accordance with the declaration or as necessary to prevent damage to the common elements or to a unit or units.

Section 719.104(1), F.S., provides a comparable provision for cooperative associations.

Official Records Chapters 718, 719, and 720, F.S.

Section 718.111(12)(c), F.S., for condominium associations, s. 719.104(2), F.S., for cooperative associations, and s. 720.303(5), F.S., for homeowners' associations, provide for the maintenance of the official records of the associations. These provisions delineate the types of records that the associations must maintain and identify types of records that are accessible to their members.

Section 718.111(12)(c), F.S., prohibits unit owner access to certain official records or information in the possession of the condominium association, including:

- Records protected by attorney-client privilege;
- Information in connection with the approval of the lease, sale, or other transfer of a unit;

- Personnel records, including but not limited to disciplinary, health, insurance, and personnel records of the association's employees;
- Medical records of unit owners;
- Social security numbers, driver's license numbers, credit card numbers, email addresses, telephone numbers, facsimile numbers, emergency contact information, and any addresses of a unit owner that are not provided to fulfill the association's notice requirements, and any personal identifying information of a unit owner;
- Electronic security measures used to safeguard data, including passwords; and
- Software and operating systems used by the association to allow manipulation of data.

Condominium unit owners may consent in writing to the disclosure of information that is not accessible to the other unit owners.

The official records provisions for condominiums and homeowners' associations are substantively similar, particularly in regards to the list of the types of information that are not accessible to members.[24] For example, members of condominium associations and homeowners' associations do not have access to the addresses, telephone numbers, and other identifying personal information of the members. Chapter 719, F.S., does not provide a similar limitation on the types of records that are accessible to the members of a cooperative association.

Condominium Bylaws-Meetings of the Board

Section 718.112(2)(b)5., F.S., allows members of the condominium board to meet by telephone conference. Members who appear by teleconference may be counted toward obtaining a quorum and may vote as if physically present. A telephone speaker must be used to permit the conversation to be heard by other board members and any unit owners who may be present.

Condominiums and Cooperatives – Assessments and Foreclosures

Current law defines an "assessment" as a "share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner."[25]

"Special assessment" is defined to mean, "any assessment levied against a unit owner other than the assessment required by a budget adopted annually."[26]

A unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. This liability is *without prejudice*[27] to any right the owner may have to recover from the previous owner the amounts paid by the owner."[28]

[24] *See* ss. 718.111(12)(c) and 720.303(5), F.S.
[25] Section 718.103(1), F.S.
[26] Section 718.103(24), F.S.
[27] The term "without prejudice" means "[w]ithout loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party." BLACK'S LAW DICTIONARY (9th ed. 2009).
[28] Section 718.116(1)(a), F.S.

Section 719.108, F.S., provides a comparable liability provision for cooperative associations.

If a first mortgagee, (e.g., the mortgage lending institution) or its successor or assignee, acquires title to a condominium unit by foreclosure or by deed in lieu of foreclosure, the first mortgagee's liability for unpaid assessments is limited to the amount of assessments that came due during the 12 months immediately preceding the acquisition of title or one percent of the original mortgage debt, whichever is less.[29] However, this limitation applies only if the first mortgagee joined the association as a defendant in the foreclosure action.[30] In the foreclosure action, the association may defend its claims for unpaid assessments. A first mortgagee who acquires title to a foreclosed condominium unit is exempt from liability for all unpaid assessments if the first mortgage was recorded prior to April 1, 1992.[31] The successor or assignee, with respect to the first mortgagee, includes only a subsequent holder of the first mortgage.[32]

Section 718.116(3), F.S., provides for the accrual of interest on unpaid assessments. Unpaid assessments and installments on assessments accrue interest at the rate provided in the declaration from the due date until paid. The rate may not exceed the rate allowed by law.[33] If no rate is specified in the declaration, the interest accrues at the rate of 18 percent per year.[34] The association may also charge an administrative late fee of up to the greater of $25 or five percent of each installment of the assessment for each delinquent installment for which the payment is late.[35] Payments are applied first to the interest accrued, then the administrative late fee, then to any costs and attorney's fees incurred in collection, and then to the delinquent assessment.[36]

Distressed Condominium Relief Act

The "Distressed Condominium Relief Act" in part VII of ch. 718, F.S., defines the extent to which successors to the developer, including the construction lender after a foreclosure and other bulk buyers and bulk assignees of condominium units, may be responsible for implied warranties.

Section 718.703(1), F.S., defines the term "bulk assignee" to mean a person who acquires more than seven condominium parcels in a single condominium as provided in s. 718.707, F.S., and receives an assignment of some or substantially all of the rights of the developer as an exhibit in the deed or as a separate instrument recorded in the public records in the county where the condominium is located.

Section 718.703(2), F.S., defines the term "bulk buyer" as a person who acquires more than seven condominium parcels in a single condominium but who does not receive an assignment of developer rights other than the rights specified in this section.

[29] Section 718.116(1)(b), F.S.
[30] *Id.*
[31] Section 718.116(1)(e), F.S.
[32] Section 718.116(1)(g), F.S.
[33] Section 687.02(2), F.S., prohibits as usurious interest rates that are higher than the equivalent of 18 percent per annum simple interest.
[34] Section 718.116(3), F.S.
[35] *Id.*
[36] *Id.*

Section 718.704(1), F.S., provides that a bulk assignee assumes all the duties and responsibilities of the developer, and specifies obligations for which the bulk assignee is not liable.

Section 718.707, F.S., specifies a time limit for classification as a bulk assignee or bulk buyer. A person acquiring condominium parcels may not be classified as a bulk assignee or a bulk buyer unless the parcels are acquired prior to July 1, 2015. The date of acquisition is based on the date that the deed or other instrument of conveyance is recorded.

Financial Reporting for Cooperatives

Section 719.104(4), F.S., sets forth the financial reporting responsibilities of cooperative associations. Cooperative associations have 60 days after the end of the fiscal year or calendar year to prepare and complete a financial report for the preceding fiscal year. The report must be mailed or furnished by personal delivery to each unit owner. The report must be a complete financial report of actual receipts and expenditures for the previous 12 months, or a complete set of financial statements for the preceding fiscal year prepared in accordance with generally accepted accounting procedures (GAAP).

Section 719.104(4)(a), F.S., specifies the accounts and expenses that must be shown in the report. It provides in pertinent part:

> The report shall show the amounts of receipts by accounts and receipt classifications and shall show the amounts of expenses by accounts and expense classifications including, if applicable, but not limited to, the following:
> 1. Costs for security;
> 2. Professional and management fees and expenses;
> 3. Taxes;
> 4. Costs for recreation facilities;
> 5. Expenses for refuse collection and utility services;
> 6. Expenses for lawn care;
> 7. Costs for building maintenance and repair;
> 8. Insurance costs;
> 9. Administrative and salary expenses; and
> 10. Reserves for capital expenditures, deferred maintenance, and any other category for which the association maintains a reserve account or accounts.

Section 719.104(4)(b), F.S., requires that the division adopt rules that may require that the association deliver to the unit owners, in lieu of the financial report required by this section, a complete set of financial statements for the preceding fiscal year.[37] The financial statements must be delivered within 90 days following the end of the previous fiscal year or annually on such other date as provided in the bylaws. The division's rules may require that the financial statements be compiled, reviewed, or audited, and the rules shall take into consideration the criteria set forth in s. 719.501(1)(j), F.S.[38]

[37] *See* rule 61B-76.006, F.A.C., for the division's financial reporting requirements for cooperative associations.
[38] Section 719.501(1)(j), F.S., authorizes the division to adopt uniform accounting principles, policies, and standards to be used by all associations in the preparation and presentation of all financial statements required by ch. 719, F.S. The

Cooperative associations may waive the requirement to have financial statements compiled, reviewed, or audited at a duly called meeting of the association.[39] In an association that is under developer control, the developer may vote to waive the audit requirement for the first two years of the operation of the association, after which time waiver of an applicable audit requirement requires the approval of a majority of voting interests other than the developer. The meeting must be held prior to the end of the fiscal year, and the waiver is effective for only 1 fiscal year.

The reporting requirements in s. 719.104(4)(b), F.S., do not apply to a cooperative that consists of 50 or fewer units.[40]

Financial Reporting for Condominium and Homeowners' Associations

Section 718.111(13), F.S., sets forth the financial reporting responsibilities of homeowners' associations. Homeowners' associations have 90 days after the end of the fiscal year to prepare and complete a financial report for the preceding fiscal year. The type of financial statements or information that must be provided is based on the association's total annual revenues.

Section 718.111(13)(a), F.S., provides, in part, that if the association has a total annual revenue of $150,000 or more, but less than $300,000, the association must prepare compiled financial statements.[41] If the association has a total annual revenue of at least $300,000 and not less than $500,000, the association must prepare reviewed financial statements.[42] If the total annual revenue is $500,000 or more, the association must prepare audited financial statements.[43] If the total annual revenue is less than $150,000, then a report of cash receipts must be prepared.[44] An association having less than 50 parcels, regardless of annual revenue, may prepare a report of cash receipt and expenditures instead of financial statements, unless the governing documents provide otherwise.[45]

The amounts of total annual revenue and the type of financial statement requirements are identical to the financial reporting requirements for homeowners' associations in s. 720.303(7), F.S.

---

principles, policies, and standards must take into consideration the size of the association and the total revenue collected by the association.

[39] Section 719.104(4)(b), F.S.

[40] *Id.*

[41] A compiled financial statement is an accounting service based on information provided by the entity that is the subject of the financial statement. A compiled financial statement is made without a Certified Public Accountant's (CPA) assurance as to conformity with GAAP. Compiled financial statements must conform to the American Institute of Certified Public Accountants (AICPA) Statements on Standards for Accounting and Review Services. J.G. Siegel and J.K. Shim, *Barron's Business Guides, Dictionary of Accounting Terms*, 3rd ed. (Barron's 2000).

[42] A reviewed financial statement is an accounting service that provides a board of directors and interested parties some assurance as to the reliability of financial data without the CPA conducting an examination in accordance with GAAP. Reviewed financial statements must comply with AICPA auditing and review standards for public companies or the AICPA review standards for non-public businesses. *Id.*

[43] An audited financial statement by a CPA verifies the accuracy and completeness of the audited entities records in accordance with GAAP. *Id.*

[44] Section 718.111(13)(b)1., F.S.

[45] Section 718.111(13)(b)2., F.S.

Homeowners' Associations – Amendments

Section 720.306(1)(b), F.S., requires that, unless otherwise provided in the governing documents or required by law, the governing document of an association may be amended by the affirmative vote of two-thirds of the voting interests of the association. The association is required to provide copies of the amendment to the members within 30 days after recording an amendment to the governing documents.

Section 720.306(1)(c), F.S., prohibits amendments that materially and adversely alter the proportionate voting interest appurtenant to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association unless the record parcel owner and all record owners of liens on the parcels join in the execution of the amendment.

III. Effect of Proposed Changes:

Timeshare Projects

The bill amends s. 509.013(4)(b)9., F.S., to exempt timeshare projects from the definition of "public lodging establishment."

The bill amends s. 509.032, F.S., to provide that public lodging units that are classified as timeshare projects are not subject to the requirement of at least biannual inspections by the division.

The bill amends s. 509.221(9), F.S., to exempt timeshare projects from the requirements that public lodging establishments maintain public bathroom facilities, provide in the main public bathroom soap and clean towels or other approved hand-drying devices, and provide each bed, bunk, cot, or other sleeping place for the use of guests with clean pillowslips and under and top sheets. Current law exempts vacation rentals and transient apartments from these requirements.

The bill amends s. 509.241(2), F.S., to provide that a condominium association that does not own any units classified as timeshare projects is not required to apply for or receive a public lodging establishment license. Current law exempts from the license requirement condominium associations that do not own any own units classified as vacation rentals.

The bill amends s. 509.242(1)(c), F.S., relating to public lodging establishments, to define the term "timeshare project" to mean any timeshare property as defined in ch. 721, F.S., that is located in this state and that is also a transient public lodging establishment.

The bill amends s. 509.242(1)(d), F.S., to remove timeshare plans from the definition of a "vacation rental." It also provides that a vacation rental is a transient public lodging establishment that is not a timeshare project.

The bill amends s. 509.251(1), F.S., to allow a single public lodging establishment license to cover all the buildings of a timeshare project which are managed by the same licensed agent even if the buildings are at separate locations. Thus, timeshare projects with respect to aggregating buildings for licensure will be treated the same way vacation rentals currently are.

Marketable Record Title Act

The bill amends s. 712.05(1), F.S., to provide that the homeowners' association or the clerk of the circuit court is not required to provide additional notice pursuant to s. 712.06(3), F.S., in order to preserve association covenants and restrictions under the Marketable Record Title Act The bill also provides that this provision is intended to clarify existing law.

Rental of Condominium Units

The bill amends s. 718.110(13), F.S., to provide that an amendment that prohibits unit owners from renting their units, alters the duration of the rental term, specifies or limits the number of times unit owners are entitled to rent their units during a specified period does not apply to unit owners that vote against the amendment. It does apply to unit owners who consent to the amendment, fail to vote on the amendment, or acquire title after the effective date of the amendment.

Right of Access to Units – Condominiums

The bill creates s. 718.111(5)(b), F.S., to expand the authority of the board to enter abandoned condominium units. Section 718.111(5)(b)1., F.S., provides that, at the sole direction of the board, the association may enter an abandoned unit to inspect it and adjoining common elements, to make specific repairs, and to maintain the unit. This includes repairs to the unit or common elements serving the unit. The bill permits the board to enter an abandoned unit to repair damage from mold, to determine if any mold or deterioration is present, to turn on the power for the unit, and to otherwise maintain, preserve, and protect the unit and adjoining common elements.

Section 718.111(5)(b)1., F.S., provides that a unit is presumed to be abandoned if it is subject to a foreclosure action and not been resided in for at least 4 continuous weeks without prior notice to the association. A unit is also presumed abandoned if a person has not resided in the unit for at least 2 consecutive months without notice to the association and the association is unable to contact the owner or determine the whereabouts of the owner after reasonable inquiry. The bill does not define what efforts to determine the whereabouts of the owner would constitute reasonable inquiry.

Section 718.111(5)(b)2., F.S., provides that, except in the case of an emergency, an association may not enter a unit until after 2 days' notice of intent to enter has been mailed or delivered to the owner at the address of the owner as reflected in the records of the association. It permits the association to give notice by electronic transmission to unit owners who have consented to receive notice by electronic transmission.

Section 718.111(5)(b)3., F.S., permits the association to charge the unit owner for any expense incurred by the association. The charge is enforceable as an assessment pursuant to s. 718.116, F.S., and the association may use its lien authority provided in s. 718.116, F.S., to enforce collection of the expense. This provision does not provide guidance as to the type of expenses that the association may incur and assign to the unit owner, e.g., it does not distinguish between

the actual cost to repair mold or deterioration of the property and administrative expenses incurred by the association in its efforts to contact the unit owner.

Section 718.111(5)(b)4., F.S., authorizes the association to petition a court to appoint a receiver and to rent an abandoned unit for the benefit of the association to offset the association's costs and expenses of maintaining, preserving, and protecting the unit and the adjoining common elements, including the costs of the receivership and all unpaid assessments, interest, administrative late fees, costs of collection, and attorney fees against the rental income.

Condominium – Insurance

The bill amends s. 718.111(11)(j), F.S., to provide that the insurance responsibility of the association or unit owners for reconstruction, repair, or replacement in the absence of an insurable event is determined by the declaration or bylaws.

Condominiums - Official Records

The bill amends s. 718.111(12)(c)5., F.S., to provide that unit owners may consent in writing to the disclosure of other contact information described in this subparagraph.

The bill also creates s. 718.111(12)(f), F.S., to require an outgoing board or committee member to relinquish all official records and property of the association in his or her possession or under his or her control to the incoming board within five days after the election. The bill requires that the division impose a civil penalty as set forth in s. 718.501(1)(d)6., F.S.,[46] against an outgoing board or committee member who willfully and knowingly fails to relinquish such records or property. The requirement that the records and property must be relinquished within 5 days after an election may not apply, or may be vague, in circumstances in which an election is not held to fill a vacancy on the board, e.g., s. 718.112(2)(d)2., F.S., provides that an election is not required if the number of vacancies equals or exceeds the number of candidates.

The bill provides a comparable provision for cooperative associations in s. 719.104(2)(e), F.S.

Condominiums - Bylaws-Meetings of the Board

The bill amends s. 718.112(2)(b)5., F.S., to permit a board or committee member's participation in a meeting via telephone, real-time videoconferencing, or similar real-time electronic or video communication to count towards a quorum and that the member can vote as if present. There is a comparable provision in current law for meetings of the board of cooperative associations.[47]

The bill also amends s. 718.112(2)(c), F.S., to provide that a board member may use e-mail as a means of communication but may not cast a vote on an association matter via e-mail.

[46] Section 718.501(1)(d)6., F.S., authorizes the division to impose a civil penalty individually against an officer or board member who willfully and knowingly violates a provision of this chapter, adopted rule, or a final order of the division. The civil penalty may not exceed $5,000.
[47] Section 719.106(1)(b)5., F.S.

Condominiums-Assessments

The bill amends s. 718.116(1)(a), F.S., to provide that a unit owner is jointly and severally liable with the previous owner not only for all unpaid assessments, but also interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process. The bill provides a comparable provision for cooperative associations in s. 719.108(1), F.S, and for homeowners' associations in s. 720.3085(2)(b), F.S.

The bill also provides that the previous owner does not include an association that acquires the title to a delinquent property through foreclosure or by deed in lieu of foreclosure. The present unit owner's liability for these costs associated with the collection process is limited to the amounts that accrued before the association acquired the title to the delinquent property. Current law provides a comparable provision for homeowners' associations in s. 720.3085(2)(b), F.S. The bill provides a comparable provision for cooperative associations in s. 719.108(1), F.S,

Distressed Condominium Relief Act

The bill amends s. 718.707, F.S., to extend the time period to be classified as a bulk buyer or bulk assignee from July 1, 2015 to July 1, 2016.

Cooperatives - Official Records

The bill amends s. 719.104(2)(c)5., F.S., to provide that unit owners may consent in writing to the disclosure of other contact information described in this subparagraph. The bill provides comparable provisions for cooperative associations in s. 719.104(2)(c)5., F.S., and homeowners' associations in s. 720.303(5)(c)5., F.S.

The bill also creates s. 719.104(2)(e), F.S., to require an outgoing board or committee member to relinquish all official records and property of the association in his or her possession or under his or her control to the incoming board within 5 days after the election. The bill requires that the division impose a civil penalty as set forth in s. 719.501(1)(d)., F.S.,[48] against an outgoing board or committee member who willfully and knowingly fails to relinquish such records or property.

The bill provides a comparable provision for condominium associations in s. 718.111(12)(f), F.S.

Cooperatives – Financial Reporting

The bill amends s. 719.104(4), F.S., to specify the type of financial reporting that a cooperative association must prepare. The bill increases the time that the board has to prepare a financial statement from 60 to 90 days. It is unclear under the bill whether the board has 90 days to contract with a third party to prepare the financial statement or whether the third party must complete the financial statement within the 90 days. It provides that within 21 days after the financial report is completed by the association or received from the third party, but no later than 120 days after the end of the fiscal year, the board must provide each member of the association

[48] Section 719.501(1)(d)4., F.S., authorizes the division to impose a civil penalty individually against an officer or board member who willfully and knowingly violates a provision of this chapter, adopted rule, or a final order of the division. The civil penalty may not exceed $5000.

a copy of the financial report or a notice that it is available at no charge. The bylaws may provide for different time frames for the financial report. The bill requires that the division adopt rules setting forth uniform accounting principles, standards, and reporting requirements.

The bill replaces existing law which requires a complete financial report of receipts and expenditures for the previous 12 months or a complete set of financial statements for the preceding fiscal year prepared by generally accepted accounting procedures. It provides that the new financial reports must conform to generally accepted accounting principles. The type of reporting is based on the association's total annual revenue.

Section 719.104(4), F.S., provides that cooperative associations may not waive the financial reporting requirements of this section for more than 3 consecutive years.

An association having total annual revenues between $150,000 and $299,000 must prepare compiled financial statements. An association having total annual revenues of at least $300,000, but less than $499,999 must prepare reviewed financial statements. An association having total revenues of $500,000 or more must prepare audited financial statements.

Section 719.104(4)(c)1., F.S., provides that an association with total annual revenue of less than $150,000 must prepare a report of cash receipts and expenditures.

These financial reporting thresholds are comparable to those required under the division's current financial reporting rule for cooperatives.[49] The thresholds are also comparable to the financial reporting thresholds for condominiums in s. 718.111(13), F.S., and for homeowners' associations in s. 720.303(7), F.S.

Section 719.104(4)(c)2., F.S., provides that an association of fewer than 50 units, regardless of the association's annual revenues, must prepare a report of cash receipts and expenditures, unless otherwise required by the declaration or other recorded governing documents.

The Institute of Certified Public Accountants has raised concerns about the smaller associations being exempt from the monetary requirements for reports. The institute is concerned that some smaller associations may have substantial assets and expenses that should have the same reporting requirements.

Section 719.104(4)(c)3., F.S., specifies the receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications that must be disclosed in the report of cash receipts and expenditures.

Section 719.104(4)(d)., F.S., provides that, if at least 20 percent of the unit owners petition the board for a greater level of financial reporting than required under s. 719.104, F.S., the association must duly notice and hold a meeting of the members within 30 days after receipt of the petition. Upon approval by a majority of the voting interests present at the meeting, the association must prepare an amended budget or adopt a special assessment to pay for the financial report regardless of any provision to the contrary in the declaration or other recorded

[49] *See* rule 61B-76.006, F.A.C.

governing documents. Section 719.104(4)(d)., F.S., also requires that the association provide the following within 90 days after the meeting or the end of the fiscal year, whichever occurs later:

- Compiled, reviewed, or audited financial statements if the association is otherwise required to prepare a report of cash receipts and expenditures;
- Reviewed or audited financial statements if the association is otherwise required to prepare compiled financial statements; or
- Audited financial statements if the association is otherwise required to prepare reviewed financial statements.

Section 719.104(4)(e), F.S., provides that, if approved by a majority of voting interests present at a duly called meeting, an association may prepare or cause to be prepared:

- A report of cash receipts and expenditures in lieu of a compiled, reviewed or audited financial statement;
- A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or
- A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

Cooperatives – Officers and Directors

The bill amends s. 719.106(1)(a)2., F.S., to provide that a person who has been suspended or removed by the division under ch. 719. F.S.,[50] or who is delinquent in the payment of any monetary obligation due to the association, is not eligible to be a candidate for board membership and may not be listed on the ballot. Section 718.112(2)(d)2., F.S., provides a comparable provision for condominium associations in current law.

Section 719.106(1)(a)2., F.S., also provides that a director or officer charged by information or indictment with a felony theft or embezzlement offense involving the association's funds or property must be removed from office, creating a vacancy in the office to be filled according to law until the end of the period of the suspension or the end of the director's term of office, whichever occurs first.[51] While the criminal charge is pending, the officer or director may not be appointed or elected to a position as a director or officer. The director or officer must be reinstated for the remainder of his or her term of office, if any, if the charges are resolved without a finding of guilt. Section 718.112(2)(o), F.S., provides a comparable provision in current law for condominium associations.

This provision also provides that a person who has been convicted of any felony in this state or in a United States District or Territorial Court, or who has been convicted of any offense in another jurisdiction which would be considered a felony if committed in this state, is not eligible for board membership unless such felon's civil rights have been restored for at least 5 years as of

[50] Section 719.501(1)(d)6., F.S., authorizes the division to order the removal of an officer or board member who has willfully and knowingly violated a provision of ch. 719, F.S., adopted rule, or a final order of the division.

[51] Section 719.106(1)(d)6., F.S., provides for the filling of a vacancy, unless otherwise provided in the bylaws. If a vacancy occurs on the board before the expiration of a term, it may be filled by the affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum, or by the sole remaining director. Alternatively, a board may hold an election to fill the vacancy. Unless otherwise provided in the bylaws, a board member appointed or elected under this subparagraph shall fill the vacancy for the unexpired term of the seat being filled.

the date such person seeks election to the board. The bill provides that the validity of an action by the board is not affected if it is later determined that a board member is ineligible for board membership due to having been convicted of a felony. Section 718.112(2)(d)2., F.S., provides a comparable provision in current law for condominium associations.

Cooperatives-Assessments

The bill amends s. 719.108(1), F.S, to provide that a unit owner is jointly and severally liable with the previous owner not only for all unpaid assessments, but also interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process. The bill provides a comparable provision for condominium associations in s. 718.116(1)(a), F.S., and homeowners' associations in s. 720.3085(2)(b), F.S.

The bill also provides that the previous owner does not include an association that acquires the title to a delinquent property through foreclosure or by deed in lieu of foreclosure. The present unit owner's liability for these costs associated with the collection process is limited to the amounts that accrued before the association acquired the title to the delinquent property. Current law provides a comparable provision for homeowners' associations in s. 720.3085(2)(b), F.S. The bill provides a comparable provision for condominium associations in s. 718.116(1)(a), F.S,

Emergency Powers for Cooperative Boards

The bill creates s. 719.128, F.S., to authorize the boards of cooperative associations, to the extent allowed by law, to exercise certain emergency powers in response to the declaration of a state of emergency in accordance with s. 252.36(2), F.S.,[52] or a mandatory evacuation order issued by civil or law enforcement authorities.

The association's articles of incorporation or bylaws may specifically prohibit the exercise of the powers granted by the bill. The exercise of authority must also be consistent with the standards of s. 617.0830, F.S., which sets forth the general standards for directors of a corporation not for profit, including acting in good faith, acting with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and acting in a manner that he or she reasonably believes to be in the best interests of the corporation.

The bill authorizes the board to:

- Conduct board or membership meetings with notice of the meetings and the board's decisions by any means the board deems appropriate and practical under the circumstances;
- Cancel and reschedule any association meeting;
- Appoint persons to act as agents for or assist any director or officer due to incapacity or unavailability;
- Relocate the principal office or designate alternative principal offices;

[52] Section 252.36, F.S., provides emergency management powers to the Governor. Section 252.36(2), F.S., authorizes the Governor to declare a state of emergency by executive order or proclamation if she or he finds an emergency has occurred or is imminent.

- Provide notice of board meetings decisions by posted signs, mailed notice to members, internet postings, public service announcements, or any other means of communication which the board deems reasonable under the circumstances;
- Enter into agreements with counties and municipalities for debris removal;
- Implement a disaster plan prior to, or after, a catastrophic event, including shutting down elevators, electricity, water, sewer, security systems, or air conditioners for association buildings;
- Based on the advice of emergency management officials or licensed professionals retained by the board, declare any portion of the condominium property unavailable for entry or occupancy by unit owners, family members, tenants, guests, agents, or invitees in order to protect the health, safety, or welfare of such persons;
- Based on the advice of emergency management officials or licensed professionals retained by the board, determine whether the condominium property can be safely inhabited or occupied. However, such evaluation is not conclusive as to any determination of habitability pursuant to the declaration; and
- Require the evacuation of the property. The association is immune from liability for injury to persons or property arising from the failure to follow an evacuation required by the board.

It is unclear whether the disaster plan may include provisions related to shutting down elevators, electricity, water, sewer, security systems, or air conditioners for association buildings or will permit the disaster plan to include shutting down the electricity, water, and sewer systems for both members' units and for association buildings. A comparable provision for condominium associations is in s. 718.1265, F.S.

In response to damage caused by an event for which a state of emergency is declared in accordance with s. 252.36(2), F.S., the association may:

- Mitigate further damage, including preventing or eradicating fungus, mold, or mildew by removing wet drywall, insulation, carpet, cabinetry, or other fixtures, even if the unit owner is obligated by the declaration or law to insure or replace such items, and remove personal property from a unit;
- Contract, on behalf of the unit owner, for services which are necessary to prevent further damage to the cooperative property, including:
  - drying of units,
  - boarding of broken windows or doors, and
  - replacement of damaged air conditioners or air handlers to provide climate control in the units or other portions of the property;
- Levy special assessments without a vote of the owners; and
- Borrow money and pledge association assets as collateral without unit owner approval.

The bill provides that the grant of authority to condominium boards to borrow money is not intended to limit the general authority of the association to borrow money.

The bill provides that the use of the special powers authorized under this section is limited to those times and circumstances that are reasonably necessary to the health, safety, and welfare of persons, and to mitigate further damage and make emergency repairs.

Current law provides a comparable provision for condominium associations in s. 718.1265, F.S. The bill provides a comparable provision for cooperative associations in s. 720.316, F.S.

Homeowners' Associations – Official Records

The bill amends s. 720.303(5)(c)5., F.S., to provide that unit owners may consent in writing to the disclosure of other contact information described in this subparagraph. The bill provides comparable provisions for condominium associations is s. 718.111(12)(c)5., F.S., and cooperative associations in s. 719.104(2)(c)5., F.S.

Homeowners' Associations – Amendments

The bill amends s. 720.306(1)(b), F.S., to provide that an association does not have to provide members with copies of an amendment to the governing documents after it is approved by the membership if a copy of the proposed amendment was previously provided to the members before the vote of the members on the amendment and the proposed amendment was not changed before the vote of the members. Instead, the association must provide notice that the amendment was adopted. The notice must provide the official book and page number or instrument number of the recorded amendment, and state that a copy of the amendment is available at no charge to the member upon written request to the association. The association may also provide the copies and notice electronically to those owners who have consented to receive notice electronically.

Homeowners' Associations – Assessments

The bill amends s. 720.3085(2)(b), F.S., to provide that a unit owner is jointly and severally liable with the previous owner not only for all unpaid assessments, but also interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process. The previous owner does not include an association that acquires the title to a delinquent property through foreclosure or by deed in lieu of foreclosure. The present unit owner's liability for these costs associated with the collection process is limited to the amounts that accrued before the association acquired the title to the delinquent property.

The bill provides a comparable provision for condominium associations in s. 718.116(1)(a), F.S., and cooperative associations in s. 719.108(1), F.S.

Emergency Powers for Homeowners' Association Boards

The bill creates s. 720.316, F.S., to authorize the boards of homeowners' associations, to the extent allowed by law, to exercise the following emergency powers in response to the declaration of a state of emergency in accordance with s. 252.36(2), F.S.,[53] or a mandatory evacuation order is issued by civil or law enforcement authorities.

[53] Section 252.36, F.S., provides emergency management powers to the Governor. Section 252.36(2), F.S., authorizes the Governor to declare a state of emergency by executive order or proclamation if she or he finds an emergency has occurred or is imminent.

The association's articles of incorporation or bylaws may specifically prohibit the exercise of the powers granted by the bill. The exercise of authority must also be consistent with the standards of s. 617.0830, F.S., which sets forth the general standards for directors of a corporation not for profit, including acting in good faith, acting with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and acting in a manner that he or she reasonably believes to be in the best interests of the corporation.

The bill authorizes the board to:

- Conduct board meetings with notice given only to directors with whom it is practicable to communicate;
- Cancel and reschedule any association meeting;
- Appoint persons to act as agents for or assist any director or officer due to incapacity or unavailability;
- Relocate the principal office or designate alternative principal offices;
- Provide notice of board meetings decisions by posted signs, mailed notice to members, internet postings, public service announcements, or any other means of communication which the board deems reasonable under the circumstances;
- Enter into agreements with counties and municipalities for debris removal;
- Implement a disaster plan prior to, or after, a catastrophic event, including shutting down elevators, electricity, water, sewer, security systems, or air conditioners for association buildings;
- Based on the advice of emergency management officials or licensed professionals retained by the board, declare any portion of the condominium property unavailable for entry or occupancy by unit owners, family members, tenants, guests, agents, or invitees in order to protect the health, safety, or welfare of such persons; and
- Based on the advice of emergency management officials or licensed professionals retained by the board, determine whether the condominium property can be safely inhabited or occupied. However, such evaluation is not conclusive as to any determination of habitability pursuant to the declaration.

It is unclear whether the disaster plan may include provisions related to shutting down elevators, electricity, water, sewer, security systems, or air conditioners for association buildings or will permit the disaster plan to include shutting down the electricity, water, and sewer systems for both members' units and for association buildings.

In response to damage caused by an event for which a state of emergency is declared in accordance with s. 252.36(2), F.S., the association may:

- Mitigate further damage, including preventing or eradicating fungus, mold, or mildew by removing wet drywall, insulation, carpet, cabinetry, or other fixtures on or within association property;
- Levy special assessments without a vote of the owners; and
- Borrow money and pledge association assets as collateral without unit owner approval.

The bill provides that the grant of authority to homeowners' association boards to borrow money is not intended to limit the general authority of the association to borrow money.

The bill provides that the use of the special powers authorized under this section is limited to those times and circumstances that are reasonably necessary to the health, safety, and welfare of persons, and to mitigate further damage and make emergency repairs.

Current law provides a comparable provision for condominium associations in s. 718.1265, F.S. The bill provides a comparable provision for cooperative associations in s. 719.128, F.S.

Effective Date

The bill provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Under the bill, a unit owner in condominium association or a cooperative or homeowner in a homeowner's association is jointly and severally liable with the previous owner not only for all unpaid assessments, but also interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 509.013, 509.032, 509.221, 509.241, 509.242, 509.251, 712.05, 718.110, 718.111, 718.112, 718.116, 718.707, 719.104, 719.106, 719.108, 720.306, and 720.3085.

This bill creates sections 719.128 and 720.316 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries Committee on March 6, 2014:
The committee substitute (CS) differs from SB 798 as follows:
The CS changes the title from an act relating to "real and personal property" to an act relating to "residential property."

The CS amends s. 509.013(4)(b)9., F.S., to exempt timeshare projects from the definition of "public lodging establishment."

The CS amends s. 509.032, F.S., to provide that public lodging units that are classified as timeshare projects are not subject to the requirement of at least biannual inspections by the division.

The CS amends s. 509.221(9), F.S., to exempt timeshare projects from the requirements that public lodging establishments must maintain public bathroom facilities, provide in the main public bathroom soap and clean towels or other approved hand-drying devices, and provide each bed, bunk, cot, or other sleeping place for the use of guests with clean pillowslips and under and top sheets.

The CS amends s. 509.241(2), F.S., to provide that a condominium that does not own any units that classified as a timeshare project is not required to apply for or receive a public lodging establishment license.

The CS amends s. 509.242(1)(c), F.S., to define the term "timeshare project" to mean any timeshare property as defined in ch. 721, F.S., that is located in this state and that is also a transient public lodging establishment.

The CS amends s. 509.242(1)(d), F.S., to remove timeshare plans from the definition of a "vacation rental." It also provides that a vacation rental is a transient public lodging establishment that is not a timeshare project.

The CS amends s. 509.251(1), F.S., to include timeshare projects, in addition vacation rental units, that are within separate buildings or at separate locations but managed by one licensed agent may be combined in a single license application, and requires that the division charge a license fee as if all units in the application are in a single licensed establishment.

The CS amends s. 712.05(1), F.S., to provide that the homeowners' association or the clerk of the circuit court is not be required to provide additional notice pursuant to s. 712.06(3), F.S., It removes the provision that the homeowners' association or the clerk of the circuit court is required to provide notice other than as provided under s. 712.06(3), F.S.

The CS amends s. 718.111(5)(b)2., F.S., to reference a 2-day wait instead of a 48-hour wait after the notice of intent to enter a property that has been abandoned. It provides that the notice of intent to enter must have been mailed or delivered, and it permits the association to give notice by electronic transmission to unit owners who have consented to receive notice by electronic transmission.

The CS amends s. 718.111(11)(j), F.S., to provide that the insurance responsibility of the association or unit owners for reconstruction, repair, or replacement in the absence of an insurable event shall be determined by the provisions of the declaration or bylaws.

The CS amends s. 718.111(12)(c)5., F.S., to provide that unit owners may consent in writing to the disclosure of other contact information described in this subparagraph.

The CS does not amend s. 718.111(12)(f), F.S., to provide that outgoing board or committee member who violates this requirement is personally subject to a civil penalty pursuant to s. 718.501(1)(d), F.S. The CS amends this provision to require the division to impose a civil penalty as set forth in s. 718.501(1)(d)6., F.S., against an outgoing board or committee member who willfully and knowingly fails to relinquish such records or property.

The CS amends s. 718.112(2)(b)5., F.S., to provide that members of the board of administration may participate by real-time electronic or video communication.

The bill amends s. 719.104(2)(c)5., F.S., to provide that unit owners may consent in writing to the disclosure of other contact information described in this subparagraph.

The CS does not amend s. 719.104(2)(e), F.S., to provide that outgoing board or committee member who violates this requirement is personally subject to a civil penalty pursuant to s. 719.501(1)(d), F.S. The CS amends this provision to require the division to impose a civil penalty as set forth in s. 719.501(1)(d), F.S., against an outgoing board or committee member who willfully and knowingly fails to relinquish such records or property.

The CS does not amend s. 719.106(1)(c), F.S., to require that notice of board meetings must specifically identify all agenda items. The CS also does not provide that, if 20 percent of the voting interests petition the board to address an item of business, the board must place the item on the agenda at its next regular board meeting or at a special meeting of the board no later than 60 days after the petition is received.

The CS does not amend s. 719.106(1)(d)6., F.S., to provide that the term of a board member who was appointed or elected to fill a vacancy on the board expires at the next annual meeting, and it does not delete the current provision that appointed or elected member shall fill the unexpired term of the seat being filled.

The CS amends s. 719.128(1)(f), F.S., to provide that the association's implementation of a disaster plan includes shutting off air conditioners for association buildings.

The CS amends s. 720.303(5)(c)5., F.S., to provide that unit owners may consent in writing to the disclosure of other contact information described in this subparagraph.

The CS amends s. 720.306(1)(b), F.S., to provide that an association does not have to provide members with copies of an amendment to the governing documents after it has been approved by the membership if a copy of the proposed amendment had been previously provided to the members before the vote of the members on the amendment and the proposed amendment was not changed before the vote of the members. In lieu of providing copies of the amendment, the CS also specifies the notice that must be provided to members after an amendment has been adopted.

The CS amends s. 720.316(1)(f), F.S., to provide that the association's implementation of a disaster plan includes shutting off air conditioners for association buildings.

B. Amendments:

None.

715464

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Ring) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Subsection (4) of section 509.013, Florida Statutes, is amended to read:

509.013 Definitions.—As used in this chapter, the term:

(4)(a) "Public lodging establishment" includes a transient public lodging establishment as defined in subparagraph 1. and a nontransient public lodging establishment as defined in

715464

subparagraph 2.

1. "Transient public lodging establishment" means any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests.

2. "Nontransient public lodging establishment" means any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests for periods of at least 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests for periods of at least 30 days or 1 calendar month.

License classifications of public lodging establishments, and the definitions therefor, are set out in s. 509.242. For the purpose of licensure, the term does not include condominium common elements as defined in s. 718.103.

(b) The following are excluded from the definitions in paragraph (a):

1. Any dormitory or other living or sleeping facility maintained by a public or private school, college, or university for the use of students, faculty, or visitors.

2. Any facility certified or licensed and regulated by the Agency for Health Care Administration or the Department of Children and Family Services or other similar place regulated under s. 381.0072.

3. Any place renting four rental units or less, unless the rental units are advertised or held out to the public to be places that are regularly rented to transients.

4. Any unit or group of units in a condominium, cooperative, or timeshare plan and any individually or collectively owned one-family, two-family, three-family, or four-family dwelling house or dwelling unit that is rented for periods of at least 30 days or 1 calendar month, whichever is less, and that is not advertised or held out to the public as a place regularly rented for periods of less than 1 calendar month, provided that no more than four rental units within a single complex of buildings are available for rent.

5. Any migrant labor camp or residential migrant housing permitted by the Department of Health under ss. 381.008-381.00895.

6. Any establishment inspected by the Department of Health and regulated by chapter 513.

7. Any nonprofit organization that operates a facility providing housing only to patients, patients' families, and patients' caregivers and not to the general public.

8. Any apartment building inspected by the United States Department of Housing and Urban Development or other entity acting on the department's behalf that is designated primarily as housing for persons at least 62 years of age. The division may require the operator of the apartment building to attest in writing that such building meets the criteria provided in this subparagraph. The division may adopt rules to implement this requirement.

9. Any roominghouse, boardinghouse, or other living or

sleeping facility that may not be classified as a hotel, motel, timeshare project, vacation rental, nontransient apartment, bed and breakfast inn, or transient apartment under s. 509.242.

Section 2. Paragraph (a) of subsection (2) of section 509.032, Florida Statutes, is amended to read:

509.032 Duties.—

(2) INSPECTION OF PREMISES.—

(a) The division has responsibility and jurisdiction for all inspections required by this chapter. The division has responsibility for quality assurance. Each licensed establishment shall be inspected at least biannually, except for transient and nontransient apartments, which shall be inspected at least annually, and shall be inspected at such other times as the division determines is necessary to ensure the public's health, safety, and welfare. The division shall establish a system to determine inspection frequency. Public lodging units classified as vacation rentals or timeshare projects are not subject to this requirement but shall be made available to the division upon request. If, during the inspection of a public lodging establishment classified for renting to transient or nontransient tenants, an inspector identifies vulnerable adults who appear to be victims of neglect, as defined in s. 415.102, or, in the case of a building that is not equipped with automatic sprinkler systems, tenants or clients who may be unable to self-preserve in an emergency, the division shall convene meetings with the following agencies as appropriate to the individual situation: the Department of Health, the Department of Elderly Affairs, the area agency on aging, the local fire marshal, the landlord and affected tenants and

clients, and other relevant organizations, to develop a plan which improves the prospects for safety of affected residents and, if necessary, identifies alternative living arrangements such as facilities licensed under part II of chapter 400 or under chapter 429.

Section 3. Subsection (9) of section 509.221, Florida Statutes, is amended to read:

509.221 Sanitary regulations.—

(9) Subsections (2), (5), and (6) do not apply to any facility or unit classified as a vacation rental, ~~or~~ nontransient apartment, or timeshare project as described in s. 509.242(1)(c), ~~and~~ (d), and (g).

Section 4. Subsection (2) of section 509.241, Florida Statutes, is amended to read:

509.241 Licenses required; exceptions.—

(2) APPLICATION FOR LICENSE.—Each person who plans to open a public lodging establishment or a public food service establishment shall apply for and receive a license from the division prior to the commencement of operation. A condominium association, as defined in s. 718.103, which does not own any units classified as vacation rentals or timeshare projects under s. 509.242(1)(c) or (g) is not required to apply for or receive a public lodging establishment license.

Section 5. Subsection (1) of section 509.242, Florida Statutes, is amended to read:

509.242 Public lodging establishments; classifications.—

(1) A public lodging establishment shall be classified as a hotel, motel, nontransient apartment, transient apartment, bed and breakfast inn, timeshare project, or vacation rental if the

establishment satisfies the following criteria:

(a) *Hotel.*—A hotel is any public lodging establishment containing sleeping room accommodations for 25 or more guests and providing the services generally provided by a hotel and recognized as a hotel in the community in which it is situated or by the industry.

(b) *Motel.*—A motel is any public lodging establishment which offers rental units with an exit to the outside of each rental unit, daily or weekly rates, offstreet parking for each unit, a central office on the property with specified hours of operation, a bathroom or connecting bathroom for each rental unit, and at least six rental units, and which is recognized as a motel in the community in which it is situated or by the industry.

(c) *Vacation rental.*—A vacation rental is any unit or group of units in a condominium or~~,~~ cooperative~~, or timeshare plan~~ or any individually or collectively owned single-family, two-family, three-family, or four-family house or dwelling unit that is also a transient public lodging establishment but that is not a timeshare project.

(d) *Nontransient apartment.*—A nontransient apartment is a building or complex of buildings in which 75 percent or more of the units are available for rent to nontransient tenants.

(e) *Transient apartment.*—A transient apartment is a building or complex of buildings in which more than 25 percent of the units are advertised or held out to the public as available for transient occupancy.

(f) *Bed and breakfast inn.*—A bed and breakfast inn is a family home structure, with no more than 15 sleeping rooms,


715464

which has been modified to serve as a transient public lodging establishment, which provides the accommodation and meal services generally offered by a bed and breakfast inn, and which is recognized as a bed and breakfast inn in the community in which it is situated or by the hospitality industry.

(g) *Timeshare project.*—A timeshare project is a timeshare property, as defined in chapter 721, which is located in this state and which is also a transient public lodging establishment.

Section 6. Subsection (1) of section 509.251, Florida Statutes, is amended to read:

509.251 License fees.—

(1) The division shall adopt, by rule, a schedule of fees to be paid by each public lodging establishment as a prerequisite to issuance or renewal of a license. Such fees shall be based on the number of rental units in the establishment. The aggregate fee per establishment charged any public lodging establishment shall not exceed $1,000; however, the fees described in paragraphs (a) and (b) may not be included as part of the aggregate fee subject to this cap. Vacation rental units or timeshare projects within separate buildings or at separate locations but managed by one licensed agent may be combined in a single license application, and the division shall charge a license fee as if all units in the application are in a single licensed establishment. The fee schedule shall require an establishment which applies for an initial license to pay the full license fee if application is made during the annual renewal period or more than 6 months prior to the next such renewal period and one-half of the fee if application is made 6


715464

months or less prior to such period. The fee schedule shall include fees collected for the purpose of funding the Hospitality Education Program, pursuant to s. 509.302, which are payable in full for each application regardless of when the application is submitted.

(a) Upon making initial application or an application for change of ownership, the applicant shall pay to the division a fee as prescribed by rule, not to exceed $50, in addition to any other fees required by law, which shall cover all costs associated with initiating regulation of the establishment.

(b) A license renewal filed with the division within 30 days after the expiration date shall be accompanied by a delinquent fee as prescribed by rule, not to exceed $50, in addition to the renewal fee and any other fees required by law. A license renewal filed with the division more than 30 but not more than 60 days after the expiration date shall be accompanied by a delinquent fee as prescribed by rule, not to exceed $100, in addition to the renewal fee and any other fees required by law.

Section 7. Subsection (1) of section 712.05, Florida Statutes, is amended to read:

712.05 Effect of filing notice.—

(1) A ~~Any~~ person claiming an interest in land or a homeowners' association desiring to preserve a ~~any~~ covenant or restriction may preserve and protect the same from extinguishment by the operation of this act by filing for record, during the 30-year period immediately following the effective date of the root of title, a written notice~~, in writing,~~ in accordance with this chapter. Such ~~the provisions~~


715464

~~hereof, which~~ notice preserves ~~shall have the effect of so preserving~~ such claim of right or such covenant or restriction or portion of such covenant or restriction for up to ~~a period of not longer than~~ 30 years after filing the notice ~~same~~ unless the notice is filed again ~~filed~~ as required in this chapter ~~herein~~. A person's ~~No~~ disability or lack of knowledge of any kind may not ~~on the part of anyone shall~~ delay the commencement of or suspend the running of the ~~said~~ 30-year period. Such notice may be filed for record by the claimant or by any other person acting on behalf of a ~~any~~ claimant who is:

(a) Under a disability;~~,~~

(b) Unable to assert a claim on his or her behalf;~~,~~ or

(c) One of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

Such notice may be filed by a homeowners' association only if the preservation of such covenant or restriction or portion of such covenant or restriction is approved by at least two-thirds of the members of the board of directors of an incorporated homeowners' association at a meeting for which a notice, stating the meeting's time and place and containing the statement of marketable title action described in s. 712.06(1)(b), was mailed or hand delivered to members of the homeowners' association at least ~~not less than~~ 7 days before ~~prior to~~ such meeting. The homeowners' association or clerk of the circuit court is not required to provide additional notice pursuant to s. 712.06(3). The preceding sentence is intended to clarify existing law.

Section 8. Subsection (5), paragraph (j) of subsection


715464

(11), and paragraph (c) of subsection (12) of section 718.111, Florida Statutes, are amended, and paragraph (f) is added to subsection (12) of that section, to read:

718.111 The association.—

(5) RIGHT OF ACCESS TO UNITS.—

(a) The association has the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit ~~or units~~.

(b)1. In addition to the association's right of access in paragraph (a) and regardless of whether authority is provided in the declaration or other recorded condominium documents, an association, at the sole discretion of the board, may enter an abandoned unit to inspect the unit and adjoining common elements; make repairs to the unit or to the common elements serving the unit, as needed; repair the unit if mold or deterioration is present; turn on the utilities for the unit; or otherwise maintain, preserve, or protect the unit and adjoining common elements. For purposes of this paragraph, a unit is presumed to be abandoned if:

a. The unit is the subject of a foreclosure action and no tenant appears to have resided in the unit for at least 4 continuous weeks without prior written notice to the association; or

b. No tenant appears to have resided in the unit for 2 consecutive months without prior written notice to the association, and the association is unable to contact the owner

or determine the whereabouts of the owner after reasonable inquiry.

2. Except in the case of an emergency, an association may not enter an abandoned unit until 2 days after notice of the association's intent to enter the unit has been mailed or hand-delivered to the owner at the address of the owner as reflected in the records of the association. The notice may be given by electronic transmission to unit owners who previously consented to receive notice by electronic transmission.

3. Any expense incurred by an association pursuant to this paragraph is chargeable to the unit owner and enforceable as an assessment pursuant to s. 718.116, and the association may use its lien authority provided by s. 718.116 to enforce collection of the expense.

4. The association may petition a court of competent jurisdiction to appoint a receiver and may lease out an abandoned unit for the benefit of the association to offset against the rental income the association's costs and expenses of maintaining, preserving, and protecting the unit and the adjoining common elements, including the costs of the receivership and all unpaid assessments, interest, administrative late fees, costs, and reasonable attorney fees.

(11) INSURANCE.—In order to protect the safety, health, and welfare of the people of the State of Florida and to ensure consistency in the provision of insurance coverage to condominiums and their unit owners, this subsection applies to every residential condominium in the state, regardless of the date of its declaration of condominium. It is the intent of the Legislature to encourage lower or stable insurance premiums for

associations described in this subsection.

(j) Any portion of the condominium property that must be insured by the association against property loss pursuant to paragraph (f) which is damaged by an insurable event shall be reconstructed, repaired, or replaced as necessary by the association as a common expense. In the absence of an insurable event, the association or the unit owners shall be responsible for the reconstruction, repair, or replacement, as determined by the provisions of the declaration or bylaws. All property insurance deductibles, uninsured losses, and other damages in excess of property insurance coverage under the property insurance policies maintained by the association are a common expense of the condominium, except that:

1. A unit owner is responsible for the costs of repair or replacement of any portion of the condominium property not paid by insurance proceeds if such damage is caused by intentional conduct, negligence, or failure to comply with the terms of the declaration or the rules of the association by a unit owner, the members of his or her family, unit occupants, tenants, guests, or invitees, without compromise of the subrogation rights of the insurer.

2. The provisions of subparagraph 1. regarding the financial responsibility of a unit owner for the costs of repairing or replacing other portions of the condominium property also apply to the costs of repair or replacement of personal property of other unit owners or the association, as well as other property, whether real or personal, which the unit owners are required to insure.

3. To the extent the cost of repair or reconstruction for

which the unit owner is responsible under this paragraph is reimbursed to the association by insurance proceeds, and the association has collected the cost of such repair or reconstruction from the unit owner, the association shall reimburse the unit owner without the waiver of any rights of subrogation.

4. The association is not obligated to pay for reconstruction or repairs of property losses as a common expense if the property losses were known or should have been known to a unit owner and were not reported to the association until after the insurance claim of the association for that property was settled or resolved with finality, or denied because it was untimely filed.

(12) OFFICIAL RECORDS.—

(c) The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association’s willful failure to comply. Minimum damages are $50 per calendar day for up to 10 days, beginning on the 11th working day after receipt of the written

359 request. The failure to permit inspection entitles any person
360 prevailing in an enforcement action to recover reasonable
361 attorney fees from the person in control of the records who,
362 directly or indirectly, knowingly denied access to the records.
363 Any person who knowingly or intentionally defaces or destroys
364 accounting records that are required by this chapter to be
365 maintained during the period for which such records are required
366 to be maintained, or who knowingly or intentionally fails to
367 create or maintain accounting records that are required to be
368 created or maintained, with the intent of causing harm to the
369 association or one or more of its members, is personally subject
370 to a civil penalty pursuant to s. 718.501(1)(d). The association
371 shall maintain an adequate number of copies of the declaration,
372 articles of incorporation, bylaws, and rules, and all amendments
373 to each of the foregoing, as well as the question and answer
374 sheet as described in s. 718.504 and year-end financial
375 information required under this section, on the condominium
376 property to ensure their availability to unit owners and
377 prospective purchasers, and may charge its actual costs for
378 preparing and furnishing these documents to those requesting the
379 documents. An association shall allow a member or his or her
380 authorized representative to use a portable device, including a
381 smartphone, tablet, portable scanner, or any other technology
382 capable of scanning or taking photographs, to make an electronic
383 copy of the official records in lieu of the association’s
384 providing the member or his or her authorized representative
385 with a copy of such records. The association may not charge a
386 member or his or her authorized representative for the use of a
387 portable device. Notwithstanding this paragraph, the following


715464

records are not accessible to unit owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502 and any record protected by the work-product privilege, including a record prepared by an association attorney or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of such litigation or proceedings until the conclusion of the litigation or proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit.

3. Personnel records of association or management company employees, including, but not limited to, disciplinary, payroll, health, and insurance records. For purposes of this subparagraph, the term "personnel records" does not include written employment agreements with an association employee or management company, or budgetary or financial records that indicate the compensation paid to an association employee.

4. Medical records of unit owners.

5. Social security numbers, driver's license numbers, credit card numbers, e-mail addresses, telephone numbers, facsimile numbers, emergency contact information, addresses of a unit owner other than as provided to fulfill the association's notice requirements, and other personal identifying information of any person, excluding the person's name, unit designation, mailing address, property address, and any address, e-mail

715464

address, or facsimile number provided to the association to fulfill the association's notice requirements. Notwithstanding the restrictions in this subparagraph, an association may print and distribute to parcel owners a directory containing the name, parcel address, and all telephone numbers ~~number~~ of each parcel owner. However, an owner may exclude his or her telephone numbers ~~number~~ from the directory by so requesting in writing to the association. An owner may consent in writing to the disclosure of other contact information described in this subparagraph. The association is not liable for the inadvertent disclosure of information that is protected under this subparagraph if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.

6. Electronic security measures that are used by the association to safeguard data, including passwords.

7. The software and operating system used by the association which allow the manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

(f) An outgoing board or committee member must relinquish all official records and property of the association in his or her possession or under his or her control to the incoming board within 5 days after the election. The division shall impose a civil penalty as set forth in s. 718.501(1)(d)6. against an outgoing board or committee member who willfully and knowingly fails to relinquish such records and property.

Section 9. Paragraphs (b) and (c) of subsection (2) of section 718.112, Florida Statutes, are amended to read:


715464

718.112 Bylaws.—

(2) REQUIRED PROVISIONS.—The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(b) *Quorum; voting requirements; proxies.*—

1. Unless a lower number is provided in the bylaws, the percentage of voting interests required to constitute a quorum at a meeting of the members is a majority of the voting interests. Unless otherwise provided in this chapter or in the declaration, articles of incorporation, or bylaws, and except as provided in subparagraph (d)4., decisions shall be made by a majority of the voting interests represented at a meeting at which a quorum is present.

2. Except as specifically otherwise provided herein, unit owners may not vote by general proxy, but may vote by limited proxies substantially conforming to a limited proxy form adopted by the division. A voting interest or consent right allocated to a unit owned by the association may not be exercised or considered for any purpose, whether for a quorum, an election, or otherwise. Limited proxies and general proxies may be used to establish a quorum. Limited proxies shall be used for votes taken to waive or reduce reserves in accordance with subparagraph (f)2.; for votes taken to waive the financial reporting requirements of s. 718.111(13); for votes taken to amend the declaration pursuant to s. 718.110; for votes taken to amend the articles of incorporation or bylaws pursuant to this section; and for any other matter for which this chapter requires or permits a vote of the unit owners. Except as provided in paragraph (d), a proxy, limited or general, may not


715464

be used in the election of board members. General proxies may be used for other matters for which limited proxies are not required, and may be used in voting for nonsubstantive changes to items for which a limited proxy is required and given. Notwithstanding this subparagraph, unit owners may vote in person at unit owner meetings. This subparagraph does not limit the use of general proxies or require the use of limited proxies for any agenda item or election at any meeting of a timeshare condominium association.

3. Any proxy given is effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. A proxy is not valid longer than 90 days after the date of the first meeting for which it was given and may be revoked~~. Every proxy is revocable~~ at any time at the pleasure of the unit owner executing it.

4. A member of the board of administration or a committee may submit in writing his or her agreement or disagreement with any action taken at a meeting that the member did not attend. This agreement or disagreement may not be used as a vote for or against the action taken or to create a quorum.

5. A ~~If any of the~~ board or committee member's participation in a meeting via telephone, real-time videoconferencing, or similar real-time electronic or video communication counts toward a quorum, and such member may vote as if physically present ~~members meet by telephone conference, those board or committee members may be counted toward obtaining a quorum and may vote by telephone~~. A ~~telephone~~ speaker must be used so that the conversation of such ~~those~~ members may be heard by the board or committee members attending in person as well as


715464

by any unit owners present at a meeting.

(c) *Board of administration meetings.*—Meetings of the board of administration at which a quorum of the members is present are open to all unit owners. Members of the board of administration may use e-mail as a means of communication but may not cast a vote on an association matter via e-mail. A unit owner may tape record or videotape the meetings. The right to attend such meetings includes the right to speak at such meetings with reference to all designated agenda items. The division shall adopt reasonable rules governing the tape recording and videotaping of the meeting. The association may adopt written reasonable rules governing the frequency, duration, and manner of unit owner statements.

1. Adequate notice of all board meetings, which must specifically identify all agenda items, must be posted conspicuously on the condominium property at least 48 continuous hours before the meeting except in an emergency. If 20 percent of the voting interests petition the board to address an item of business, the board, within 60 days after receipt of the petition, shall place the item on the agenda at its next regular board meeting or at a special meeting called for that purpose ~~of the board, but not later than 60 days after the receipt of the petition, shall place the item on the agenda~~. An ~~Any~~ item not included on the notice may be taken up on an emergency basis by a vote of at least a majority plus one of the board members. Such emergency action must be noticed and ratified at the next regular board meeting. However, written notice of a ~~any~~ meeting at which a nonemergency special assessment ~~assessments,~~ or an ~~at which~~ amendment to rules regarding unit use~~,~~ will be considered

must be mailed, delivered, or electronically transmitted to the unit owners and posted conspicuously on the condominium property at least 14 days before the meeting. Evidence of compliance with this 14-day notice requirement must be made by an affidavit executed by the person providing the notice and filed with the official records of the association. Upon notice to the unit owners, the board shall, by duly adopted rule, designate a specific location on the condominium or association property where all notices of board meetings must ~~are to~~ be posted. If there is no condominium property or association property where notices can be posted, notices shall be mailed, delivered, or electronically transmitted to each unit owner at least 14 days before the meeting ~~to the owner of each unit~~. In lieu of or in addition to the physical posting of the notice on the condominium property, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the condominium association. However, if broadcast notice is used in lieu of a notice physically posted on condominium property, the notice and agenda must be broadcast at least four times every broadcast hour of each day that a posted notice is otherwise required under this section. If broadcast notice is provided, the notice and agenda must be broadcast in a manner and for a sufficient continuous length of time so as to allow an average reader to observe the notice and read and comprehend the entire content of the notice and the agenda. Notice of any meeting in which regular or special assessments against unit owners are to be considered ~~for any reason~~ must specifically state that assessments will be


715464

considered and provide the nature, estimated cost, and description of the purposes for such assessments.

2. Meetings of a committee to take final action on behalf of the board or make recommendations to the board regarding the association budget are subject to this paragraph. Meetings of a committee that does not take final action on behalf of the board or make recommendations to the board regarding the association budget are subject to this section, unless those meetings are exempted from this section by the bylaws of the association.

3. Notwithstanding any other law, the requirement that board meetings and committee meetings be open to the unit owners does not apply to:

a. Meetings between the board or a committee and the association's attorney, with respect to proposed or pending litigation, if the meeting is held for the purpose of seeking or rendering legal advice; or

b. Board meetings held for the purpose of discussing personnel matters.

Section 10. Section 718.50151, Florida Statutes, is repealed.

Section 11. Section 718.707, Florida Statutes, is amended to read:

718.707 Time limitation for classification as bulk assignee or bulk buyer.—A person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the condominium parcels were acquired on or after July 1, 2010, but before July 1, 2016 ~~2015~~. The date of such acquisition shall be determined by the date of recording a deed or other instrument of conveyance for such parcels in the public records of the


715464

county in which the condominium is located, or by the date of issuing a certificate of title in a foreclosure proceeding with respect to such condominium parcels.

Section 12. Paragraph (c) of subsection (2) and subsection (4) of section 719.104, Florida Statues, are amended, and paragraph (e) is added to subsection (2) of that section, to read:

719.104 Cooperatives; access to units; records; financial reports; assessments; purchase of leases.—

(2) OFFICIAL RECORDS.—

(c) The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association’s willful failure to comply. The minimum damages are $50 per calendar day for up to 10 days, beginning on the 11th working day after receipt of the written request. The failure to permit inspection entitles any person prevailing in an enforcement action to recover reasonable attorney fees from the person in control of the records who, directly or indirectly, knowingly

denied access to the records. Any person who knowingly or intentionally defaces or destroys accounting records that are required by this chapter to be maintained during the period for which such records are required to be maintained, or who knowingly or intentionally fails to create or maintain accounting records that are required to be created or maintained, with the intent of causing harm to the association or one or more of its members, is personally subject to a civil penalty pursuant to s. 719.501(1)(d). The association shall maintain an adequate number of copies of the declaration, articles of incorporation, bylaws, and rules, and all amendments to each of the foregoing, as well as the question and answer sheet as described in s. 719.504 and year-end financial information required by the department, on the cooperative property to ensure their availability to unit owners and prospective purchasers, and may charge its actual costs for preparing and furnishing these documents to those requesting the same. An association shall allow a member or his or her authorized representative to use a portable device, including a smartphone, tablet, portable scanner, or any other technology capable of scanning or taking photographs, to make an electronic copy of the official records in lieu of the association providing the member or his or her authorized representative with a copy of such records. The association may not charge a member or his or her authorized representative for the use of a portable device. Notwithstanding this paragraph, the following records shall not be accessible to unit owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502 and any record protected by the work-

715464

product privilege, including any record prepared by an association attorney or prepared at the attorney's express direction which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of such litigation or proceedings until the conclusion of the litigation or proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit.

3. Personnel records of association or management company employees, including, but not limited to, disciplinary, payroll, health, and insurance records. For purposes of this subparagraph, the term "personnel records" does not include written employment agreements with an association employee or management company, or budgetary or financial records that indicate the compensation paid to an association employee.

4. Medical records of unit owners.

5. Social security numbers, driver license numbers, credit card numbers, e-mail addresses, telephone numbers, facsimile numbers, emergency contact information, addresses of a unit owner other than as provided to fulfill the association's notice requirements, and other personal identifying information of any person, excluding the person's name, unit designation, mailing address, property address, and any address, e-mail address, or facsimile number provided to the association to fulfill the association's notice requirements. Notwithstanding the


715464

restrictions in this subparagraph, an association may print and distribute to parcel owners a directory containing the name, parcel address, and all telephone numbers ~~number~~ of each parcel owner. However, an owner may exclude his or her telephone numbers ~~number~~ from the directory by so requesting in writing to the association. An owner may consent in writing to the disclosure of other contact information described in this subparagraph. The association is not liable for the inadvertent disclosure of information that is protected under this subparagraph if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.

6. Electronic security measures that are used by the association to safeguard data, including passwords.

7. The software and operating system used by the association which allow the manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

(e) An outgoing board or committee member must relinquish all official records and property of the association in his or her possession or under his or her control to the incoming board within 5 days after the election. The division shall impose a civil penalty as set forth in s. 719.501(1)(d) against an outgoing board or committee member who willfully and knowingly fails to relinquish such records and property.

(4) FINANCIAL REPORT.—

(a) Within 90 ~~60~~ days following the end of the fiscal or calendar year or annually on such date as ~~is otherwise~~ provided in the bylaws of the association, the board of administration ~~of~~


715464

~~the association~~ shall prepare and complete, or contract with a third party to prepare and complete, a financial report covering the preceding fiscal or calendar year. Within 21 days after the financial report is completed by the association or received from the third party, but no later than 120 days after the end of the fiscal year, calendar year, or other date provided in the bylaws, the association shall provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member. The division shall adopt rules setting forth uniform accounting principles, standards, and reporting requirements ~~mail or furnish by personal delivery to each unit owner a complete financial report of actual receipts and expenditures for the previous 12 months, or a complete set of financial statements for the preceding fiscal year prepared in accordance with generally accepted accounting procedures~~. ~~The report shall show the amounts of receipts by accounts and receipt classifications and shall show the amounts of expenses by accounts and expense classifications including, if applicable, but not limited to, the following:~~

~~1. Costs for security;~~

~~2. Professional and management fees and expenses;~~

~~3. Taxes;~~

~~4. Costs for recreation facilities;~~

~~5. Expenses for refuse collection and utility services;~~

~~6. Expenses for lawn care;~~

~~7. Costs for building maintenance and repair;~~

~~8. Insurance costs;~~

~~9. Administrative and salary expenses; and~~


715464

~~10. Reserves for capital expenditures, deferred maintenance, and any other category for which the association maintains a reserve account or accounts.~~

(b) Except as provided in paragraph (c), an association whose total annual revenues meet the criteria of this paragraph shall prepare or cause to be prepared a complete set of financial statements according to the generally accepted accounting principles adopted by the Board of Accountancy. The financial statements shall be as follows:

1. An association with total annual revenues between $150,000 and $299,999 shall prepare a compiled financial statement.

2. An association with total annual revenues between $300,000 and $499,999 shall prepare a reviewed financial statement.

3. An association with total annual revenues of $500,000 or more shall prepare an audited financial statement ~~The division shall adopt rules that may require that the association deliver to the unit owners, in lieu of the financial report required by this section, a complete set of financial statements for the preceding fiscal year~~. ~~The financial statements shall be delivered within 90 days following the end of the previous fiscal year or annually on such other date as provided in the bylaws. The rules of the division may require that the financial statements be compiled, reviewed, or audited, and the rules shall take into consideration the criteria set forth in s. 719.501(1)(j).~~

4. The requirement to have the financial statement~~s~~ compiled, reviewed, or audited does not apply to an association


715464

~~associations~~ if a majority of the voting interests of the association present at a duly called meeting of the association have voted ~~determined for a fiscal year~~ to waive this requirement for the fiscal year. In an association in which turnover of control by the developer has not occurred, the developer may vote to waive the audit requirement for the first 2 years of ~~the~~ operation of the association, after which time waiver of an applicable audit requirement shall be by a majority of voting interests other than the developer. The meeting shall be held prior to the end of the fiscal year, and the waiver shall be effective for only one fiscal year. An association may not waive the financial reporting requirements of this section for more than 3 consecutive years ~~This subsection does not apply to a cooperative that consists of 50 or fewer units~~.

(c)1. An association with total annual revenues of less than $150,000 shall prepare a report of cash receipts and expenditures.

2. An association in a community of fewer than 50 units, regardless of the association's annual revenues, shall prepare a report of cash receipts and expenditures in lieu of the financial statements required by paragraph (b), unless the declaration or other recorded governing documents provide otherwise.

3. A report of cash receipts and expenditures must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including the following, as applicable: costs for security, professional, and management fees and expenses; taxes; costs for recreation facilities; expenses for refuse

collection and utility services; expenses for lawn care; costs for building maintenance and repair; insurance costs; administration and salary expenses; and reserves, if maintained by the association.

(d) If at least 20 percent of the unit owners petition the board for a greater level of financial reporting than that required by this section, the association shall duly notice and hold a membership meeting within 30 days after receipt of the petition to vote on raising the level of reporting for that fiscal year. Upon approval by a majority of the voting interests represented at a meeting at which a quorum of unit owners is present, the association shall prepare an amended budget or shall adopt a special assessment to pay for the financial report regardless of any provision to the contrary in the declaration or other recorded governing documents. In addition, the association shall provide within 90 days after the meeting or the end of the fiscal year, whichever occurs later:

1. Compiled, reviewed, or audited financial statements, if the association is otherwise required to prepare a report of cash receipts and expenditures;

2. Reviewed or audited financial statements, if the association is otherwise required to prepare compiled financial statements; or

3. Audited financial statements, if the association is otherwise required to prepare reviewed financial statements.

(e) If approved by a majority of the voting interests present at a properly called meeting of the association, an association may prepare or cause to be prepared:

1. A report of cash receipts and expenditures in lieu of a

compiled, reviewed, or audited financial statement;

2. A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or

3. A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

Section 13. Paragraph (a) of subsection (1) of section 719.106, Florida Statutes, is amended to read:

719.106 Bylaws; cooperative ownership.—

(1) MANDATORY PROVISIONS.—The bylaws or other cooperative documents shall provide for the following, and if they do not, they shall be deemed to include the following:

(a) *Administration.*—

1. The form of administration of the association shall be described, indicating the titles of the officers and board of administration and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and board members. In the absence of such a provision, the board of administration shall be composed of five members, except in the case of cooperatives having five or fewer units, in which case in not-for-profit corporations, the board shall consist of not fewer than three members. In the absence of provisions to the contrary, the board of administration shall have a president, a secretary, and a treasurer, who shall perform the duties of those offices customarily performed by officers of corporations. Unless prohibited in the bylaws, the board of administration may appoint other officers and grant them those duties it deems appropriate. Unless otherwise provided in the bylaws, the

officers shall serve without compensation and at the pleasure of the board. Unless otherwise provided in the bylaws, the members of the board shall serve without compensation.

2. A person who has been suspended or removed by the division under this chapter, or who is delinquent in the payment of any monetary obligation due to the association, is not eligible to be a candidate for board membership and may not be listed on the ballot. A director or officer charged by information or indictment with a felony theft or embezzlement offense involving the association's funds or property is suspended from office. The board shall fill the vacancy according to general law until the end of the period of the suspension or the end of the director's term of office, whichever occurs first. However, if the charges are resolved without a finding of guilt or without acceptance of a plea of guilty or nolo contendere, the director or officer shall be reinstated for any remainder of his or her term of office. A member who has such criminal charges pending may not be appointed or elected to a position as a director or officer. A person who has been convicted of any felony in this state or in any United States District Court, or who has been convicted of any offense in another jurisdiction which would be considered a felony if committed in this state, is not eligible for board membership unless such felon's civil rights have been restored for at least 5 years as of the date such person seeks election to the board. The validity of an action by the board is not affected if it is later determined that a board member is ineligible for board membership due to having been convicted of a felony.


715464

3.~~2.~~ When a unit owner files a written inquiry by certified mail with the board of administration, the board shall respond in writing to the unit owner within 30 days of receipt of the inquiry. The board's response shall either give a substantive response to the inquirer, notify the inquirer that a legal opinion has been requested, or notify the inquirer that advice has been requested from the division. If the board requests advice from the division, the board shall, within 10 days of its receipt of the advice, provide in writing a substantive response to the inquirer. If a legal opinion is requested, the board shall, within 60 days after the receipt of the inquiry, provide in writing a substantive response to the inquirer. The failure to provide a substantive response to the inquirer as provided herein precludes the board from recovering attorney's fees and costs in any subsequent litigation, administrative proceeding, or arbitration arising out of the inquiry. The association may, through its board of administration, adopt reasonable rules and regulations regarding the frequency and manner of responding to the unit owners' inquiries, one of which may be that the association is obligated to respond to only one written inquiry per unit in any given 30-day period. In such case, any additional inquiry or inquiries must be responded to in the subsequent 30-day period, or periods, as applicable.

Section 14. Section 719.128, Florida Statutes, is created to read:

719.128 Association emergency powers.—

(1) To the extent allowed by law, unless specifically prohibited by the cooperative documents, and consistent with s. 617.0830, the board of administration, in response to damage


715464

caused by an event for which a state of emergency is declared pursuant to s. 252.36 in the area encompassed by the cooperative, may exercise the following powers:

(a) Conduct board or membership meetings after notice of the meetings and board decisions is provided in as practicable a manner as possible, including via publication, radio, United States mail, the Internet, public service announcements, conspicuous posting on the cooperative property, or any other means the board deems appropriate under the circumstances.

(b) Cancel and reschedule an association meeting.

(c) Designate assistant officers who are not directors. If the executive officer is incapacitated or unavailable, the assistant officer has the same authority during the state of emergency as the executive officer he or she assists.

(d) Relocate the association's principal office or designate an alternative principal office.

(e) Enter into agreements with counties and municipalities to assist counties and municipalities with debris removal.

(f) Implement a disaster plan before or immediately following the event for which a state of emergency is declared, which may include turning on or shutting off elevators; electricity; water, sewer, or security systems; or air conditioners for association buildings.

(g) Based upon the advice of emergency management officials or upon the advice of licensed professionals retained by the board of administration, determine any portion of the cooperative property unavailable for entry or occupancy by unit owners or their family members, tenants, guests, agents, or invitees to protect their health, safety, or welfare.

(h) Based upon the advice of emergency management officials or upon the advice of licensed professionals retained by the board of administration, determine whether the cooperative property can be safely inhabited or occupied. However, such determination is not conclusive as to any determination of habitability pursuant to the declaration.

(i) Require the evacuation of the cooperative property in the event of a mandatory evacuation order in the area where the cooperative is located. If a unit owner or other occupant of a cooperative fails to evacuate the cooperative property for which the board has required evacuation, the association is immune from liability for injury to persons or property arising from such failure.

(j) Mitigate further damage, including taking action to contract for the removal of debris and to prevent or mitigate the spread of fungus, including mold or mildew, by removing and disposing of wet drywall, insulation, carpet, cabinetry, or other fixtures on or within the cooperative property, regardless of whether the unit owner is obligated by the declaration or law to insure or replace those fixtures and to remove personal property from a unit.

(k) Contract, on behalf of a unit owner, for items or services for which the owner is otherwise individually responsible, but which are necessary to prevent further damage to the cooperative property. In such event, the unit owner on whose behalf the board has contracted is responsible for reimbursing the association for the actual costs of the items or services, and the association may use its lien authority provided by s. 719.108 to enforce collection of the charges.


715464

Such items or services may include the drying of the unit, the boarding of broken windows or doors, and the replacement of a damaged air conditioner or air handler to provide climate control in the unit or other portions of the property.

(l) Notwithstanding a provision to the contrary, and regardless of whether such authority does not specifically appear in the cooperative documents, levy special assessments without a vote of the owners.

(m) Without unit owners' approval, borrow money and pledge association assets as collateral to fund emergency repairs and carry out the duties of the association if operating funds are insufficient. This paragraph does not limit the general authority of the association to borrow money, subject to such restrictions contained in the cooperative documents.

(2) The authority granted under subsection (1) is limited to that time reasonably necessary to protect the health, safety, and welfare of the association and the unit owners and their family members, tenants, guests, agents, or invitees, and to mitigate further damage and make emergency repairs.

Section 15. Paragraph (c) of subsection (5) of section 720.303, Florida Statutes, is amended to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.—

(5) INSPECTION AND COPYING OF RECORDS.—The official records shall be maintained within the state for at least 7 years and shall be made available to a parcel owner for inspection or photocopying within 45 miles of the community or within the county in which the association is located within 10 business


715464

days after receipt by the board or its designee of a written request. This subsection may be complied with by having a copy of the official records available for inspection or copying in the community or, at the option of the association, by making the records available to a parcel owner electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request. If the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages. An association shall allow a member or his or her authorized representative to use a portable device, including a smartphone, tablet, portable scanner, or any other technology capable of scanning or taking photographs, to make an electronic copy of the official records in lieu of the association's providing the member or his or her authorized representative with a copy of such records. The association may not charge a fee to a member or his or her authorized representative for the use of a portable device.

(c) The association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not require a parcel owner to demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records to less than one 8-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including the costs of copying and the costs required for personnel to retrieve and copy the records if the time spent retrieving and


715464

copying the records exceeds one-half hour and if the personnel costs do not exceed $20 per hour. Personnel costs may not be charged for records requests that result in the copying of 25 or fewer pages. The association may charge up to 25 cents per page for copies made on the association's photocopier. If the association does not have a photocopy machine available where the records are kept, or if the records requested to be copied exceed 25 pages in length, the association may have copies made by an outside duplicating service and may charge the actual cost of copying, as supported by the vendor invoice. The association shall maintain an adequate number of copies of the recorded governing documents, to ensure their availability to members and prospective members. Notwithstanding this paragraph, the following records are not accessible to members or parcel owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502 and any record protected by the work-product privilege, including, but not limited to, a record prepared by an association attorney or prepared at the attorney's express direction which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings or which was prepared in anticipation of such litigation or proceedings until the conclusion of the litigation or proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a parcel.


715464

3. Personnel records of association or management company employees, including, but not limited to, disciplinary, payroll, health, and insurance records. For purposes of this subparagraph, the term "personnel records" does not include written employment agreements with an association or management company employee or budgetary or financial records that indicate the compensation paid to an association or management company employee.

4. Medical records of parcel owners or community residents.

5. Social security numbers, driver license numbers, credit card numbers, electronic mailing addresses, telephone numbers, facsimile numbers, emergency contact information, any addresses for a parcel owner other than as provided for association notice requirements, and other personal identifying information of any person, excluding the person's name, parcel designation, mailing address, and property address. Notwithstanding the restrictions in this subparagraph, an association may print and distribute to parcel owners a directory containing the name, parcel address, and <u>all</u> telephone <u>numbers</u> ~~number~~ of each parcel owner. However, an owner may exclude his or her telephone <u>numbers</u> ~~number~~ from the directory by so requesting in writing to the association. <u>An owner may consent in writing to the disclosure of other contact information described in this subparagraph.</u> The association is not liable for the disclosure of information that is protected under this subparagraph if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.

6. Any electronic security measure that is used by the association to safeguard data, including passwords.


715464

7. The software and operating system used by the association which allows the manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

Section 16. Paragraph (b) of subsection (1) of section 720.306, Florida Statutes, is amended to read:

720.306 Meetings of members; voting and election procedures; amendments.—

(1) QUORUM; AMENDMENTS.—

(b) Unless otherwise provided in the governing documents or required by law, and other than those matters set forth in paragraph (c), any governing document of an association may be amended by the affirmative vote of two-thirds of the voting interests of the association. Within 30 days after recording an amendment to the governing documents, the association shall provide copies of the amendment to the members. However, if a copy of the proposed amendment is provided to the members before they vote on the amendment and the proposed amendment is not changed before the vote, the association, in lieu of providing a copy of the amendment, may provide notice to the members that the amendment was adopted, identifying the official book and page number or instrument number of the recorded amendment and that a copy of the amendment is available at no charge to the member upon written request to the association. The copies and notice described in this paragraph may be provided electronically to those owners who previously consented to receive notice electronically.

Section 17. Section 720.316, Florida Statutes, is created to read:


715464

720.316 Association emergency powers.—

(1) To the extent allowed by law, unless specifically prohibited by the declaration or other recorded governing documents, and consistent with s. 617.0830, the board of directors, in response to damage caused by an event for which a state of emergency is declared pursuant to s. 252.36 in the area encompassed by the association, may exercise the following powers:

(a) Conduct board or membership meetings after notice of the meetings and board decisions is provided in as practicable a manner as possible, including via publication, radio, United States mail, the Internet, public service announcements, conspicuous posting on the association property, or any other means the board deems appropriate under the circumstances.

(b) Cancel and reschedule an association meeting.

(c) Designate assistant officers who are not directors. If the executive officer is incapacitated or unavailable, the assistant officer has the same authority during the state of emergency as the executive officer he or she assists.

(d) Relocate the association’s principal office or designate an alternative principal office.

(e) Enter into agreements with counties and municipalities to assist counties and municipalities with debris removal.

(f) Implement a disaster plan before or immediately following the event for which a state of emergency is declared, which may include, but is not limited to, turning on or shutting off elevators; electricity; water, sewer, or security systems; or air conditioners for association buildings.

(g) Based upon the advice of emergency management officials


715464

or upon the advice of licensed professionals retained by the board, determine any portion of the association property unavailable for entry or occupancy by owners or their family members, tenants, guests, agents, or invitees to protect their health, safety, or welfare.

(h) Based upon the advice of emergency management officials or upon the advice of licensed professionals retained by the board, determine whether the association property can be safely inhabited or occupied. However, such determination is not conclusive as to any determination of habitability pursuant to the declaration.

(i) Mitigate further damage, including taking action to contract for the removal of debris and to prevent or mitigate the spread of fungus, including mold or mildew, by removing and disposing of wet drywall, insulation, carpet, cabinetry, or other fixtures on or within the association property.

(j) Notwithstanding a provision to the contrary, and regardless of whether such authority does not specifically appear in the declaration or other recorded governing documents, levy special assessments without a vote of the owners.

(k) Without owners' approval, borrow money and pledge association assets as collateral to fund emergency repairs and carry out the duties of the association if operating funds are insufficient. This paragraph does not limit the general authority of the association to borrow money, subject to such restrictions contained in the declaration or other recorded governing documents.

(2) The authority granted under subsection (1) is limited to that time reasonably necessary to protect the health, safety,


715464

and welfare of the association and the parcel owners and their family members, tenants, guests, agents, or invitees, and to mitigate further damage and make emergency repairs.

Section 18. This act shall take effect July 1, 2014.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to residential properties; amending s. 509.013, F.S.; revising the definition of the term "public lodging establishment"; amending s. 509.032, F.S.; providing that timeshare projects are not subject to annual inspection requirements; amending s. 509.221, F.S.; providing nonapplicability of certain public lodging establishment requirements to timeshare projects; amending s. 509.241, F.S.; providing that a condominium association that does not own any units classified as timeshare projects is not required to apply for or receive a public lodging establishment license; amending s. 509.242, F.S.; revising the definition of the term "public lodging establishment" to include a "timeshare project"; deleting reference to the term "timeshare plan" in the definition of "vacation rental"; defining the term "timeshare project"; amending s. 509.251, F.S.; providing that timeshare projects within separate buildings or at separate locations but managed by one licensed agent

715464

may be combined in a single license application; amending s. 712.05, F.S.; clarifying existing law relating to notification for purposes of preserving marketable title; amending s. 718.111, F.S.; authorizing an association to inspect and repair abandoned condominium units; providing conditions to determine if a unit is abandoned; providing a mechanism for an association to recover costs associated with maintaining an abandoned unit; providing that in the absence of an insurable event, the association or unit owners are responsible for repairs; providing that an owner may consent in writing to the disclosure of certain contact information; requiring an outgoing condominium association board or committee member to relinquish all official records and property of the association within a specified time; providing a civil penalty for failing to relinquish such records and property; amending s. 718.112, F.S.; providing that a board or committee member's participation in a meeting via real-time videoconferencing, Internet-enabled videoconferencing, or similar electronic or video communication counts toward a quorum and that such member may vote as if physically present; prohibiting the board from voting via e-mail; repealing s. 718.50151, F.S., relating to the Community Association Living Study Council and its membership functions; amending s. 718.707, F.S.; extending the date by which a condominium parcel must be acquired in order for a


715464

person to be classified as a bulk assignee or bulk buyer; amending s. 719.104, F.S.; providing that an owner may consent in writing to the disclosure of certain contact information; requiring an outgoing cooperative association board or committee member to relinquish all official records and property of the association within a specified time; providing a civil penalty for failing to relinquish such records and property; providing dates by which financial reports for an association must be completed; specifying that members must receive copies of financial reports; requiring specific types of financial statements for associations of varying sizes; providing exceptions; providing a mechanism for waiving or increasing financial reporting requirements; amending s. 719.106, F.S.; providing for suspension from office of a director or officer who is charged with one or more of certain felony offenses; providing procedures for filling such vacancy or reinstating such member under specific circumstances; providing a mechanism for a person who is convicted of a felony to be eligible for board membership; creating s. 719.128, F.S.; providing emergency powers of a cooperative association; amending s. 720.303, F.S.; providing that an owner may consent in writing to the disclosure of certain contact information; amending s. 720.306, F.S.; providing for specified notice to members in lieu of copies of an amendment; creating s. 720.316, F.S.; providing emergency powers of a homeowners'

1258 association; providing an effective date.

787056

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Ring) recommended the following:

Senate Amendment to Amendment (715464) (with title amendment)

Between lines 579 and 580
insert:

Section 10. Paragraph (a) of subsection (1) of section 718.116, Florida Statutes, is amended to read:

718.116 Assessments; liability; lien and priority; interest; collection.—

(1)(a) A unit owner, regardless of how his or her title has been acquired, including by purchase at a foreclosure sale or by

787056

deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner. Additionally, a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title, as well as interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process, except that in the case of a foreclosure sale, the interest, late charges, and reasonable attorney fees and costs may not exceed 10 percent of the winning bid amount. This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner. For the purposes of this paragraph, the term "previous owner" does not include an association that acquires title to a delinquent property through foreclosure or by deed in lieu of foreclosure. The present parcel owner's liability for unpaid assessments, interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process is limited to those amounts that accrued before the association acquired title to the delinquent property through foreclosure or by deed in lieu of foreclosure. This paragraph does not affect the liability of a first mortgagee or its successor or assignees as provided in paragraph (b).

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 1224

and insert:

the board from voting via e-mail; amending s. 718.116, F.S.; providing that a unit owner is jointly and

787056

severally liable with the previous owner for certain costs; providing an exception; defining the term "previous owner"; limiting costs and fees incurred by the association incident to the collection process to those incurred before the association acquired title; repealing s.

374712

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Ring) recommended the following:

Senate Amendment to Amendment (715464) (with title amendment)

Between lines 579 and 580
insert:

Section 10. Paragraph (a) of subsection (1) of section 718.116, Florida Statutes, is amended to read:

718.116 Assessments; liability; lien and priority; interest; collection.—

(1)(a) A unit owner, regardless of how his or her title has been acquired, including by purchase at a foreclosure sale or by

374712

deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner. Additionally, a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title, as well as interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process, except that in the case of a foreclosure sale, the interest, late charges, and reasonable attorney fees and costs may not exceed 10 percent of the winning bid amount. This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner. For the purposes of this paragraph, the term "previous owner" does not include an association that acquires title to a delinquent property through foreclosure or by deed in lieu of foreclosure. The present unit owner's liability for unpaid assessments, interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process is limited to those amounts that accrued before the association acquired title to the delinquent property through foreclosure or by deed in lieu of foreclosure. This paragraph does not affect the liability of a first mortgagee or its successor or assignees as provided in paragraph (b).

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 1224

and insert:

the board from voting via e-mail; amending s. 718.116, F.S.; providing that a unit owner is jointly and

374712

severally liable with the previous owner for certain costs; providing an exception; defining the term "previous owner"; limiting costs and fees incurred by the association incident to the collection process to those incurred before the association acquired title; repealing s.

By the Committee on Regulated Industries; and Senator Ring

580-02208-14 2014798c1

A bill to be entitled

An act relating to residential properties; amending s. 509.013, F.S.; replacing a reference to timeshare plan with timeshare project; amending s. 509.032, F.S.; providing that timeshare projects are not subject to annual inspection requirements; amending s. 509.221, F.S.; providing that certain public lodging establishment requirements do not apply to timeshare projects; amending s. 509.241, F.S.; providing a condominium association that does not include any units classified as a timeshare project is not required to apply for or receive a public lodging establishment license; amending s. 509.242, F.S.; providing a definition of the term "timeshare project"; deleting the reference to timeshare plans in the definition of the term "vacation rental"; amending s. 509.251, F.S.; providing that timeshare projects within separate buildings or at separate locations but managed by one licensed agent may be combined in a single license application; amending s. 712.05, F.S.; clarifying existing law relating to marketable record title; amending s. 718.110, F.S.; providing that an amendment to a declaration relating to rental condominium units does not apply to unit owners who vote against the amendment; amending s. 718.111, F.S.; providing authority to an association to inspect and repair abandoned condominium units; providing conditions to determine if a unit is abandoned; providing a mechanism for an association to recover

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

580-02208-14 2014798c1

costs associated with maintaining an abandoned unit; providing that in the absence of an insurable event, the association or unit owners are responsible for repairs; providing that an owner may consent in writing to the disclosure of certain contact information; requiring an outgoing condominium association board or committee member to relinquish all official records and property of the association within a specified time; providing a civil penalty for failing to relinquish such records and property; amending s. 718.112, F.S.; providing that a board or committee member's participation in a meeting via real-time videoconferencing, Internet-enabled videoconferencing, or similar electronic or video communication counts toward a quorum and that such member may vote as if physically present; prohibiting the board from voting via e-mail; amending s. 718.116 F.S.; revising the liabilities of the unit owner and the previous owner; excluding specified association from certain liability; limiting the present owner's liability; amending s. 718.707, F.S.; extending the date by which a condominium parcel must be acquired in order for a person to be classified as a bulk assignee or bulk buyer; amending s. 719.104, F.S.; providing that an owner may consent in writing to the disclosure of certain contact information; requiring an outgoing cooperative association board or committee member to relinquish all official records and property of the association within a specified time; providing a civil

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

penalty for failing to relinquish such records and property; providing dates by which financial reports for an association must be completed; specifying that members must receive copies of financial reports; requiring specific types of financial statements for associations of varying sizes; providing exceptions; providing a mechanism for waiving or increasing financial reporting requirements; amending s. 719.106, F.S.; providing for suspension from office of a director or officer who is charged with one or more of certain felony offenses; providing procedures for filling such vacancy or reinstating such member under specific circumstances; providing a mechanism for a person who is convicted of a felony to be eligible for board membership; amending s. 719.108, F.S.; revising the liabilities of the unit owner and the previous unit owner; excluding specified association from certain liability; limiting the liability of the present owner; creating s. 719.128, F.S.; providing emergency powers of a cooperative association; amending s. 720.303, F.S.; providing that an owner may consent in writing to the disclosure of certain contact information; amending s. 720.306, F.S.; providing an exception to the need for the association to provide copies of an amendment to members; amending s. 720.3085, F.S.; revising the liabilities of the parcel owner and the previous parcel owner; limiting the liability of the present parcel owner; creating s. 720.316, F.S.; providing emergency powers of a

homeowners' association; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (4) of section 509.013, Florida Statutes, is amended to read:

509.013 Definitions.—As used in this chapter, the term:

(4)(a) "Public lodging establishment" includes a transient public lodging establishment as defined in subparagraph 1. and a nontransient public lodging establishment as defined in subparagraph 2.

1. "Transient public lodging establishment" means any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests.

2. "Nontransient public lodging establishment" means any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests for periods of at least 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests for periods of at least 30 days or 1 calendar month.

License classifications of public lodging establishments, and the definitions therefor, are set out in s. 509.242. For the purpose of licensure, the term does not include condominium

common elements as defined in s. 718.103.

(b) The following are excluded from the definitions in paragraph (a):

1. Any dormitory or other living or sleeping facility maintained by a public or private school, college, or university for the use of students, faculty, or visitors.

2. Any facility certified or licensed and regulated by the Agency for Health Care Administration or the Department of Children and Family Services or other similar place regulated under s. 381.0072.

3. Any place renting four rental units or less, unless the rental units are advertised or held out to the public to be places that are regularly rented to transients.

4. Any unit or group of units in a condominium, cooperative, or timeshare project ~~plan~~ and any individually or collectively owned one-family, two-family, three-family, or four-family dwelling house or dwelling unit that is rented for periods of at least 30 days or 1 calendar month, whichever is less, and that is not advertised or held out to the public as a place regularly rented for periods of less than 1 calendar month, provided that no more than four rental units within a single complex of buildings are available for rent.

5. Any migrant labor camp or residential migrant housing permitted by the Department of Health under ss. 381.008-381.00895.

6. Any establishment inspected by the Department of Health and regulated by chapter 513.

7. Any nonprofit organization that operates a facility providing housing only to patients, patients' families, and

patients' caregivers and not to the general public.

8. Any apartment building inspected by the United States Department of Housing and Urban Development or other entity acting on the department's behalf that is designated primarily as housing for persons at least 62 years of age. The division may require the operator of the apartment building to attest in writing that such building meets the criteria provided in this subparagraph. The division may adopt rules to implement this requirement.

9. Any roominghouse, boardinghouse, or other living or sleeping facility that may not be classified as a hotel, motel, timeshare project, vacation rental, nontransient apartment, bed and breakfast inn, or transient apartment under s. 509.242.

Section 2. Paragraph (a) of subsection (2) of section 509.032, Florida Statutes, is amended to read:

509.032 Duties.—

(2) INSPECTION OF PREMISES.—

(a) The division has responsibility and jurisdiction for all inspections required by this chapter. The division has responsibility for quality assurance. Each licensed establishment shall be inspected at least biannually, except for transient and nontransient apartments, which shall be inspected at least annually, and shall be inspected at such other times as the division determines is necessary to ensure the public's health, safety, and welfare. The division shall establish a system to determine inspection frequency. Public lodging units classified as vacation rentals or as timeshare projects are not subject to this requirement but shall be made available to the division upon request. If, during the inspection of a public

lodging establishment classified for renting to transient or nontransient tenants, an inspector identifies vulnerable adults who appear to be victims of neglect, as defined in s. 415.102, or, in the case of a building that is not equipped with automatic sprinkler systems, tenants or clients who may be unable to self-preserve in an emergency, the division shall convene meetings with the following agencies as appropriate to the individual situation: the Department of Health, the Department of Elderly Affairs, the area agency on aging, the local fire marshal, the landlord and affected tenants and clients, and other relevant organizations, to develop a plan which improves the prospects for safety of affected residents and, if necessary, identifies alternative living arrangements such as facilities licensed under part II of chapter 400 or under chapter 429.

Section 3. Subsection (9) of section 509.221, Florida Statutes, is amended to read:

509.221 Sanitary regulations.—

(9) Subsections (2), (5), and (6) do not apply to any facility or unit classified as a vacation rental, ~~or~~ nontransient apartment, or timeshare project as described in s. 509.242(1)(c)-(e) ~~and (d)~~.

Section 4. Subsection (2) of section 509.241, Florida Statutes, is amended to read:

509.241 Licenses required; exceptions.—

(2) APPLICATION FOR LICENSE.—Each person who plans to open a public lodging establishment or a public food service establishment shall apply for and receive a license from the division prior to the commencement of operation. A condominium

association, as defined in s. 718.103, which does not own any units classified as timeshare projects or vacation rentals under s. 509.242(1)(c) and (d) is not required to apply for or receive a public lodging establishment license.

Section 5. Subsection (1) of section 509.242, Florida Statutes, is amended to read:

509.242 Public lodging establishments; classifications.—

(1) A public lodging establishment shall be classified as a hotel, motel, nontransient apartment, transient apartment, bed and breakfast inn, timeshare project, or vacation rental if the establishment satisfies the following criteria:

(a) *Hotel.*—A hotel is any public lodging establishment containing sleeping room accommodations for 25 or more guests and providing the services generally provided by a hotel and recognized as a hotel in the community in which it is situated or by the industry.

(b) *Motel.*—A motel is any public lodging establishment which offers rental units with an exit to the outside of each rental unit, daily or weekly rates, offstreet parking for each unit, a central office on the property with specified hours of operation, a bathroom or connecting bathroom for each rental unit, and at least six rental units, and which is recognized as a motel in the community in which it is situated or by the industry.

(c) *Timeshare project.*—A timeshare project is any timeshare property as defined in chapter 721 which is located in this state and which is also a transient public lodging establishment.

(d)~~(c)~~ *Vacation rental.*—A vacation rental is any unit or

group of units in a condominium~~,~~ or cooperative~~, or timeshare plan~~ or any individually or collectively owned single-family, two-family, three-family, or four-family house or dwelling unit that is also a transient public lodging establishment and that is not a timeshare project.

(e)~~(d)~~ *Nontransient apartment.*—A nontransient apartment is a building or complex of buildings in which 75 percent or more of the units are available for rent to nontransient tenants.

(f)~~(e)~~ *Transient apartment.*—A transient apartment is a building or complex of buildings in which more than 25 percent of the units are advertised or held out to the public as available for transient occupancy.

(g)~~(f)~~ *Bed and breakfast inn.*—A bed and breakfast inn is a family home structure, with no more than 15 sleeping rooms, which has been modified to serve as a transient public lodging establishment, which provides the accommodation and meal services generally offered by a bed and breakfast inn, and which is recognized as a bed and breakfast inn in the community in which it is situated or by the hospitality industry.

Section 6. Subsection (1) of section 509.251, Florida Statutes, is amended to read:

509.251 License fees.—

(1) The division shall adopt, by rule, a schedule of fees to be paid by each public lodging establishment as a prerequisite to issuance or renewal of a license. Such fees shall be based on the number of rental units in the establishment. The aggregate fee per establishment charged any public lodging establishment shall not exceed $1,000; however, the fees described in paragraphs (a) and (b) may not be included

as part of the aggregate fee subject to this cap. Vacation rental units or timeshare projects within separate buildings or at separate locations but managed by one licensed agent may be combined in a single license application, and the division shall charge a license fee as if all units in the application are in a single licensed establishment. The fee schedule shall require an establishment which applies for an initial license to pay the full license fee if application is made during the annual renewal period or more than 6 months prior to the next such renewal period and one-half of the fee if application is made 6 months or less prior to such period. The fee schedule shall include fees collected for the purpose of funding the Hospitality Education Program, pursuant to s. 509.302, which are payable in full for each application regardless of when the application is submitted.

(a) Upon making initial application or an application for change of ownership, the applicant shall pay to the division a fee as prescribed by rule, not to exceed $50, in addition to any other fees required by law, which shall cover all costs associated with initiating regulation of the establishment.

(b) A license renewal filed with the division within 30 days after the expiration date shall be accompanied by a delinquent fee as prescribed by rule, not to exceed $50, in addition to the renewal fee and any other fees required by law. A license renewal filed with the division more than 30 but not more than 60 days after the expiration date shall be accompanied by a delinquent fee as prescribed by rule, not to exceed $100, in addition to the renewal fee and any other fees required by law.

Section 7. Subsection (1) of section 712.05, Florida Statutes, is amended to read:

712.05 Effect of filing notice.—

(1) A ~~Any~~ person claiming an interest in land or a homeowners' association desiring to preserve a ~~any~~ covenant or restriction may preserve and protect the same from extinguishment by the operation of this act by filing for record, during the 30-year period immediately following the effective date of the root of title, a written notice~~, in writing,~~ in accordance with this chapter. Such ~~the provisions hereof, which~~ notice preserves ~~shall have the effect of so preserving~~ such claim of right or such covenant or restriction or portion of such covenant or restriction for up to ~~a period of not longer than~~ 30 years after filing the notice ~~same~~ unless the notice is filed again ~~filed~~ as required in this chapter ~~herein~~. A person's ~~No~~ disability or lack of knowledge of any kind may not ~~on the part of anyone shall~~ delay the commencement of or suspend the running of the ~~said~~ 30-year period. Such notice may be filed for record by the claimant or by any other person acting on behalf of a ~~any~~ claimant who is:

(a) Under a disability~~;~~~~,~~

(b) Unable to assert a claim on his or her behalf~~;~~~~,~~ or

(c) One of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

Such notice may be filed by a homeowners' association only if the preservation of such covenant or restriction or portion of such covenant or restriction is approved by at least two-thirds

of the members of the board of directors of an incorporated homeowners' association at a meeting for which a notice, stating the meeting's time and place and containing the statement of marketable title action described in s. 712.06(1)(b), was mailed or hand delivered to members of the homeowners' association at least ~~not less than~~ 7 days before ~~prior to~~ such meeting. The homeowners' association or clerk of the circuit court is not required to provide additional notice pursuant to s. 712.06(3). The preceding sentence is intended to clarify existing law.

Section 8. Subsection (13) of section 718.110, Florida Statutes, is amended to read:

718.110 Amendment of declaration; correction of error or omission in declaration by circuit court.—

(13) An amendment that prohibits ~~prohibiting~~ unit owners from renting their units or altering the duration of the rental term or that specifies or limits ~~specifying or limiting~~ the number of times unit owners are entitled to rent their units during a specified period does not apply ~~applies only~~ to unit owners who voted against ~~consent to~~ the amendment. However, such amendment applies to unit owners who consented to the amendment, who failed to cast a vote, or ~~and unit owners~~ who acquired ~~acquire~~ title to their units after the effective date of the ~~that~~ amendment.

Section 9. Subsection (5), paragraph (j) of subsection (11), and paragraph (c) of subsection (12) of section 718.111, Florida Statutes, are amended, and paragraph (f) is added to subsection (12) of that section, to read:

718.111 The association.—

(5) RIGHT OF ACCESS TO UNITS.—

(a) The association has the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit ~~or units~~.

(b)1. In addition to the association's right of access in paragraph (a) and regardless of whether authority is provided in the declaration or other recorded condominium documents, an association, at the sole discretion of the board, may enter an abandoned unit to inspect the unit and adjoining common elements; make repairs to the unit or to the common elements serving the unit, as needed; repair the unit if mold or deterioration is present; turn on the utilities for the unit; or otherwise maintain, preserve, or protect the unit and adjoining common elements. For purposes of this paragraph, a unit is presumed to be abandoned if:

a. The unit is the subject of a foreclosure action and no tenant appears to have resided in the unit for at least 4 continuous weeks without prior written notice to the association; or

b. No tenant appears to have resided in the unit for 2 consecutive months without prior written notice to the association, and the association is unable to contact the owner or determine the whereabouts of the owner after reasonable inquiry.

2. Except in the case of an emergency, an association may not enter an abandoned unit until 2 days after notice of the association's intent to enter the unit has been mailed or hand

delivered to the owner at the address of the owner as reflected in the records of the association. The notice may be given by electronic transmission to a unit owner who has consented to receive notice by electronic transmission.

3. Any expense incurred by an association pursuant to this paragraph is chargeable to the unit owner and enforceable as an assessment pursuant to s. 718.116, and the association may use its lien authority provided by s. 718.116 to enforce collection of the expense.

4. The association may petition a court of competent jurisdiction to appoint a receiver and may lease out an abandoned unit for the benefit of the association to offset against the rental income the association's costs and expenses of maintaining, preserving, and protecting the unit and the adjoining common elements, including the costs of the receivership and all unpaid assessments, interest, administrative late fees, costs, and reasonable attorney fees.

(11) INSURANCE.—In order to protect the safety, health, and welfare of the people of the State of Florida and to ensure consistency in the provision of insurance coverage to condominiums and their unit owners, this subsection applies to every residential condominium in the state, regardless of the date of its declaration of condominium. It is the intent of the Legislature to encourage lower or stable insurance premiums for associations described in this subsection.

(j) Any portion of the condominium property that must be insured by the association against property loss pursuant to paragraph (f) which is damaged by an insurable event shall be reconstructed, repaired, or replaced as necessary by the

association as a common expense. In the absence of an insurable event, responsibility for reconstruction, repair, or replacement shall be by the association or by the unit owners, as determined by the provisions of the declaration or bylaws. All property insurance deductibles, uninsured losses, and other damages in excess of property insurance coverage under the property insurance policies maintained by the association are a common expense of the condominium, except that:

1. A unit owner is responsible for the costs of repair or replacement of any portion of the condominium property not paid by insurance proceeds if such damage is caused by intentional conduct, negligence, or failure to comply with the terms of the declaration or the rules of the association by a unit owner, the members of his or her family, unit occupants, tenants, guests, or invitees, without compromise of the subrogation rights of the insurer.

2. The provisions of subparagraph 1. regarding the financial responsibility of a unit owner for the costs of repairing or replacing other portions of the condominium property also apply to the costs of repair or replacement of personal property of other unit owners or the association, as well as other property, whether real or personal, which the unit owners are required to insure.

3. To the extent the cost of repair or reconstruction for which the unit owner is responsible under this paragraph is reimbursed to the association by insurance proceeds, and the association has collected the cost of such repair or reconstruction from the unit owner, the association shall reimburse the unit owner without the waiver of any rights of

subrogation.

4. The association is not obligated to pay for reconstruction or repairs of property losses as a common expense if the property losses were known or should have been known to a unit owner and were not reported to the association until after the insurance claim of the association for that property was settled or resolved with finality, or denied because it was untimely filed.

(12) OFFICIAL RECORDS.—

(c) The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association’s willful failure to comply. Minimum damages are $50 per calendar day for up to 10 days, beginning on the 11th working day after receipt of the written request. The failure to permit inspection entitles any person prevailing in an enforcement action to recover reasonable attorney fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records. Any person who knowingly or intentionally defaces or destroys

accounting records that are required by this chapter to be maintained during the period for which such records are required to be maintained, or who knowingly or intentionally fails to create or maintain accounting records that are required to be created or maintained, with the intent of causing harm to the association or one or more of its members, is personally subject to a civil penalty pursuant to s. 718.501(1)(d). The association shall maintain an adequate number of copies of the declaration, articles of incorporation, bylaws, and rules, and all amendments to each of the foregoing, as well as the question and answer sheet as described in s. 718.504 and year-end financial information required under this section, on the condominium property to ensure their availability to unit owners and prospective purchasers, and may charge its actual costs for preparing and furnishing these documents to those requesting the documents. An association shall allow a member or his or her authorized representative to use a portable device, including a smartphone, tablet, portable scanner, or any other technology capable of scanning or taking photographs, to make an electronic copy of the official records in lieu of the association's providing the member or his or her authorized representative with a copy of such records. The association may not charge a member or his or her authorized representative for the use of a portable device. Notwithstanding this paragraph, the following records are not accessible to unit owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502 and any record protected by the work-product privilege, including a record prepared by an association attorney or prepared at the attorney's express direction, which

reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of such litigation or proceedings until the conclusion of the litigation or proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit.

3. Personnel records of association or management company employees, including, but not limited to, disciplinary, payroll, health, and insurance records. For purposes of this subparagraph, the term "personnel records" does not include written employment agreements with an association employee or management company, or budgetary or financial records that indicate the compensation paid to an association employee.

4. Medical records of unit owners.

5. Social security numbers, driver's license numbers, credit card numbers, e-mail addresses, telephone numbers, facsimile numbers, emergency contact information, addresses of a unit owner other than as provided to fulfill the association's notice requirements, and other personal identifying information of any person, excluding the person's name, unit designation, mailing address, property address, and any address, e-mail address, or facsimile number provided to the association to fulfill the association's notice requirements. Notwithstanding the restrictions in this subparagraph, an association may print and distribute to parcel owners a directory containing the name, parcel address, and all telephone numbers ~~number~~ of each parcel

owner. However, an owner may exclude his or her telephone number from the directory by so requesting in writing to the association. An owner may consent in writing to the disclosure of other contact information described in this subparagraph. The association is not liable for the inadvertent disclosure of information that is protected under this subparagraph if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.

6. Electronic security measures that are used by the association to safeguard data, including passwords.

7. The software and operating system used by the association which allow the manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

(f) An outgoing board or committee member must relinquish all official records and property of the association in his or her possession or under his or her control to the incoming board within 5 days after the election. The division shall impose a civil penalty as set forth in s. 718.501(1)(d)6. against an outgoing board or committee member who willfully and knowingly fails to relinquish such records and property.

Section 10. Paragraphs (b) and (c) of subsection (2) of section 718.112, Florida Statutes, are amended to read:

718.112 Bylaws.—

(2) REQUIRED PROVISIONS.—The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(b) *Quorum; voting requirements; proxies.*—

1. Unless a lower number is provided in the bylaws, the percentage of voting interests required to constitute a quorum at a meeting of the members is a majority of the voting interests. Unless otherwise provided in this chapter or in the declaration, articles of incorporation, or bylaws, and except as provided in subparagraph (d)4., decisions shall be made by a majority of the voting interests represented at a meeting at which a quorum is present.

2. Except as specifically otherwise provided herein, unit owners may not vote by general proxy, but may vote by limited proxies substantially conforming to a limited proxy form adopted by the division. A voting interest or consent right allocated to a unit owned by the association may not be exercised or considered for any purpose, whether for a quorum, an election, or otherwise. Limited proxies and general proxies may be used to establish a quorum. Limited proxies shall be used for votes taken to waive or reduce reserves in accordance with subparagraph (f)2.; for votes taken to waive the financial reporting requirements of s. 718.111(13); for votes taken to amend the declaration pursuant to s. 718.110; for votes taken to amend the articles of incorporation or bylaws pursuant to this section; and for any other matter for which this chapter requires or permits a vote of the unit owners. Except as provided in paragraph (d), a proxy, limited or general, may not be used in the election of board members. General proxies may be used for other matters for which limited proxies are not required, and may be used in voting for nonsubstantive changes to items for which a limited proxy is required and given. Notwithstanding this subparagraph, unit owners may vote in

person at unit owner meetings. This subparagraph does not limit the use of general proxies or require the use of limited proxies for any agenda item or election at any meeting of a timeshare condominium association.

3. Any proxy given is effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. A proxy is not valid longer than 90 days after the date of the first meeting for which it was given and may be revoked~~. Every proxy is revocable~~ at any time at the pleasure of the unit owner executing it.

4. A member of the board of administration or a committee may submit in writing his or her agreement or disagreement with any action taken at a meeting that the member did not attend. This agreement or disagreement may not be used as a vote for or against the action taken or to create a quorum.

5. A ~~If any of the~~ board or committee member's participation in a meeting via telephone, real-time videoconferencing, or similar real-time electronic or video communication counts toward a quorum, and such member may vote as if physically present ~~members meet by telephone conference, those board or committee members may be counted toward obtaining a quorum and may vote by telephone~~. A ~~telephone~~ speaker must be used so that the conversation of such ~~those~~ members may be heard by the board or committee members attending in person as well as by any unit owners present at a meeting.

(c) *Board of administration meetings.*—Meetings of the board of administration at which a quorum of the members is present are open to all unit owners. Members of the board of administration may use e-mail as a means of communication but

may not cast a vote on an association matter via e-mail. A unit owner may tape record or videotape the meetings. The right to attend such meetings includes the right to speak at such meetings with reference to all designated agenda items. The division shall adopt reasonable rules governing the tape recording and videotaping of the meeting. The association may adopt written reasonable rules governing the frequency, duration, and manner of unit owner statements.

1. Adequate notice of all board meetings, which must specifically identify all agenda items, must be posted conspicuously on the condominium property at least 48 continuous hours before the meeting except in an emergency. If 20 percent of the voting interests petition the board to address an item of business, the board, within 60 days after receipt of the petition, shall place the item on the agenda at its next regular board meeting or at a special meeting called for that purpose ~~of the board, but not later than 60 days after the receipt of the petition, shall place the item on the agenda~~. An ~~Any~~ item not included on the notice may be taken up on an emergency basis by a vote of at least a majority plus one of the board members. Such emergency action must be noticed and ratified at the next regular board meeting. However, written notice of a ~~any~~ meeting at which a nonemergency special assessment ~~assessments,~~ or an ~~at which~~ amendment to rules regarding unit use~~,~~ will be considered must be mailed, delivered, or electronically transmitted to the unit owners and posted conspicuously on the condominium property at least 14 days before the meeting. Evidence of compliance with this 14-day notice requirement must be made by an affidavit executed by the person providing the notice and filed with the

official records of the association. Upon notice to the unit owners, the board shall, by duly adopted rule, designate a specific location on the condominium or association property where all notices of board meetings must ~~are to~~ be posted. If there is no condominium property or association property where notices can be posted, notices shall be mailed, delivered, or electronically transmitted to each unit owner at least 14 days before the meeting ~~to the owner of each unit~~. In lieu of or in addition to the physical posting of the notice on the condominium property, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the condominium association. However, if broadcast notice is used in lieu of a notice physically posted on condominium property, the notice and agenda must be broadcast at least four times every broadcast hour of each day that a posted notice is otherwise required under this section. If broadcast notice is provided, the notice and agenda must be broadcast in a manner and for a sufficient continuous length of time so as to allow an average reader to observe the notice and read and comprehend the entire content of the notice and the agenda. Notice of any meeting in which regular or special assessments against unit owners are to be considered ~~for any reason~~ must specifically state that assessments will be considered and provide the nature, estimated cost, and description of the purposes for such assessments.

2. Meetings of a committee to take final action on behalf of the board or make recommendations to the board regarding the association budget are subject to this paragraph. Meetings of a

committee that does not take final action on behalf of the board or make recommendations to the board regarding the association budget are subject to this section, unless those meetings are exempted from this section by the bylaws of the association.

3. Notwithstanding any other law, the requirement that board meetings and committee meetings be open to the unit owners does not apply to:

a. Meetings between the board or a committee and the association's attorney, with respect to proposed or pending litigation, if the meeting is held for the purpose of seeking or rendering legal advice; or

b. Board meetings held for the purpose of discussing personnel matters.

Section 11. Paragraph (a) of subsection (1) of section 718.116, Florida Statutes, is amended to read:

718.116 Assessments; liability; lien and priority; interest; collection.—

(1)(a) A unit owner, regardless of how his or her title has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner. Additionally, a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title, as well as interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process. This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner. For the purposes of this paragraph, the term "previous owner" does not include an

association that acquires title to a delinquent property through foreclosure or by deed in lieu of foreclosure. The present parcel owner's liability for unpaid assessments, interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process is limited to those amounts that accrued before the association acquired title to the delinquent property through foreclosure or by deed in lieu of foreclosure.

Section 12. Section 718.707, Florida Statutes, is amended to read:

718.707 Time limitation for classification as bulk assignee or bulk buyer.—A person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the condominium parcels were acquired on or after July 1, 2010, but before July 1, 2016 ~~2015~~. The date of such acquisition shall be determined by the date of recording a deed or other instrument of conveyance for such parcels in the public records of the county in which the condominium is located, or by the date of issuing a certificate of title in a foreclosure proceeding with respect to such condominium parcels.

Section 13. Paragraph (c) of subsection (2) and subsection (4) of section 719.104, Florida Statutes, are amended, and paragraph (e) is added to subsection (4) of that section, to read:

719.104 Cooperatives; access to units; records; financial reports; assessments; purchase of leases.—

(2) OFFICIAL RECORDS.—

(c) The official records of the association are open to inspection by any association member or the authorized

representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply. The minimum damages are $50 per calendar day for up to 10 days, beginning on the 11th working day after receipt of the written request. The failure to permit inspection entitles any person prevailing in an enforcement action to recover reasonable attorney fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records. Any person who knowingly or intentionally defaces or destroys accounting records that are required by this chapter to be maintained during the period for which such records are required to be maintained, or who knowingly or intentionally fails to create or maintain accounting records that are required to be created or maintained, with the intent of causing harm to the association or one or more of its members, is personally subject to a civil penalty pursuant to s. 719.501(1)(d). The association shall maintain an adequate number of copies of the declaration, articles of incorporation, bylaws, and rules, and all amendments to each of the foregoing, as well as the question and answer

sheet as described in s. 719.504 and year-end financial information required by the department, on the cooperative property to ensure their availability to unit owners and prospective purchasers, and may charge its actual costs for preparing and furnishing these documents to those requesting the same. An association shall allow a member or his or her authorized representative to use a portable device, including a smartphone, tablet, portable scanner, or any other technology capable of scanning or taking photographs, to make an electronic copy of the official records in lieu of the association providing the member or his or her authorized representative with a copy of such records. The association may not charge a member or his or her authorized representative for the use of a portable device. Notwithstanding this paragraph, the following records shall not be accessible to unit owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502 and any record protected by the work-product privilege, including any record prepared by an association attorney or prepared at the attorney's express direction which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of such litigation or proceedings until the conclusion of the litigation or proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit.

3. Personnel records of association or management company employees, including, but not limited to, disciplinary, payroll, health, and insurance records. For purposes of this subparagraph, the term "personnel records" does not include written employment agreements with an association employee or management company, or budgetary or financial records that indicate the compensation paid to an association employee.

4. Medical records of unit owners.

5. Social security numbers, driver license numbers, credit card numbers, e-mail addresses, telephone numbers, facsimile numbers, emergency contact information, addresses of a unit owner other than as provided to fulfill the association's notice requirements, and other personal identifying information of any person, excluding the person's name, unit designation, mailing address, property address, and any address, e-mail address, or facsimile number provided to the association to fulfill the association's notice requirements. Notwithstanding the restrictions in this subparagraph, an association may print and distribute to parcel owners a directory containing the name, parcel address, and all telephone numbers ~~number~~ of each parcel owner. However, an owner may exclude his or her telephone number from the directory by so requesting in writing to the association. An owner may consent in writing to the disclosure of other contact information described in this subparagraph. The association is not liable for the inadvertent disclosure of information that is protected under this subparagraph if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.

6. Electronic security measures that are used by the association to safeguard data, including passwords.

7. The software and operating system used by the association which allow the manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

(e) An outgoing board or committee member must relinquish all official records and property of the association in his or her possession or under his or her control to the incoming board within 5 days after the election. The division shall impose a civil penalty as set forth in s. 719.501(1)(d) against an outgoing board or committee member who willfully and knowingly fails to relinquish such records and property.

(4) FINANCIAL REPORT.—

(a) Within 90 ~~60~~ days following the end of the fiscal or calendar year or annually on such date as ~~is otherwise~~ provided in the bylaws of the association, the board of administration ~~of the association~~ shall prepare and complete, or contract with a third party to prepare and complete, a financial report covering the preceding fiscal or calendar year. Within 21 days after the financial report is completed by the association or received from the third party, but no later than 120 days after the end of the fiscal year, calendar year, or other date provided in the bylaws, the association shall provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member. The division shall adopt rules setting forth uniform accounting principles, standards, and reporting requirements ~~mail or furnish by personal delivery to each unit owner a~~

~~complete financial report of actual receipts and expenditures for the previous 12 months, or a complete set of financial statements for the preceding fiscal year prepared in accordance with generally accepted accounting procedures. The report shall show the amounts of receipts by accounts and receipt classifications and shall show the amounts of expenses by accounts and expense classifications including, if applicable, but not limited to, the following:~~

~~1. Costs for security;~~

~~2. Professional and management fees and expenses;~~

~~3. Taxes;~~

~~4. Costs for recreation facilities;~~

~~5. Expenses for refuse collection and utility services;~~

~~6. Expenses for lawn care;~~

~~7. Costs for building maintenance and repair;~~

~~8. Insurance costs;~~

~~9. Administrative and salary expenses; and~~

~~10. Reserves for capital expenditures, deferred maintenance, and any other category for which the association maintains a reserve account or accounts.~~

(b) Except as provided in paragraph (c), an association whose total annual revenues meet the criteria of this paragraph shall prepare or cause to be prepared a complete financial statement according to the generally accepted accounting principles adopted by the Board of Accountancy. The financial statement shall be as follows:

1. An association with total annual revenues between $150,000 and $299,999 shall prepare a compiled financial statement.

2. An association with total annual revenues between $300,000 and $499,999 shall prepare a reviewed financial statement.

3. An association with total annual revenues of $500,000 or more shall prepare an audited financial statement ~~The division shall adopt rules that may require that the association deliver to the unit owners, in lieu of the financial report required by this section, a complete set of financial statements for the preceding fiscal year~~. ~~The financial statements shall be delivered within 90 days following the end of the previous fiscal year or annually on such other date as provided in the bylaws. The rules of the division may require that the financial statements be compiled, reviewed, or audited, and the rules shall take into consideration the criteria set forth in s. 719.501(1)(j).~~

The requirement to have the financial statement ~~statements~~ compiled, reviewed, or audited does not apply to an association ~~associations~~ if a majority of the voting interests of the association present at a duly called meeting of the association have voted ~~determined for a fiscal year~~ to waive this requirement for the fiscal year. In an association in which turnover of control by the developer has not occurred, the developer may vote to waive the audit requirement for the first 2 years of ~~the~~ operation of the association, after which time waiver of an applicable audit requirement shall be by a majority of voting interests other than the developer. The meeting shall be held prior to the end of the fiscal year, and the waiver shall be effective for only one fiscal year. An association may

not waive the financial reporting requirements of this section for more than 3 consecutive years ~~This subsection does not apply to a cooperative that consists of 50 or fewer units~~.

(c)1. An association with total annual revenues of less than $150,000 shall prepare a report of cash receipts and expenditures.

2. An association in a community of fewer than 50 units, regardless of the association's annual revenues, shall prepare a report of cash receipts and expenditures in lieu of the financial statement required by paragraph (b), unless the declaration or other recorded governing documents provide otherwise.

3. A report of cash receipts and expenditures must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including the following, as applicable: costs for security; professional and management fees and expenses; taxes; costs for recreation facilities; expenses for refuse collection and utility services; expenses for lawn care; costs for building maintenance and repair; insurance costs; administration and salary expenses; and reserves, if maintained by the association.

(d) If at least 20 percent of the unit owners petition the board for a greater level of financial reporting than that required by this section, the association shall duly notice and hold a meeting of members within 30 days after receipt of the petition to vote on raising the level of reporting for that fiscal year. Upon approval by a majority of the voting interests represented at a meeting at which a quorum of unit owners is

present, the association shall prepare an amended budget or shall adopt a special assessment to pay for the financial report regardless of any provision to the contrary in the declaration or other recorded governing documents. In addition, the association shall provide within 90 days after the meeting or the end of the fiscal year, whichever occurs later:

1. A compiled, reviewed, or audited financial statement, if the association is otherwise required to prepare a report of cash receipts and expenditures;

2. A reviewed or audited financial statement, if the association is otherwise required to prepare a compiled financial statement; or

3. An audited financial statement, if the association is otherwise required to prepare a reviewed financial statement.

(e) If approved by a majority of the voting interests present at a properly called meeting of the association, an association may prepare or cause to be prepared:

1. A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;

2. A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or

3. A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

Section 14. Paragraph (a) of subsection (1) of section 719.106, Florida Statutes, is amended to read:

719.106 Bylaws; cooperative ownership.—

(1) MANDATORY PROVISIONS.—The bylaws or other cooperative

documents shall provide for the following, and if they do not, they shall be deemed to include the following:

(a) *Administration.*—

1. The form of administration of the association shall be described, indicating the titles of the officers and board of administration and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and board members. In the absence of such a provision, the board of administration shall be composed of five members, except in the case of cooperatives having five or fewer units, in which case in not-for-profit corporations, the board shall consist of not fewer than three members. In the absence of provisions to the contrary, the board of administration shall have a president, a secretary, and a treasurer, who shall perform the duties of those offices customarily performed by officers of corporations. Unless prohibited in the bylaws, the board of administration may appoint other officers and grant them those duties it deems appropriate. Unless otherwise provided in the bylaws, the officers shall serve without compensation and at the pleasure of the board. Unless otherwise provided in the bylaws, the members of the board shall serve without compensation.

2. A person who has been suspended or removed by the division under this chapter, or who is delinquent in the payment of any monetary obligation due to the association, is not eligible to be a candidate for board membership and may not be listed on the ballot. A director or officer charged by information or indictment with a felony theft or embezzlement offense involving the association's funds or property is suspended from office. The board shall fill the vacancy

according to general law until the end of the period of the suspension or the end of the director's term of office, whichever occurs first. However, if the charges are resolved without a finding of guilt or without acceptance of a plea of guilty or nolo contendere, the director or officer shall be reinstated for any remainder of his or her term of office. A member who has such criminal charges pending may not be appointed or elected to a position as a director or officer. A person who has been convicted of any felony in this state or in any United States District Court, or who has been convicted of any offense in another jurisdiction which would be considered a felony if committed in this state, is not eligible for board membership unless such felon's civil rights have been restored for at least 5 years as of the date such person seeks election to the board. The validity of an action by the board is not affected if it is later determined that a board member is ineligible for board membership due to having been convicted of a felony.

3.~~2.~~ When a unit owner files a written inquiry by certified mail with the board of administration, the board shall respond in writing to the unit owner within 30 days of receipt of the inquiry. The board's response shall either give a substantive response to the inquirer, notify the inquirer that a legal opinion has been requested, or notify the inquirer that advice has been requested from the division. If the board requests advice from the division, the board shall, within 10 days of its receipt of the advice, provide in writing a substantive response to the inquirer. If a legal opinion is requested, the board shall, within 60 days after the receipt of the inquiry, provide

in writing a substantive response to the inquirer. The failure to provide a substantive response to the inquirer as provided herein precludes the board from recovering attorney ~~attorney's~~ fees and costs in any subsequent litigation, administrative proceeding, or arbitration arising out of the inquiry. The association may, through its board of administration, adopt reasonable rules and regulations regarding the frequency and manner of responding to the unit owners' inquiries, one of which may be that the association is obligated to respond to only one written inquiry per unit in any given 30-day period. In such case, any additional inquiry or inquiries must be responded to in the subsequent 30-day period, or periods, as applicable.

Section 15. Subsection (1) of section 719.108, Florida Statutes, is amended to read:

719.108 Rents and assessments; liability; lien and priority; interest; collection; cooperative ownership.—

(1) A unit owner, regardless of how title is acquired, including, without limitation, a purchaser at a judicial sale, shall be liable for all rents and assessments coming due while the unit owner is in exclusive possession of a unit. In a voluntary transfer, the unit owner in exclusive possession shall be jointly and severally liable with the previous unit owner for all unpaid rents and assessments against the previous unit owner for his or her share of the common expenses up to the time of the transfer, as well as interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process without prejudice to the rights of the unit owner in exclusive possession to recover from the previous unit owner the amounts paid by the unit owner in exclusive

possession therefor. For the purposes of this paragraph, the term "previous owner" does not include an association that acquires title to a delinquent property through foreclosure or by deed in lieu of foreclosure. The present parcel owner's liability for unpaid rents and assessments, interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process is limited to those amounts that accrued before the association acquired title to the delinquent property through foreclosure or by deed in lieu of foreclosure.

Section 16. Section 719.128, Florida Statutes, is created to read:

719.128 Association emergency powers.—

(1) To the extent allowed by law, unless specifically prohibited by the cooperative documents, and consistent with s. 617.0830, the board of administration, in response to damage caused by an event for which a state of emergency is declared pursuant to s. 252.36 in the area encompassed by the cooperative, may exercise the following powers:

(a) Conduct board or membership meetings after notice of the meetings and board decisions is provided in as practicable a manner as possible, including via publication, radio, United States mail, the Internet, public service announcements, conspicuous posting on the cooperative property, or any other means the board deems appropriate under the circumstances.

(b) Cancel and reschedule an association meeting.

(c) Designate assistant officers who are not directors. If the executive officer is incapacitated or unavailable, the assistant officer has the same authority during the state of

emergency as the executive officer he or she assists.

(d) Relocate the association's principal office or designate an alternative principal office.

(e) Enter into agreements with counties and municipalities to assist counties and municipalities with debris removal.

(f) Implement a disaster plan before or immediately following the event for which a state of emergency is declared, which may include turning on or shutting off elevators; electricity; water, sewer, or security systems; or air conditioners for association buildings.

(g) Based upon the advice of emergency management officials or upon the advice of licensed professionals retained by the board of administration, determine any portion of the cooperative property unavailable for entry or occupancy by unit owners or their family members, tenants, guests, agents, or invitees to protect their health, safety, or welfare.

(h) Based upon the advice of emergency management officials or upon the advice of licensed professionals retained by the board of administration, determine whether the cooperative property can be safely inhabited or occupied. However, such determination is not conclusive as to any determination of habitability pursuant to the declaration.

(i) Require the evacuation of the cooperative property in the event of a mandatory evacuation order in the area where the cooperative is located. If a unit owner or other occupant of a cooperative fails to evacuate the cooperative property for which the board has required evacuation, the association is immune from liability for injury to persons or property arising from such failure.

(j) Mitigate further damage, including taking action to contract for the removal of debris and to prevent or mitigate the spread of fungus, including mold or mildew, by removing and disposing of wet drywall, insulation, carpet, cabinetry, or other fixtures on or within the cooperative property, regardless of whether the unit owner is obligated by the declaration or law to insure or replace those fixtures and to remove personal property from a unit.

(k) Contract, on behalf of a unit owner, for items or services for which the owner is otherwise individually responsible, but which are necessary to prevent further damage to the cooperative property. In such event, the unit owner on whose behalf the board has contracted is responsible for reimbursing the association for the actual costs of the items or services, and the association may use its lien authority provided by s. 719.108 to enforce collection of the charges. Such items or services may include the drying of the unit, the boarding of broken windows or doors, and the replacement of a damaged air conditioner or air handler to provide climate control in the unit or other portions of the property.

(l) Notwithstanding a provision to the contrary, and regardless of whether such authority does not specifically appear in the cooperative documents, levy special assessments without a vote of the owners.

(m) Without unit owners' approval, borrow money and pledge association assets as collateral to fund emergency repairs and carry out the duties of the association if operating funds are insufficient. This paragraph does not limit the general authority of the association to borrow money, subject to such

restrictions contained in the cooperative documents.

(2) The authority granted under subsection (1) is limited to that time reasonably necessary to protect the health, safety, and welfare of the association and the unit owners and their family members, tenants, guests, agents, or invitees, and to mitigate further damage and make emergency repairs.

Section 17. Paragraph (c) of subsection (5) of section 720.303, Florida Statutes, is amended to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.—

(5) INSPECTION AND COPYING OF RECORDS.—The official records shall be maintained within the state for at least 7 years and shall be made available to a parcel owner for inspection or photocopying within 45 miles of the community or within the county in which the association is located within 10 business days after receipt by the board or its designee of a written request. This subsection may be complied with by having a copy of the official records available for inspection or copying in the community or, at the option of the association, by making the records available to a parcel owner electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request. If the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages. An association shall allow a member or his or her authorized representative to use a portable device, including a smartphone, tablet, portable scanner, or any other

technology capable of scanning or taking photographs, to make an electronic copy of the official records in lieu of the association's providing the member or his or her authorized representative with a copy of such records. The association may not charge a fee to a member or his or her authorized representative for the use of a portable device.

(c) The association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not require a parcel owner to demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records to less than one 8-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including the costs of copying and the costs required for personnel to retrieve and copy the records if the time spent retrieving and copying the records exceeds one-half hour and if the personnel costs do not exceed $20 per hour. Personnel costs may not be charged for records requests that result in the copying of 25 or fewer pages. The association may charge up to 25 cents per page for copies made on the association's photocopier. If the association does not have a photocopy machine available where the records are kept, or if the records requested to be copied exceed 25 pages in length, the association may have copies made by an outside duplicating service and may charge the actual cost of copying, as supported by the vendor invoice. The association shall maintain an adequate number of copies of the recorded governing documents, to ensure their availability to members and prospective members. Notwithstanding this paragraph, the

following records are not accessible to members or parcel owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502 and any record protected by the work-product privilege, including, but not limited to, a record prepared by an association attorney or prepared at the attorney's express direction which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings or which was prepared in anticipation of such litigation or proceedings until the conclusion of the litigation or proceedings.

2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a parcel.

3. Personnel records of association or management company employees, including, but not limited to, disciplinary, payroll, health, and insurance records. For purposes of this subparagraph, the term "personnel records" does not include written employment agreements with an association or management company employee or budgetary or financial records that indicate the compensation paid to an association or management company employee.

4. Medical records of parcel owners or community residents.

5. Social security numbers, driver license numbers, credit card numbers, electronic mailing addresses, telephone numbers, facsimile numbers, emergency contact information, any addresses for a parcel owner other than as provided for association notice

requirements, and other personal identifying information of any person, excluding the person's name, parcel designation, mailing address, and property address. Notwithstanding the restrictions in this subparagraph, an association may print and distribute to parcel owners a directory containing the name, parcel address, and all telephone numbers ~~number~~ of each parcel owner. However, an owner may exclude his or her telephone number from the directory by so requesting in writing to the association. An owner may consent in writing to the disclosure of other contact information described in this subparagraph. The association is not liable for the disclosure of information that is protected under this subparagraph if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.

6. Any electronic security measure that is used by the association to safeguard data, including passwords.

7. The software and operating system used by the association which allows the manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

Section 18. Paragraph (b) of subsection (1) of section 720.306, Florida Statutes, is amended to read:

720.306 Meetings of members; voting and election procedures; amendments.—

(1) QUORUM; AMENDMENTS.—

(b) Unless otherwise provided in the governing documents or required by law, and other than those matters set forth in paragraph (c), any governing document of an association may be amended by the affirmative vote of two-thirds of the voting

interests of the association. Within 30 days after recording an amendment to the governing documents, the association shall provide copies of the amendment to the members. Further, if a copy of the proposed amendment had been previously provided to the members before the vote of the members on the amendment and the proposed amendment was not changed before the vote of the members, the association may, in lieu of providing a copy of the amendment, provide notice that the amendment was adopted, provide in the notice the official book and page number or instrument number of the recorded amendment, and provide notice that a copy of the amendment is available at no charge to the member upon written request to the association. The copies and notice described herein may be provided electronically to those owners who have consented to receive notice electronically.

Section 19. Paragraph (b) of subsection (2) of section 720.3085, Florida Statutes, is amended to read:

720.3085 Payment for assessments; lien claims.—

(2)(b) A parcel owner is jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title, as well as interest, late charges, and reasonable costs and attorney fees incurred by the association incident to the collection process. This liability is without prejudice to any right the present parcel owner may have to recover any amounts paid by the present owner from the previous owner. For the purposes of this paragraph, the term "previous owner" shall not include an association that acquires title to a delinquent property through foreclosure or by deed in lieu of foreclosure. The present parcel owner's liability for unpaid assessments, interest, late charges, and

reasonable costs and attorney fees incurred by the association incident to the collection process is limited to those amounts ~~any unpaid assessments~~ that accrued before the association acquired title to the delinquent property through foreclosure or by deed in lieu of foreclosure.

Section 20. Section 720.316, Florida Statutes, is created to read:

720.316 Association emergency powers.—

(1) To the extent allowed by law, unless specifically prohibited by the declaration or other recorded governing documents, and consistent with s. 617.0830, the board of directors, in response to damage caused by an event for which a state of emergency is declared pursuant to s. 252.36 in the area encompassed by the association, may exercise the following powers:

(a) Conduct board or membership meetings after notice of the meetings and board decisions is provided in as practicable a manner as possible, including via publication, radio, United States mail, the Internet, public service announcements, conspicuous posting on the association property, or any other means the board deems appropriate under the circumstances.

(b) Cancel and reschedule an association meeting.

(c) Designate assistant officers who are not directors. If the executive officer is incapacitated or unavailable, the assistant officer has the same authority during the state of emergency as the executive officer he or she assists.

(d) Relocate the association's principal office or designate an alternative principal office.

(e) Enter into agreements with counties and municipalities

to assist counties and municipalities with debris removal.

(f) Implement a disaster plan before or immediately following the event for which a state of emergency is declared, which may include, but is not limited to, turning on or shutting off elevators; electricity; water, sewer, or security systems; or air conditioners for association buildings.

(g) Based upon the advice of emergency management officials or upon the advice of licensed professionals retained by the board, determine any portion of the association property unavailable for entry or occupancy by owners or their family members, tenants, guests, agents, or invitees to protect their health, safety, or welfare.

(h) Based upon the advice of emergency management officials or upon the advice of licensed professionals retained by the board, determine whether the association property can be safely inhabited or occupied. However, such determination is not conclusive as to any determination of habitability pursuant to the declaration.

(i) Mitigate further damage, including taking action to contract for the removal of debris and to prevent or mitigate the spread of fungus, including, mold or mildew, by removing and disposing of wet drywall, insulation, carpet, cabinetry, or other fixtures on or within the association property.

(j) Notwithstanding a provision to the contrary, and regardless of whether such authority does not specifically appear in the declaration or other recorded governing documents, levy special assessments without a vote of the owners.

(k) Without owners' approval, borrow money and pledge association assets as collateral to fund emergency repairs and

carry out the duties of the association if operating funds are insufficient. This paragraph does not limit the general authority of the association to borrow money, subject to such restrictions contained in the declaration or other recorded governing documents.

(2) The authority granted under subsection (1) is limited to that time reasonably necessary to protect the health, safety, and welfare of the association and the parcel owners and their family members, tenants, guests, agents, or invitees, and to mitigate further damage and make emergency repairs.

Section 21. This act shall take effect July 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 834

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Latvala

SUBJECT: Legal Notices

DATE: March 31, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kim	McVaney	GO	**Fav/CS**
2.	Davis	Cibula	JU	**Pre-meeting**
3.			AP	
4.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 834 ensures that access to legal notices is free and more user friendly. A newspaper's legal notice webpage must be clearly titled, accessible for free, and may not require registration. The statewide website for legal notices, which is maintained by the Florida Press Association, must also be accessible for free, searchable by case name and number, and keep legal notices on-line for at least 90 consecutive days. This bill repeals a provision which states that an error in a legal notice appearing on a newspaper's website or on the statewide website is harmless if the legal notice was correctly published in the print version of the newspaper.

II. Present Situation:

Publication of Legal Notices

The publication of legal notices in newspapers is a long established practice. Legal notices and publication in newspapers occur for a variety of cases, such as when the government is proposing

to take an action[1] or when a plaintiff is not able to personally serve a defendant.[2] In most civil cases in which service may be accomplished by publication, notice must be published in a newspaper in the county where the lawsuit is filed once a week for 4 consecutive weeks.[3] Foreclosure proceedings are published once a week for 2 weeks.[4]

Publication Requirements

The requirements for legal publication are located in ch. 50, F.S. The law requires that publication be in a newspaper that is printed and published at least once a week and that contains at least 25 percent of its words in the English language.[5] The newspaper must qualify or be entered to qualify as a periodical at the post office in the county where it is published, and be generally available to the public for the purpose of publication of notices.[6] All official notices and legal advertisements must be charged and paid for on the basis of 6-point type on 6-point body, unless otherwise specified in statute.[7]

---

[1] There are many types of situations where legal notices are required, and the publication requirements for those situations are particular to each law. An example would be a judicial sale, when there is a court order or judgment for the sale of real or personal property, pursuant to ch. 45, F.S. Another example in s. 125.66, F.S., requires the board of county commissioners to publish in a newspaper a notice of intent to enact or amend ordinances at least 10 days before the meeting in which the ordinance may be enacted or amended.

[2] In general, laws addressing constructive service of process by publication are located in ch. 49, F.S. Section 49.011, F.S., provides that service of process by publication is permitted in the following types of cases:
(1) To enforce any legal or equitable lien or claim to any title or interest in real or personal property within the jurisdiction of the court or any fund held or debt owing by any party on whom process can be served within this state.
(2) To quiet title or remove any encumbrance, lien, or cloud on the title to any real or personal property within the jurisdiction of the court or any fund held or debt owing by any party on whom process can be served within this state.
(3) To partition real or personal property within the jurisdiction of the court.
(4) For dissolution or annulment of marriage.
(5) For the construction of any will, deed, contract, or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien, or interest thereunder.
(6) To reestablish a lost instrument or record which has or should have its situs within the jurisdiction of the court.
(7) In which a writ of replevin, garnishment, or attachment has been issued and executed.
(8) In which any other writ or process has been issued and executed which places any property, fund, or debt in the custody of a court.
(9) To revive a judgment by motion or scire facias.
(10) For adoption.
(11) In which personal service of process or notice is not required by the statutes or constitution of this state or by the Constitution of the United States.
(12) In probate or guardianship proceedings in which personal service of process or notice is not required by the statutes or constitution of this state or by the Constitution of the United States.
(13) For termination of parental rights pursuant to part VIII of ch. 39 or ch. 63.
(14) For temporary custody of a minor child, under ch. 751.
(15) To determine paternity, but only as to the legal father in a paternity action in which another man is alleged to be the biological father, in which case it is necessary to serve process on the legal father in order to establish paternity with regard to the alleged biological father.

[3] Section 49.10(1)(b), F.S.
[4] Section 49.10(1)(c), F.S.
[5] Section 50.011, F.S.
[6] Section 50.011, F.S.
[7] Section 50.061(6), F.S.

Publication Costs

The amount a newspaper can charge for publication is standardized at 70 cents per square inch for the first insertion, and 40 cents per square inch for each subsequent insertion.[8] Where the regular established minimum commercial rate per square inch of the newspaper publishing the official notice or legal advertisement is greater than the per square inch rate established in statute, the minimum commercial rate may be charged.[9] If the government is required to publish a notice multiple times, a newspaper may only charge 85 percent of the allowable rate for the subsequent publications.[10] The government may also procure publication through bids.[11]

Newspaper's Website

The law requires that the following legal actions must be published on a newspaper's website at the same time that they appear in print:

> constructive service, or the initiating, assuming, reviewing, exercising or enforcing jurisdiction or power, by any court in this state, or any notice of sale of property, real or personal, for taxes, state, county or municipal, or sheriff's, guardian's or administrator's or any sale made pursuant to any judicial order, decree or statute or any other publication or notice pertaining to any affairs of the state, or any county, municipality or other political subdivision thereof.[12]

Legal notices must be placed on a newspaper's website on the same day the notices appear in print, and the front page of a newspaper's website must have a link to the legal notices webpage.[13] The legal notices webpage must be searchable and accessible for free to the public.[14] If there are size requirements for a printed legal notice, then the newspaper's website is required to optimize online visibility of the legal notice; in addition, the legal notices must be the dominant feature of the webpage.[15] Effective July 1, 2013, newspapers are required to provide free e-mail notification of publication of new legal notices.[16]

Statewide Website

A newspaper is also required to place a legal notice published in its newspaper on a statewide website maintained by the Florida Press Association.[17] Finally, any error in the legal notice published on a newspaper's webpage or the statewide website is considered harmless if the legal notice printed in the newspaper is correct.[18]

---

[8] Section 50.061(2), F.S.
[9] Section 50.061(3), F.S.
[10] Section 50.061(2), F.S.
[11] Section 50.061(4), F.S.
[12] Section 50.031, F.S.
[13] Section 50.0211(2), F.S.
[14] *Id*.
[15] *Id*.
[16] Section 50.0211(4), F.S.
[17] Section 50.0211(3), F.S. See www.floridapublicnotices.com.
[18] Section 50.0211(5), F.S.

III. Effect of Proposed Changes:

Newspaper Websites

Legal notices webpages for newspapers must be titled "Legal Notices," "Legal Advertising," or use similar language. The legal notices webpages must also be the "leading" as well as dominant subject of the page.

If the legal notice is published in a newspaper, the newspaper is prohibited from charging a fee or requiring a person to register with the newspaper in order to view or search a legal notice webpage.

Statewide Website

The statewide legal notice website must be accessible and searchable by name and case number and legal notices must be posted for at least 90 consecutive days. Effective October 1, 2014, the statewide website must keep a legal notice posted for 18 months, be searchable, and free to the public.

Conflicting Notices

The bill deletes s. 50.0211(5), F.S., which provides that an error in the internet version of a legal notice is harmless if the printed version is correct.[19]

Technical changes

Obsolete effective date clauses are removed from s. 50.0211, F.S., and editorial changes are made to ss. 50.0211 and 50.061, F.S.

Effective Date

The bill takes effect October 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

[19] Section 50.0211(5), F.S. provides that "[a]n error in the notice placed on the newspaper or statewide website shall be considered a harmless error and proper legal notice requirements shall be considered met if the notice published in the newspaper is correct."

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill prohibits newspapers and the Florida Press Association from charging fees for viewing legal notices on their websites. It is unknown if newspapers and the Florida Press Association are currently charging the public for viewing their legal notices websites and if this bill will reduce existing or potential revenue streams.

The Florida Press Association estimates that the initial cost associated with making changes to their website to conform to this bill is $3,600.00, but may increase. The Florida Press Association did not have an estimate for the financial impact this bill will have on newspapers, but did state that only a few newspapers would be affected.[20]

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Section 50.0211(5), F.S. provides that an error placed on the newspaper website or statewide website is considered a harmless error and proper legal notice requirements are considered to be met if the notice published in the newspaper is correct. This section is removed in this bill. If an error occurs on either of those websites once this bill becomes law, it is not clear which published version will control, the printed newspaper version or the websites. It is also unclear if an ambiguity results from the error what redress is available for someone who relied upon the erroneous publication.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: s. 50.0211 and 50.061.

[20] E-mail from Sam Morley, General Counsel for the Florida Press Association (March 26, 2014) (on file with the Senate Committee on Judiciary).

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on March 13, 2014:
The CS removes clauses which permit, but do not require, a clerk of court to link his or her website to a newspaper's legal notices website.

The CS also removes a provision stating that if there is a conflict between the electronic and the printed versions of a legal notice, the printed version controls. The CS also deletes a provision stating that a person adversely affected by a mistake in a judicial sale notice is permitted to seek relief if the error is in the printed legal notice or appears on the statewide website.

B. Amendments:

None.

By the Committee on Governmental Oversight and Accountability; and Senator Latvala

585-02544-14 2014834c1

A bill to be entitled

An act relating to legal notices; amending s. 50.0211, F.S.; requiring legal notices to be posted on a newspaper's website on web pages with specified titles; prohibiting charging a fee or requiring registration for viewing online legal notices; establishing the period for which legal notices are required to be published on the statewide website; requiring that legal notices be archived on the statewide website for a specified period; deleting a provision relating to harmless error; amending s. 50.061, F.S.; clarifying payment provisions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 50.0211, Florida Statutes, is amended to read:

50.0211 Internet website publication.—

(1) This section applies to legal notices that must be published in accordance with this chapter unless otherwise specified.

(2) Each legal notice must be posted ~~placed~~ on the newspaper's website on the same day that the printed notice appears in the newspaper, at no additional charge, in a separate web page titled "Legal Notices," "Legal Advertising," or comparable identifying language. A link to the legal notices web page shall be provided on the front page of the newspaper's website that provides access to the legal notices ~~without~~

585-02544-14 2014834c1

~~charge~~. If there is a specified size and placement required for a printed legal notice, the size and placement of the notice on the newspaper's website must ~~should~~ optimize its online visibility in keeping with the print requirements. The newspaper's web pages that contain legal notices must ~~shall~~ present the legal notices as the dominant and leading subject matter of those pages. The newspaper's website must ~~shall~~ contain a search function to facilitate searching the legal notices. A fee may not be charged, and registration may not be required, for viewing or searching legal notices on a newspaper's website if the legal notice is published in a newspaper ~~This subsection shall take effect July 1, 2013~~.

(3)(a) If a legal notice is published in a newspaper, the newspaper publishing the notice shall place the notice on the statewide website established and maintained as an initiative of the Florida Press Association as a repository for such notices located at the following address: www.floridapublicnotices.com.

(b) A legal notice placed on the statewide website created under this subsection must be:

1. Accessible and searchable by party name and case number.

2. Posted for a period of at least 90 consecutive days after the first day of posting.

(c) The statewide website created under this subsection shall maintain a searchable archive of all legal notices posted on the publicly accessible website on or after October 1, 2014, for 18 months after the first day of posting. Such searchable archive shall be provided and accessible to the general public without charge.

(4) Newspapers that publish legal notices shall, upon

request, provide e-mail notification of new legal notices when they are printed in the newspaper and added to the newspaper's website. Such e-mail notification shall be provided without charge, and notification for such an e-mail registry shall be available on the front page of the legal notices section of the newspaper's website. ~~This subsection shall take effect July 1, 2013.~~

~~(5) An error in the notice placed on the newspaper or statewide website shall be considered a harmless error and proper legal notice requirements shall be considered met if the notice published in the newspaper is correct.~~

Section 2. Subsections (2) and (3) of section 50.061, Florida Statutes, are amended to read:

50.061 Amounts chargeable.—

(2) The charge for publishing each such official public notice or legal advertisement shall be 70 cents per square inch for the first insertion and 40 cents per square inch for each subsequent insertion, except that government notices required to be published more than once, the cost of which ~~whose cost~~ is paid for by the government and not paid in advance by or allowed to be recouped from private parties, may not be charged for the second and successive insertions at a rate greater than 85 percent of the original rate.

(3) Where the regular established minimum commercial rate per square inch of the newspaper publishing such official public notices or legal advertisements is in excess of the rate herein stipulated, said minimum commercial rate per square inch may be charged for all such legal advertisements or official public notices for each insertion, except that government notices

required to be published more than once, the cost of which ~~whose cost~~ is paid for by the government and not paid in advance by or allowed to be recouped from private parties, may not be charged for the second and successive insertions at a rate greater than 85 percent of the original rate.

Section 3. This act shall take effect October 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 1400
INTRODUCER:	Education Committee and Senator Latvala
SUBJECT:	Postsecondary Student Tuition
DATE:	March 31, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Graf	Klebacha	ED	**Fav/CS**
2.	Brown	Cibula	JU	**Pre-meeting**
3.			AED	
4.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1400 makes an undocumented immigrant eligible for the waiver of out-of-state fees at a public postsecondary education institution if he or she spends 3 consecutive years in this state before graduating from high school in this state. However, the bill provides that these undocumented immigrants are not eligible for state financial aid.

The bill clarifies that U.S. citizens who are dependents of undocumented immigrants may not be denied in-state tuition solely based on the undocumented status of their parents. The bill also grants tuition waivers to combat-decorated veterans who attend career centers, eliminates the automatic annual tuition increases at public postsecondary institutions, and reduces the costs of prepaid contracts from the Florida Prepaid Program by reducing the amounts the program will pay to public postsecondary institutions.

The bill codifies the federal district court decision of *Ruiz v. Robinson*[1], which found that the regulations of the Board of Governors of the State University System violated the Equal Protection Clause of the U.S. Constitution. The regulations at issue prohibited students who otherwise qualified for in-state tuition from receiving in-state tuition because they were dependents to parents who had an undocumented immigration status. Accordingly, this bill conforms the statutes to the *Ruiz* decision and the revised regulations of the BOG which provide

[1] *Ruiz v. Robinson*, 892 F.Supp.2d 1321 (S.D. Fla. 2012).

that the undocumented status of a student's parent cannot be used to determine a student's residency for tuition purposes.

The bill also:

- Eliminates the automatic increase in tuition and fees based on the rate of inflation for workforce education postsecondary programs and certain programs available through the Florida College System (FCS).
- Eliminates the automatic increase of resident undergraduate tuition for state universities based on the rate of inflation and prohibits state university boards of trustees from establishing and increasing the tuition differential fee for undergraduate courses.
- Specifies that for an advance payment contract purchased before July 1, 2024, the amount assessed and paid by the Florida Prepaid College Board (Prepaid Board) to the state universities will follow the methodology previously utilized by the Prepaid Board for contracts purchased prior to July 1, 2009.
- Expands the mandatory tuition waiver benefit for recipients of a Purple Heart and other combat decorations who are enrolled at a state university or a FCS institution to also apply at career center operated by a school district or charter technical career center.

II. Present Situation:

Tuition and Fees

The term "tuition" is defined as "the basic fee charged to a student for instruction provided by a public postsecondary educational institution in this state."[2] A student who is classified as a "resident for tuition purposes" is a student who qualifies for the in-state tuition rate.[3]

An "out-of-state fee" is the additional fee for instruction provided by a public postsecondary institution charged to a student who does not qualify for the in-state tuition rate."[4] A "non-resident for tuition purposes" is defined as a "person who does not qualify for the in-state tuition rate,"[5] and pays the out-of-state fee in addition to tuition.

Residents for tuition purposes are charged in-state rates for tuition while non-residents pay out-of-state fees in addition to tuition, unless these costs are exempted or waived.[6] Residents for tuition purposes also have access to need-based, merit-based, and other state financial aid upon meeting specified requirements.[7]

[2] Section 1009.01(1), F.S. Additionally, the definition states that "[a] charge for any other purpose shall not be included within this fee." *Id.*
[3] Section 1009.21(1)(g), F.S.
[4] Section 1009.01(2), F.S. Adding that "[a] charge for any other purpose shall not be included within this fee." *Id.*
[5] Section 1009.21(1)(e), F.S.
[6] Sections 1009.22(2) and (3)(c), 1009.23(2)(a) and (3)(b)2., and 1009.24(2) and (5), F.S.
[7] Section 1009.40, F.S.

Workforce Education Postsecondary Fees

A student who enrolls in workforce education postsecondary programs is charged tuition and other fees, unless the student is eligible for an exemption or a waiver.[8] The Legislature establishes the standard tuition and out-of-state fee per contact hour. For programs leading to a career certificate or an applied technology diploma, standard tuition is $2.22 per contact hour for residents and nonresidents. The out-of-state fee for these programs is $6.66 per contact hour.[9] For adult general education programs, a block tuition of $45 per half year or $30 per term is assessed for residents and nonresidents. The out-of-state fee for these programs is $135 per half year or $90 per term.[10]

The tuition and out-of-state fee per credit hour increase automatically at the beginning of each fall semester at a rate equal to inflation, unless otherwise provided in the General Appropriations Act (GAA). The Office of Economic and Demographic Research (EDR) must report the rate of inflation to the President of the Senate, the Speaker of the House of Representatives, the Governor, and the State Board of Education (SBE) each year prior to March 1. The rate of inflation is defined as "the rate of the 12-month percentage change in the Consumer Price Index for All Urban Consumers, U.S. City Average, All Items, or successor reports as reported by the United States Department of Labor, Bureau of Labor Statistics, or its successor for December of the previous year."[11] If the percentage change is negative, the tuition and out-of-state fee per credit hour must remain the same as the prior fiscal year.[12]

Florida College System Institution Student Fees

A student who enrolls in a course for college credit, a college preparatory course, or an educator preparation institute (EPI) program at a Florida College System (FCS) institution is charged tuition and other fees, unless the student is eligible for an exemption or a waiver.[13] The Legislature establishes the standard tuition and out-of-state fee per credit hour. The standard tuition per credit hour for residents and non-residents enrolled in advanced and professional, postsecondary vocational, developmental education, and EPI programs is $68.56. The out-of-state fee for such programs is $205.82 per credit hour.[14] For baccalaureate programs, the tuition per credit hour for resident students is $87.42 per credit hour.[15] The sum of tuition and out-of-state fees per credit hour for non-resident students must not be more than 85 percent of the sum of tuition and out-of-state fee at a state university nearest to the FCS institution.[16]

The tuition and out-of-state fee per credit hour increase automatically at the beginning of each fall semester at a rate equal to inflation, unless otherwise provided in the GAA. Current law requires EDR to report the rate of inflation to the President of the Senate, the Speaker of the House of Representatives, the Governor, and the SBE each year prior to March 1. The rate of inflation is defined as "the rate of the 12-month percentage change in the Consumer Price Index

[8] Sections 1009.22(2), 1009.25, and 1009.26, F.S.
[9] Section 1009.22(3)(c), F.S.
[10] Section 1009.22(3)(c), F.S.
[11] Section 1009.22(3)(d), F.S.
[12] Section 1009.22(3)(d), F.S.
[13] Sections 1009.23(1)-(2)(a), 1009.25, and 1009.26, F.S.
[14] Section 1009.23(3)(a), F.S.
[15] Section 1009.23(3)(b)1., F.S.
[16] Section 1009.23(3)(b)2., F.S.

for All Urban Consumers, U.S. City Average, All Items, or successor reports as reported by the United States Department of Labor, Bureau of Labor Statistics, or its successor for December of the previous year."[17] If the percentage change is negative, the tuition and out-of-state fee per credit hour must remain the same as the prior fiscal year.[18]

State University Student Fees

A student who enrolls in a college credit course at a state university is charged tuition and other fees, unless the student is eligible for an exemption or a waiver.[19] The Legislature establishes the amount of resident undergraduate tuition per credit hour. Resident undergraduate tuition is $103.32 per credit hour for lower-level and upper-level coursework at a state university.[20]

The resident undergraduate tuition per credit hour increases automatically at the beginning of each fall semester at a rate equal to inflation, unless otherwise provided in the GAA. The EDR must report the rate of inflation to the President of the Senate, the Speaker of the House of Representatives, the Governor, and the Board of Governors each year prior to March 1. The rate of inflation is defined as "the rate of the 12-month percentage change in the Consumer Price Index for All Urban Consumers, U.S. City Average, All Items, or successor reports as reported by the United States Department of Labor, Bureau of Labor Statistics, or its successor for December of the previous year."[21] If the percentage change is negative, the resident undergraduate tuition must remain the same as the prior fiscal year.[22]

In addition to the resident undergraduate tuition, the Legislature also establishes the financial aid fee, Capital Improvement Trust Fund fee, technology fee, and distance learning course fee as a specified dollar amount or percent of tuition.[23] Additionally, the board of trustees for each state university may establish certain fees subject to the approval of the Board of Governors for the State University System of Florida (BOG), such as an activity and service fee, health fee, athletic fee, technology fee, and tuition differential fee.[24]

A state university board of trustees may establish a tuition differential fee for undergraduate courses provided that the BOG approves. The fee must promote improvements in the quality of undergraduate education and provide financial aid to undergraduate students who exhibit financial need.[25] The aggregate sum of undergraduate tuition and fees per credit hour, including the tuition differential fee, must not exceed the national average of undergraduate tuition and fees at public postsecondary institutions that grant 4-year degrees.[26]

---

[17] Section 009.23(3)(c), F.S.
[18] Section 1009.23(3)(c), F.S.
[19] Sections 1009.24(2), 1009.25, and 1009.26, F.S.
[20] Section 1009.24(4)(a), F.S.
[21] Section 1009.24(4)(b), F.S.
[22] Section 1009.24(4)(b), F.S.
[23] Section 1009.24 (7), (8), (13), and (17), F.S.
[24] Tuition differential is defined as the "supplemental fee charged to a student by a public university in this state." Section 1009.01(3), F.S. "The aggregate sum of undergraduate tuition and fees per credit hour, including the tuition differential [fee at a state university], may not exceed the national average of undergraduate tuition and fees at 4-year degree-granting public postsecondary educational institutions." Section 1009.24(16)(b)4., F.S. Section 1009.24(4)(e), (9)-(13), and (16), F.S.; Florida Board of Governors Regulations 7.001(6) and (14) and 7.003(4), (5), (16), (17), and (23).
[25] Section 1009.24(16), F.S.
[26] Section 1009.24(16)(b)4., F.S.

A state university board of trustees may also propose annual increases to the tuition differential fee subject to BOG approval. The tuition differential fee may increase the aggregate sum of tuition and the tuition differential fee by more than 15 percent of the total charged for these fees in the preceding fiscal year.[27]

Fee Exemptions and Fee Waivers

Florida law provides fee exemptions[28] and fee waivers[29] to students who meet specified criteria. A number of fee exemptions and fee waivers are mandatory,[30] while others are permissive.[31] For example, the state of Florida extends tuition and fee exemption benefits to a student who lacks a fixed, regular, and adequate nighttime residence or whose primary nighttime residence is a shelter designed to provide temporary residence[32] and a student who is in the custody of the Department of Children and Family Services (DCF) at the age of 18 or who after reaching 16 years of age spent at least 6 months in DCF custody and was placed in guardianship by the court.[33] Students who are exempted from the payment of tuition and fees are not required to establish Florida residency for tuition purposes.[34]

Florida law also grants tuition and fee waivers to students who meet certain conditions.[35] For example, a state university or FCS institution may waive tuition and fees for a classroom teacher who is employed full-time by a school district and who meets the academic requirements of the university or institution, as applicable.[36] Additionally, each university board of trustees is authorized to "waive tuition and out-of-state fees for purposes that support and enhance the mission of the university."[37] Students who are otherwise eligible for fee waivers qualify regardless of whether they are Florida residents for tuition purposes.[38]

Regarding military personnel, Florida law provides a mandatory undergraduate fee waiver for "each recipient of a Purple Heart or another combat decoration superior in precedence" at a state university or FCS institution.[39] The statute requires the recipient to:[40]

---

[27] Section 1009.24(16)(b)3., F.S.; *see also* Florida Board of Governors Regulation 7.001(14).
[28] Section 1009.25, F.S.; *see* The Florida College System, *Exemptions and Waivers in The Florida College System*, http://www.fldoe.org/fcs/OSAS/Evaluations/pdf/FYI2012-02Exemptions.pdf (noting that "[a]n exemption is provided for certain students who are, by statutory definition, exempt from the payment of tuition and fees, including lab fees").
[29] Section 1009.26, F.S.; *see* The Florida College System, *Exemptions and Waivers in The Florida College System*, http://www.fldoe.org/fcs/OSAS/Evaluations/pdf/FYI2012-02Exemptions.pdf (providing that a "waiver occurs when a student has his or her fees, which would otherwise be due, waived or forgiven by an institution").
[30] Sections 1009.25(1)(a)-(g) and 1009.26(5), (7), (8), F.S.
[31] Section 1009.25(2), F.S. (authorizing each Florida College System institution to grant additional fee exemptions "up to 54 full-time equivalent students or 1 percent of [an] institution's total full-time equivalent enrollment, whichever is greater at each institution"); *see also* s. 1009.26(1)-(4), (6), (9), (10), (11), F.S.
[32] Section 1009.25(1)(f), F.S.
[33] Section 1009.25(1)(c), F.S.
[34] Section 1009.25, F.S.
[35] Section 1009.26, F.S.
[36] Section 1009.26(10), F.S.
[37] Section 1009.26(9), F.S.
[38] Section 1009.26, F.S.
[39] Section 1009.26(8), F.S.
[40] Section 1009.26(8)(a)-(c), F.S.

- Be enrolled in an undergraduate program that results in a degree or certificate;
- Be a state resident when applying for the waiver and at the time of military action that resulted in the awarding of the qualifying combat decoration; and
- Submit to the institution a specified form documenting the award issued at the time of separation from service or another document recognized by the United States Department of Defense or the United States Department of Veterans Affairs.

The fee waiver for Purple Heart recipients and recipients of superior combat decorations covers 110 percent of the credit hours the recipient needs to complete the applicable degree or certificate program.[41] In 2011-2012, 168 students at FCS institutions received a fee waiver as the result of receiving a Purple Heart totaling $269,580.[42] At state universities, 46 students received fee waivers as the result of receiving a Purple Heart totaling $151,896 during 2012-2013.[43]

In 2011-2012, FCS institutions provided exemptions and fee waivers for 71,719 students, which totaled $93,689,726.[44] Fee exemptions and fee waivers, respectively, totaled $83,926,832 and $9,762,894 for use at FCS institutions.[45] State universities provided a total of $205,824,039 in fee exemptions and fee waivers in 2012-2013.[46] In 2012-2013, Career Centers and Charter Technical Career Centers provided approximately $671,000 in fee exemptions.[47]

Tuition Assistance for Undocumented Aliens

Federal Law

Federal law authorizes states to enact laws that expressly make undocumented aliens eligible for any state or local public benefit for which they would not otherwise be eligible.[48] However, federal law prohibits preferential treatment of aliens not lawfully present on the basis of residence for higher education benefits.[49] Specifically, federal law [50] provides:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a state (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

[41] Section 1009.26(8), F.S.
[42] Email, Florida Department of Education (December 11, 2013), on file with the Committee on Education.
[43] Email, Florida Board of Governors (December 11, 2013), on file with the Committee on Education.
[44] Email, Florida Department of Education (December 11, 2013), on file with the Committee on Education.
[45] *Id.* The calculation of fee exemptions the exemptions provided under s. 1009.25(2), F.S., which totaled $7,912,717 for 2,691 students and the exemptions under s. 1009.25(1), F.S. *Id.*
[46] Email, Florida Board of Governors (December 11, 2013), on file with the Committee on Education.
[47] Email, Florida Department of Education (January 17, 2014), on file with the Committee on Education. Career Centers and charter technical career centers provided 671 non-dual enrollment fee exemptions. The calculation of fee exemptions provided under s. 1009.25 (1), F.S., is based on the average student enrollment in 423 clock hours. Phone call with staff, FDOE (January 17, 2014).
[48] 8 U.S.C. s. 1621(d).
[49] 8 U.S.C. s. 1623.
[50] 8 U.S.C. s. 1623.

An alien is "an individual who is not a U.S. citizen or U.S. national."[51] An illegal alien, also known as an undocumented alien, is an alien who has entered the United States illegally and is deportable if apprehended, or an alien who entered the United States legally but who has fallen "out of status" and is deportable.[52]

On June 15, 2012, the Secretary of Homeland Security announced that "certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of two years, subject to renewal, and would then be eligible for work authorization. Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. Deferred action does not provide an individual with lawful status."[53] Individuals must meet certain requirements including an age requirement to be considered for temporary status under the deferred action for childhood arrivals (DACA) memorandum.[54]

State Law on the Extension of In-state Tuition to Undocumented Students or Dependent Children of Undocumented Parents

States Other Than Florida

States vary regarding extending in-state tuition and state financial aid benefits to students who are undocumented aliens.

Fifteen states, California, Colorado, Connecticut, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Texas, Utah, and Washington extend in-state tuition rates to students who are undocumented aliens and who meet specific requirements.[55] However, Wisconsin revoked nonresident tuition and fee exemptions for undocumented aliens in 2011.[56]

Oklahoma and Rhode Island provide in-state tuition rates to undocumented students through Board of Regents decisions. In 2013, the University of Hawaii's Board of Regents and the University of Michigan's Board of Regents adopted similar policies for students who are undocumented aliens to get in-state tuition at their institutions.[57]

---

[51] Internal Revenue Service, *Immigration Terms and Definitions Involving Aliens*, http://www.irs.gov/Individuals/International-Taxpayers/Immigration-Terms-and-Definitions-Involving-Aliens (last visited March 26, 2014).
[52] Internal Revenue Service, *Immigration Terms and Definitions Involving Aliens*, http://www.irs.gov/Individuals/International-Taxpayers/Immigration-Terms-and-Definitions-Involving-Aliens (last visited March 26, 2014).
[53] U.S. Citizenship and Immigration Services, *Consideration of Deferred Action for Childhood Arrivals Process*, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process (last visited March 26, 2014).
[54] U.S. Citizenship and Immigration Services, *Consideration of Deferred Action for Childhood Arrivals Process*, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process (last visited March 26, 2014).
[55] National Conference of State Legislatures, *Undocumented Student Tuition: Overview* (February 2014), http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx (last visited March 26, 2014).
[56] National Conference of State Legislatures, *Undocumented Student Tuition: Overview* (February 2014), http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx (last visited March 26, 2014).
[57] National Conference of State Legislatures, *Undocumented Student Tuition: Overview* (February 2014), http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx (last visited March 26, 2014).

California, New Mexico, Texas, and Washington allow undocumented aliens to receive state financial aid. Students without legal immigrant status are ineligible for federal financial aid.[58]

Arizona, Georgia, and Indiana specifically prohibit undocumented aliens from getting in-state tuition rates.[59]

Alabama and South Carolina prohibit students who are undocumented aliens from enrolling in public postsecondary institutions.[60]

Florida

Section 1009.21(3)(a), F.S., excludes students from classification as residents for tuition purposes if the student is a dependent child based on the federal income tax code and the student cannot establish his or her parent's legal residency in Florida. The determination of legal residency is not based on a parent's legal presence in the United States but on their duration of residency in the state for a minimum of 12 consecutive months.[61] Therefore, Florida law appears silent regarding whether in-state tuition and state financial aid benefits extend to dependent children of parents who are undocumented aliens.

Florida law authorizes university board of trustees to waive tuition and out-of-state fees for purposes that support and enhance the mission of the university.[62] Similarly, school districts and FCS institutions may waive fees for any fee-nonexempt student.[63] FCS institutions are also authorized to grant fee exemptions to students.[64]

In 2012, the United States District Court for the Southern District of Florida in *Ruiz v. Robinson* ruled that U.S. citizens who otherwise meet Florida's residency requirements for tuition purposes may not be denied in-state tuition based on their parent's undocumented status for federal immigration purposes.[65] All of the plaintiffs in the case became United States citizens by virtue of birthright, meaning that they were born in the U.S.[66] The plaintiffs did not challenge Florida law. Instead, the plaintiffs challenged regulations in place by the State Board of Education and the Board of Governors which denied in-state tuition to plaintiffs who were financial dependents of undocumented aliens, as the parents could not establish a legal presence in the U.S.[67] The

[58] National Conference of State Legislatures, *Undocumented Student Tuition: Overview* (February 2014), http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx (last visited March 26, 2014).
[59] National Conference of State Legislatures, *Undocumented Student Tuition: Overview* (February 2014), http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx (last visited March 26, 2014).
[60] National Conference of State Legislatures, *Undocumented Student Tuition: Overview* (February 2014), http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx (last visited March 26, 2014).
[61] Section 1009.21(3)(b), F.S. Section 1009.21(1)(d), F.S., defines a legal resident as someone who maintained a Florida residence for the preceding year, purchased a home occupied by him or her as a residence, or established domicile, which requires a person to submit to the clerk a sworn statement that the person is a bona fide resident either residing and maintaining a place of abode in the county in which the person intends to maintain as his or her permanent home or that the place of abode is his or her predominant and principal home. Section 222.17(1), (2), and (3), F.S.
[62] Section 1009.26(9), F.S.
[63] Section 1009.26(1), F.S.
[64] Section 1009.25(2), F.S.
[65] *Ruiz v. Robinson*, 892 F. Supp. 2d 1321, 1331-1333 (S.D. Fla. 2012).
[66] *Id*. at 1323-1324.
[67] FAC 72-1.001(5)(a)3. and 6A-10.044(4).

Court specifically struck down these regulations for violating the Equal Protection Clause of the U.S. Constitution. [68]

Case Law

The U.S. Supreme Court definitively ruled in 1982 that states must provide all students with K-12 public education, regardless of immigration status. The Court ruled that "If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here."[69] The 1982 U.S Supreme Court ruling did not extend to postsecondary education.

California provides in-state tuition benefits to students, including undocumented aliens, who meet certain statutory requirements.[70] The benefit is provided through an exemption from payment of nonresident tuition[71] and has been upheld under federal law[72] because the benefit is not based upon residence within the state.[73] The requirements to receive the exemption from payment of nonresident tuition are:

- Attendance at a California high school for 3 or more years;
- Graduation from a California high school or attainment of a graduation equivalent;
- Registration as an entering, or currently enrolled, student at an accredited institution of higher education in California; and
- If the student is not a lawful immigrant, the filing of an affidavit with the institution of higher education which states that the student has applied to legalize his or her immigration status, or will apply as soon as he or she is eligible."[74]

In 2005, a federal district court in Kansas dismissed a lawsuit that challenged the state law regarding in-state tuition benefits for students who are undocumented aliens based on procedural grounds of the plaintiffs' lack of standing and lack of a private right of action.[75] In 2007, the Tenth Circuit Court of Appeals affirmed the federal district court's decision.[76]

---

[68] *Ruiz*, 892 F.Supp.2d at 1331-1333.
[69] *Plyler v. Doe*, 457 U.S. 202, 230 (1982) [citation omitted].
[70] Cal. Educ. Code § 68130.5.
[71] *Id.*
[72] *Martinez v. The Regents of the Univ. of California*, 241 P.3d 855, 860 (Cal. 2010), cert. denied, 131 S. Ct. 2961 (2011); *see also* 8 U.S.C. §1623. Federal law states that "[n]otwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible *on the basis of residence within a State* (or political subdivision) for any postsecondary education benefit unless a citizen or nation of the United States is eligible for such a benefit (in no less amount, duration, and scope) without regard to whether the citizen or national is such a resident." 8 U.S.C. §1623 (italics added).
[73] *Martinez*, 241 P.3d at 860. The California Supreme Court stated that exemption is not based on residence "[b]ecause the exemption is given to all who have attended high school in California for at least three years (and meet other requirements), and not all who have done so qualify as California residents for purposes of in-state tuition, and further because not all unlawful aliens who would qualify as residents but for their unlawful status are eligible for the exemption, we conclude the exemption is not based on residence in California. Rather, it is based on other criteria. Accordingly, section 68130.5 does not violate section 1623." *Id.*
[74] Cal. Educ. Code § 68130.5.
[75] *Day v. Sebelius*, 376 F. Supp. 2d 1022, 1040 (D. Kan. 2005).
[76] *Day v. Bond*, 500 F.3d 1127, 1140 (10th Cir. 2007).

Stanley G. Tate Florida Prepaid College Program (Prepaid Program)

The Legislature created the Stanley G. Tate Florida Prepaid College Program (Prepaid Program) in 1987[77] to provide Florida families affordable means to plan and save for their children's college education.[78] The Prepaid Program is administered by the Florida Prepaid College Board (Prepaid Board).[79] Florida's families have purchased more than 1.5 million Prepaid Program contracts.[80]

The Prepaid Program provides for the purchase of advance payment contracts for postsecondary education. The contracts, which are financially guaranteed by the State of Florida,[81] lock-in many of the costs associated with enrollment in state universities and Florida College System (FCS) institutions (registration fees, tuition differential fees, local fees, and dormitory fees) at the time such contracts are purchased.[82] Families may choose from the following:[83]

- 2-Year Florida College Plan
- 4-Year Florida College Plan
- 2+2 Florida Plan
- 4-Year Florida University Plan

A qualified beneficiary[84] with a Prepaid Plan choosing to attend an out-of-state or private institution may have the full value of the Plan, which would have been paid to a Florida state university or a Florida college for that beneficiary, transferred semester by semester to the private or out-of-state institution.[85]

Each year, the Prepaid Board analyzes the actuarial adequacy of the Prepaid Trust Fund. In order to conduct this analysis, a series of assumptions are made regarding investment yield, tuition increases, tuition differential fee increases, local fee increases, and dormitory fee increases. The result of the analysis is a determination of the actuarial reserve, which means the amount by which the expected value of the assets in the Prepaid Trust Fund exceeds the value of the expected liabilities. The table below shows a recent history of the actuarial reserve.[86]

---

[77] Section 1, ch. 1987-132, L.O.F.; *see also* Florida Prepaid College Board, *Our History*, http://www.myfloridaprepaid.com/who-we-are/ (last visited March 26, 2014).
[78] Section 1009.98(1), F.S.
[79] Section 1009.971(1), F.S.
[80] Florida Prepaid College Board, *Annual Report* (2012), *available at* http://www.myfloridaprepaid.com/wp-content/uploads/2012-annual-report.pdf, at 1.
[81] Section 1009.98(7), F.S.
[82] Section 1009.98(2), F.S.
[83] Florida Prepaid College Board, *Explore Your Options*, http://www.myfloridaprepaid.com/what-we-offer/ (last visited March 26, 2014).
[84] A qualified beneficiary is a Florida resident at the time a purchaser enters into an advance payment contract on behalf of the resident; a nonresident who is the child of a noncustodial parent who is a Florida resident at the time the parent enters into an advance payment contract for the child; or a graduate of an accredited high school in Florida who is a Florida resident at the time he or she is designated to receive benefits from the advance payment contract. Section 1009.97(3)(f), F.S.
[85] Florida Prepaid College Board, *Annual Report* (2012), *available at* http://www.myfloridaprepaid.com/wp-content/uploads/2012-annual-report.pdf, at 10.
[86] State Board of Administration, *2014 Agency Legislative Bill Analysis for SB 732* (February 5, 2013), at 1-2, on file with the Senate Judiciary Committee.

Actuarial Information				
	2010	**2011**	**2012**	**2013**
Actuarial Reserve	$482,626,581	$589,408,656	$569,458,560	$834,449,416
As Percentage of Expected Liabilities	5.1%	6.0%	4.9%	7.6%

The Prepaid Plan payment methodology (tuition and fee caps) established for advance payment contracts purchased before July 1, 2009, specifies the amount the Prepaid Board will pay universities for registration and tuition differential increases within a reasonable range based on fund reserve. The table below shows the methodology.[87]

Registration & Tuition Differential Fee Payment Scenarios				
Actuarial Reserve, as a Percentage of Expected Liabilities	**<5%**	**5% - 6%**	**6% - 7%**	**≥7.5%**
Prepaid Board Payment to Universities above Fee Assessed Previous Year	5.5%	6.0%	6.5%	7.0%

The Prepaid Board pays state universities 5 percent above the amount assessed in the previous fiscal year for local fees and 6 percent above the amount assessed in the previous fiscal year for dormitory fees.[88]

For advance payment contracts purchased on or after July 1, 2009, for registration, tuition differential, local, and dormitory fees, the Prepaid Board must pay the university the actual amount charged for these fees.[89] For actuarial planning purposes, the Prepaid Board must price the Plan with the assumption that universities will assess maximum allowable fees each year.

III. Effect of Proposed Changes:

CS/SB 1400 eliminates the automatic annual tuition increases at public postsecondary institutions, reduces the costs of prepaid contracts from the Florida Prepaid Program by reducing the amounts the program will pay to public postsecondary institutions, and extends an in-state tuition benefit to students who meet certain conditions. As a result, the bill makes postsecondary education less costly providing tuition and fee benefits.

Tuition and Fees

The bill codifies the public postsecondary tuition and out-of-state fee levels for the 2014-2015 academic year and eliminates the automatic annual increase in tuition and fees based on the rate of inflation.

[87] State Board of Administration, *2014 Agency Legislative Bill Analysis for SB 732* (February 5, 2013), at 2, on file with the Senate Judiciary Committee.
[88] *Id*.
[89] *Id*.

Workforce Education Postsecondary Fees

For programs leading to a career certificate or applied technology diploma, the bill increases the standard tuition for residents and nonresidents from $2.22 to $2.33 per contact hour, and the out-of-state fee from $6.66 to $6.99 per contact hour. The bill locks-in the current tuition and out-of-state fee levels for the 2014-2015 academic year and each year thereafter by eliminating statutory provisions annually increasing these amounts by the rate of inflation.

Florida College System Institution Student Fees

For advanced and professional, postsecondary vocational, developmental education, and educator preparation institute programs, the bill increases standard tuition from $68.56 to $71.98 per credit hour for residents and nonresidents, and the out-of-state fee from $205.82 to $215.94 per credit hour. For baccalaureate degree programs, the bill changes tuition from $87.42 to $91.79 per credit hour for residents. The bill locks-in the current tuition and out-of-state fee levels for the 2014-2015 academic year and each year thereafter by eliminating statutory provisions annually increasing these amounts by the rate of inflation.

State University Student Fees

For resident undergraduate tuition at state universities, the bill reduces tuition to $103.32 from $105.07 per credit hour by eliminating an increase caused by statutes indexing tuition figures set in law to inflation.[90] The bill locks-in the 2011 tuition level for the 2014-2015 academic year and each year thereafter by eliminating the automatic annual increases in tuition based on inflation. As a result, fees indexed to tuition will also not increase due to automatic inflation increases annually, making university education more affordable and accessible.

The bill also prohibits state university boards of trustees from establishing and increasing tuition differential fees for undergraduate courses.[91] Current tuition differential fees remain in place.

Tuition Assistance

In-State Tuition for U.S. Citizens But Whose Parents Are Undocumented Aliens

The bill codifies a 2012 court ruling regarding residency classification of students who are U.S. citizens but whose parents are undocumented aliens by extending an in-state tuition benefit to these students. Again, this change may be clarifying in nature, as the BOG has already changed the challenged regulations prohibited these students from getting the status of in-state residents for tuition purposes. Still, the change makes the statute consistent the *Ruiz* holding and current BOG regulations.[92]

Combat-decorated Recipients

Current law waives tuition at state universities or Florida College System institutions for Purple Heart and other qualifying combat-decorated veterans. The bill extends the tuition waiver by

[90] Florida Board of Governors, *2013-2014 Fees*, http://flbog.edu/about/budget/current.php (last visited March 26, 2014).
[91] Section 1009.24(16)(d), F.S.
[92] *Ruiz v. Robinson*, 892 F. Supp. 2d 1321, 1331-1333 (S.D. Fla. 2012).

making it applicable to career centers operated by a school district and charter technical career centers.

In-State Tuition for Students Who Are Undocumented Aliens

The bill creates an in-state tuition benefit for students who are undocumented aliens and who meet certain conditions by waiving the out-of-state fees. This means that undocumented aliens who otherwise qualify will essentially receive the same in-state tuition and fees benefit provided to qualifying students who are not undocumented aliens. Eligible undocumented aliens may use this benefit at public state universities, Florida College System institutions, career centers, and charter technical career centers.

To receive an out-of-state tuition and fee waiver, students who are undocumented aliens must:

- Attend a secondary school in Florida for 3 consecutive years immediately before graduating from a high school in Florida,
- Enroll in an institution of higher education within 24 months after high school graduation, and
- Submit an official Florida high school transcript as evidence of attendance and graduation.

State universities, FCS institutions, career centers and charter technical career centers must report the number and value of all fee waivers granted annually to the BOG and the SBE.

The bill also clarifies that students who are undocumented for federal immigration purposes are ineligible for state financial aid.

Currently, the BOG requires that the nonresident student enrollment not exceed 10 percent of the total state university systemwide student enrollment.[93] The bill requires the BOG and the SBE to annually certify in their legislative budget request that the percentage of resident students enrolled systemwide remain at least the same as 2013-2014 resident student enrollment systemwide. In Fall 2012, nonresident student enrollment ranged from 18 percent at the University of Florida to 3 percent at the University of North Florida and University of South Florida Sarasota-Manatee and St. Petersburg campuses. Systemwide, 91 percent of students enrolled in state universities in Fall 2012 were residents while the remaining 9 percent of enrolled students were nonresidents.[94] By preventing an increase in the proportion of state residents, this requirement is expected to keep costs stable for the state and the higher education institutions.

Stanley G. Tate Florida Prepaid College Program (Prepaid Program)

The bill specifies that for an advance payment contract purchased before July 1, 2024, the amount assessed and paid by the Florida Prepaid College Board (Prepaid Board) to the state universities will follow the methodology previously utilized by the Prepaid Board for contracts purchased prior to July 1, 2009.

[93] Florida Board of Governors Regulation 7.006.
[94] Email, Board of Governors of the State University System of Florida (February 13, 2014), on file with the Committee on Education.

Registration & Tuition Differential Fee Payment Scenarios				
Actuarial Reserve, as a Percentage of Expected Liabilities	**<5%**	**5% - 6%**	**6% - 7%**	**≥7.5%**
Prepaid Board Payment to Universities above Fee Assessed Previous Year	5.5%	6.0%	6.5%	7.0%

The bill caps the aggregate percentage that the Prepaid Program pays state universities for registration, tuition differential, and local fees to the actual amounts charged for those fees as well as a cap on dormitory fees equal to the actual amount charged for that fee.

The bill provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Tuition and Fees

The bill eliminates the automatic annual increases in tuition and fees based on the rate of inflation for workforce education programs and baccalaureate degree programs offered by the Florida College System (FCS) institutions and resident undergraduate tuition per credit hour at state universities, which will result in cost savings to students. Still, the Legislature may consider inflation rates in setting tuition in the future.

Tuition Assistance

The bill provides an in-state tuition benefit to Florida's students who are undocumented aliens resulting in significant cost savings for these students and their families. Under the bill, students who are undocumented aliens will pay in-state tuition and fees.

Additionally, recipients of a Purple Heart and other combat decorations enrolled at a technical centers will not have to pay tuition.

For the 2013-2014 academic year, the average State University System undergraduate cost for tuition and fees for two semesters is $6,155 for residents and $21,434 for non-residents.[95] At the graduate level, the average cost for two semesters is $10,262 for residents and $25,138 for non-residents.[96] Therefore, this out-of-state fee waiver could save an eligible, full-time veteran graduate student[97] at a state university approximately $14,876 per academic year.

For the same period, the Florida College System reports the average cost for two semesters is approximately $3,124 for residents enrolled in lower-level credit programs and $11,531 for non-residents. For residents enrolled in the upper-level credit programs the cost for two semesters is $3,585 and $15,400 for non-residents.[98]

For the 2013-2014 academic year, the average district technical center cost for tuition and fees for a full-time equivalent student[99] is $2,443 for residents, and $9,710 for non-residents.

Stanley G. Tate Florida Prepaid College Program

The Florida Prepaid College Board (Prepaid Board) estimates that the bill will reduce the cost for individuals to purchase Prepaid Program contracts. The new lump-sum price for the 4-Year Florida University Plan would be reduced by approximately $10,000, [100] from $53,729 to less than $43,000.[101] Over 26,000 Florida families who purchased plans at higher prices in recent years would be entitled to refunds of approximately $50 million. In addition, future monthly payments would be reduced for those purchasing a Prepaid Program contract and paying on a monthly basis. A Florida family enrolling a newborn during 2012-13 in a 4-Year Florida University Plan is currently paying $332 per month under the monthly payment option.[102] These monthly payments are estimated to drop to $255 per payment, a savings of over $75 per month for 223 months[103] totaling approximately $17,000 over the life of the contract.

[95] Board of Governors of the State University System of Florida, *Public Colleges and Universities of Florida, Tuition and Required Fees, 2013-14 for New Students in Main Campus*, http://www.flbog.edu/about/budget/current.php (select the Excel link for "2013-2014 Fees") (last visited March 26, 2014) (noting that the calculation is for students who are full-time taking 30 credit hours).
[96] *Id.* (providing that the calculation is for full-time graduate students taking 24 credit hours).
[97] Full-time status for graduate students is 24 hours.
[98] Data provided by the Division of Florida Colleges (on file with Senate Appropriations Subcommittee on Education).
[99] Full-time equivalent is defined as 900 instructional hours in a certificate program.
[100] State Board of Administration, *2014 Agency Legislative Bill Analysis for SB 732* (February 5, 2013), at 3, on file with the Committee on Education staff.
[101] Email, Florida Prepaid College Board (January 15, 2014), on file with Committee on Education.
[102] Email, Florida Prepaid College Board (January 15, 2014), on file with Committee on Education.
[103] Email, Florida Prepaid College Board (January 15, 2014), on file with Committee on Education.

C. Government Sector Impact:

Tuition and Fees

With the elimination of automatic annual increases in tuition and out-of-state fees based on inflation, Florida's public postsecondary institutions will not receive an automatic annual increase in revenue from tuition and fees. Additionally, because the bill maintains $103.32 as the resident undergraduate tuition per credit hour and eliminates the automatic annual increases in tuition, the state universities may likely experience a dip in tuition and fee revenues relative to the fiscal year 2013-2014 tuition and fee revenues. In 2013, the state universities raised the resident undergraduate tuition to 105.07 per credit hour [104] based on the annual rate of inflation increase. The Board of Governors anticipates a potential fiscal impact of $10 million from reducing the undergraduate base tuition rate per credit hour under this provision.[105]

Tuition Assistance

The bill clarifies that U.S. citizens who are dependent children of parents who are undocumented aliens receive in-state tuition and fee benefits. This language, however, is not expected to have a fiscal impact on public postsecondary institutions and career centers, as these students are already extended this benefit since the 2012 *Ruiz* ruling.

The bill treats students who are undocumented aliens as in-state residents (through granting them out-of-state fee waivers) provided that they meet more requirements than that required for in-state students who are not undocumented. The fiscal impact of this bill on state universities, FCS institutions, and technical centers may be insignificant because the bill requires the percentage of resident students as a reflection of overall student population to remain the same.

Purple Heart recipients and other qualifying combat-decorated veterans will not have to pay tuition at technical centers. The fiscal impact is unknown.

Stanley G. Tate Florida Prepaid College Program

For advance payment contracts purchased on or after July 1, 2009, with regard to tuition and tuition differential fees, the Prepaid Board must pay a university the actual amount charged for these fees. For actuarial planning purposes, the Prepaid Board must price the Prepaid Plan with the assumption that universities will assess the maximum allowable fee increase of 15 percent each year. This has led to a higher cost for the 4-Year Florida University Plan and 2+2 Florida Plan.[106] This bill provides an improved forecast methodology allowing the Prepaid Board to more accurately price the 4-Year Florida University Plan and 2+2 Florida Plan.

[104] Florida Board of Governors, *2013-2014 Fees*, http://flbog.edu/about/budget/current.php (last visited March 26, 2014).
[105] Board of Governors, State University System of Florida, *2014 Legislative Bill Analysis*, CS/SB 1400, pg. 9 (March 27, 2014).
[106] Email, Florida Prepaid College Board (February 5, 2014), on file with Committee on Education.

The fiscal impact of the bill on state universities is indeterminate, but may reduce tuition fees, tuition differential fees, local fees, and dormitory fees that will be paid by the Prepaid Board to the state universities on behalf of qualified beneficiaries of Prepaid Program Plans purchased prior to July 1, 2024.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill requires the BOG and the SBE to annually certify in their legislative budget request that the percentage of resident students enrolled systemwide remain at least the same as 2013-2014 resident student enrollment systemwide. What is meant by requiring percentages to remain "at least the same" is unclear. However, what is meant is likely that the percentage of resident students remain at least as high as the percentage was for 2013-2014.

VIII. Statutes Affected:

This bill substantially amends the following section of the Florida Statutes: 1009.22, 1009.23, 1009.24, 1009.26, and 1009.98.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Education on March 18, 2014:
The committee substitute maintains the original substance of SB 1400, regarding public postsecondary tuition and fee provisions, with the following modifications:

- Extends an in-state tuition benefit to students who are undocumented aliens through an out-of-state fee waiver approach rather than a residency classification for tuition purposes approach, and clarifies that such students are not eligible for state financial aid.
- Expands tuition waiver benefit for Purple Heart and other combat decoration recipients enrolled at a state university or a FCS institution to also apply to Purple Heart and other combat decoration recipients enrolled at a career center operated by a school district or charter technical career center.
- Clarifies that the cap on the aggregate sum the Prepaid Program pays state universities for registration, tuition differential, local fees, and dormitory fees, under the bill, apply to advance payment contracts purchased before July 1, 2024.
- Codifies the 2012 United States District Court for the Southern District of Florida ruling that U.S. citizens, who would otherwise meet Florida's residency requirements for tuition purposes but for their status as dependents and their parents' undocumented immigration status, may not be denied in-state tuition benefits based upon their parents' undocumented immigration status.

B. Amendments:

None.

By the Committee on Education; and Senator Latvala

581-02749-14 20141400c1

A bill to be entitled

An act relating to postsecondary student tuition; amending ss. 1009.22 and 1009.23, F.S.; revising the standard tuition and out-of-state fees for workforce education postsecondary programs leading to certain certificates and diplomas and certain other programs at Florida College System institutions; deleting a provision relating to an increase in tuition and out-of-state fees at a rate equal to inflation; deleting a requirement that the Office of Economic and Demographic Research annually report the rate of inflation to the Governor, the Legislature, and the State Board of Education; deleting the definition of the term "rate of inflation"; amending s. 1009.24, F.S.; deleting a provision related to an increase of the resident undergraduate tuition at state universities at a rate equal to inflation; deleting the requirement of the Office of Economic and Demographic Research to annually report the rate of inflation to the Governor, the Legislature, and the Board of Governors; deleting the definition of the term "rate of inflation"; conforming provisions to changes made by the act; prohibiting a state university board of trustees from establishing or increasing the tuition differential for undergraduate courses; amending s. 1009.26, F.S.; requiring a state university, a Florida College System institution, a career center operated by a school district, or a charter technical career center to waive undergraduate

581-02749-14 20141400c1

tuition for a recipient of a Purple Heart or another combat decoration superior in precedence under certain conditions; requiring a state university, a Florida College System institution, a career center operated by a school district, and a charter technical career center to waive out-of-state fees for certain students who attended a secondary school in this state; requiring a state university, a Florida College System institution, a career center operated by a school district, and a charter technical career center to report to the Board of Governors and the State Board of Education, respectively, the number and value of all fee waivers; requiring a state university, a Florida College System institution, a career center operated by a school district, and a charter technical career center to annually certify within its legislative budget request that the percentage of resident students enrolled systemwide is at least the same as the resident student enrollment systemwide in a specified academic year; providing that a student who is undocumented for federal immigration purposes is not eligible for state financial aid; amending s. 1009.98, F.S.; redefining the term "tuition differential"; revising the purchase date of an advance payment contract as it relates to the amount paid by the Florida Prepaid College Board to a state university on behalf of a qualified beneficiary; prohibiting the amount of the aggregate sum of registration fees, the tuition differential fee, and

local fees paid by the board to a state university on behalf of a qualified beneficiary of an advance payment contract from exceeding a certain percentage of the amount charged by the state university for the aggregate sum of those fees; prohibiting the amount of the dormitory fees paid for by the board to a state university on behalf of a qualified beneficiary of an advance payment contract from exceeding a certain percentage of the amount charged by the state university for those fees; conforming provisions to changes made by the act; prohibiting certain dependent children from being denied residency classification for tuition purposes based solely on a parent's undocumented immigration status; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraphs (c) through (g) of subsection (3) of section 1009.22, Florida Statutes, are amended to read:

1009.22 Workforce education postsecondary student fees.—

(3)

(c) Effective July 1, 2014 ~~2011~~, for programs leading to a career certificate or an applied technology diploma, the standard tuition shall be $2.33 ~~$2.22~~ per contact hour for residents and nonresidents and the out-of-state fee shall be $6.99 ~~$6.66~~ per contact hour. For adult general education programs, a block tuition of $45 per half year or $30 per term shall be assessed for residents and nonresidents, and the out-

of-state fee shall be $135 per half year or $90 per term. Each district school board and Florida College System institution board of trustees shall adopt policies and procedures for the collection of and accounting for the expenditure of the block tuition. All funds received from the block tuition shall be used only for adult general education programs. Students enrolled in adult general education programs may not be assessed the fees authorized in subsection (5), subsection (6), or subsection (7).

~~(d) Beginning with the 2008-2009 fiscal year and each year thereafter, the tuition and the out-of-state fee per contact hour shall increase at the beginning of each fall semester at a rate equal to inflation, unless otherwise provided in the General Appropriations Act. The Office of Economic and Demographic Research shall report the rate of inflation to the President of the Senate, the Speaker of the House of Representatives, the Governor, and the State Board of Education each year prior to March 1. For purposes of this paragraph, the rate of inflation shall be defined as the rate of the 12-month percentage change in the Consumer Price Index for All Urban Consumers, U.S. City Average, All Items, or successor reports as reported by the United States Department of Labor, Bureau of Labor Statistics, or its successor for December of the previous year. In the event the percentage change is negative, the tuition and out-of-state fee shall remain at the same level as the prior fiscal year.~~

(d) ~~(c)~~ Each district school board and each Florida College System institution board of trustees may adopt tuition and out-of-state fees that may vary no more than 5 percent below and 5 percent above the combined total of the standard tuition and

out-of-state fees established in paragraph (c).

(e)~~(f)~~ The maximum increase in resident tuition for any school district or Florida College System institution during the 2007-2008 fiscal year shall be 5 percent over the tuition charged during the 2006-2007 fiscal year.

(f)~~(g)~~ The State Board of Education may adopt, by rule, the definitions and procedures that district school boards and Florida College System institution boards of trustees shall use in the calculation of cost borne by students.

Section 2. Subsection (3) of section 1009.23, Florida Statutes, is amended to read:

1009.23 Florida College System institution student fees.—

(3)(a) Effective July 1, 2014 ~~2011~~, for advanced and professional, postsecondary vocational, developmental education, and educator preparation institute programs, the standard tuition shall be $71.98 ~~$68.56~~ per credit hour for residents and nonresidents, and the out-of-state fee shall be $215.94 ~~$205.82~~ per credit hour.

(b) Effective July 1, 2014 ~~2011~~, for baccalaureate degree programs, the following tuition and fee rates shall apply:

1. The tuition shall be $91.79 ~~$87.42~~ per credit hour for students who are residents for tuition purposes.

2. The sum of the tuition and the out-of-state fee per credit hour for students who are nonresidents for tuition purposes shall be no more than 85 percent of the sum of the tuition and the out-of-state fee at the state university nearest the Florida College System institution.

~~(c) Beginning with the 2008-2009 fiscal year and each year thereafter, the tuition and the out-of-state fee shall increase at the beginning of each fall semester at a rate equal to inflation, unless otherwise provided in the General Appropriations Act. The Office of Economic and Demographic Research shall report the rate of inflation to the President of the Senate, the Speaker of the House of Representatives, the Governor, and the State Board of Education each year prior to March 1. For purposes of this paragraph, the rate of inflation shall be defined as the rate of the 12-month percentage change in the Consumer Price Index for All Urban Consumers, U.S. City Average, All Items, or successor reports as reported by the United States Department of Labor, Bureau of Labor Statistics, or its successor for December of the previous year. In the event the percentage change is negative, the tuition and the out-of-state fee per credit hour shall remain at the same levels as the prior fiscal year.~~

Section 3. Paragraphs (a), (b), and (e) of subsection (4) of section 1009.24, Florida Statutes, are amended, and paragraph (g) is added to subsection (16) of that section, to read:

1009.24 State university student fees.—

(4)(a) Effective July 1, 2014 ~~2011~~, the resident undergraduate tuition for lower-level and upper-level coursework shall be $103.32 per credit hour.

~~(b) Beginning with the 2008-2009 fiscal year and each year thereafter, the resident undergraduate tuition per credit hour shall increase at the beginning of each fall semester at a rate equal to inflation, unless otherwise provided in the General Appropriations Act. The Office of Economic and Demographic Research shall report the rate of inflation to the President of the Senate, the Speaker of the House of Representatives, the~~

~~Governor, and the Board of Governors each year prior to March 1. For purposes of this paragraph, the rate of inflation shall be defined as the rate of the 12-month percentage change in the Consumer Price Index for All Urban Consumers, U.S. City Average, All Items, or successor reports as reported by the United States Department of Labor, Bureau of Labor Statistics, or its successor for December of the previous year. In the event the percentage change is negative, the resident undergraduate tuition shall remain at the same level as the prior fiscal year.~~

(d) ~~(c)~~ The sum of the activity and service, health, and athletic fees a student is required to pay to register for a course may ~~shall~~ not exceed 40 percent of the tuition established in law or in the General Appropriations Act. No university shall be required to lower any fee in effect on the effective date of this act in order to comply with this subsection. Within the 40 percent cap, universities may not increase the aggregate sum of activity and service, health, and athletic fees more than 5 percent per year~~, or the same percentage increase in tuition authorized under paragraph (b), whichever is greater,~~ unless specifically authorized in law or in the General Appropriations Act. A university may increase its athletic fee to defray the costs associated with changing National Collegiate Athletic Association divisions. Any such increase in the athletic fee may exceed both the 40 percent cap and the 5 percent cap imposed by this subsection. Any such increase must be approved by the athletic fee committee in the process outlined in subsection (12) and may not ~~cannot~~ exceed $2 per credit hour. Notwithstanding ~~the provisions of~~ ss. 1009.534, 1009.535, and 1009.536, that portion of any increase in an

athletic fee pursuant to this subsection which ~~that~~ causes the sum of the activity and service, health, and athletic fees to exceed the 40 percent cap or the annual increase in such fees to exceed the 5 percent cap may ~~shall~~ not be included in calculating the amount a student receives for a Florida Academic Scholars award, a Florida Medallion Scholars award, or a Florida Gold Seal Vocational Scholars award. Notwithstanding this paragraph and subject to approval by the board of trustees, each state university may ~~is authorized to~~ exceed the 5 percent ~~5-percent~~ cap on the annual increase to the aggregate sum of activity and service, health, and athletic fees for the 2010-2011 fiscal year. Any such increase may ~~shall~~ not exceed 15 percent or the amount required to reach the 2009-2010 fiscal year statewide average for the aggregate sum of activity and service, health, and athletic fees at the main campuses, whichever is greater. The aggregate sum of the activity and service, health, and athletic fees may ~~shall~~ not exceed 40 percent of tuition. Any increase in the activity and service fee, health fee, or athletic fee must be approved by the appropriate fee committee pursuant to subsection (10), subsection (11), or subsection (12).

(16) Each university board of trustees may establish a tuition differential for undergraduate courses upon receipt of approval from the Board of Governors. The tuition differential shall promote improvements in the quality of undergraduate education and shall provide financial aid to undergraduate students who exhibit financial need.

(g) Notwithstanding this subsection, effective July 1, 2014, a state university board of trustees may not establish or

increase a tuition differential for undergraduate courses as provided in this subsection.

Section 4. Subsection (8) of section 1009.26, Florida Statutes, is amended, and subsection (12) is added to that section, to read:

1009.26 Fee waivers.—

(8) A state university or Florida College System institution, a career center operated by a school district under s. 1001.44, or a charter technical career center shall waive undergraduate tuition for each recipient of a Purple Heart or another combat decoration superior in precedence who:

(a) Is enrolled as a full-time, part-time, or summer-school student in an undergraduate program that terminates in a degree or certificate;

(b) Is currently, and was at the time of the military action that resulted in the awarding of the Purple Heart or other combat decoration superior in precedence, a resident of this state; and

(c) Submits to the state university or the Florida College System institution the DD-214 form issued at the time of separation from service as documentation that the student has received a Purple Heart or another combat decoration superior in precedence. If the DD-214 is not available, other documentation may be acceptable if recognized by the United States Department of Defense or the United States Department of Veterans Affairs as documenting the award.

Such a waiver for a Purple Heart recipient or recipient of another combat decoration superior in precedence shall be

applicable for 110 percent of the number of required credit hours of the degree or certificate program for which the student is enrolled.

(12)(a) A state university or a Florida College System institution, a career center operated by a school district under s. 1001.44, or a charter technical career center shall waive out-of-state fees for a student who attended a secondary school in this state for 3 consecutive years immediately before graduating from a high school in this state, enrolled in an institution of higher education within 24 months after high school graduation, submitted an official Florida high school transcript as documentary evidence of attendance and graduation, and who is undocumented for federal immigration purposes.

(b) Tuition and fees charged to a student who qualifies for the out-of-state fee waiver under this subsection may not exceed the tuition and fees charged to a resident student. The waiver is applicable for 110 percent of the required credit hours of the degree or certificate program for which the student is enrolled. Each state university, Florida College System institution, career center operated by a school district under s. 1001.44, and charter technical career center shall report to the Board of Governors and the State Board of Education, respectively, the number and value of all fee waivers granted annually under this subsection. The Board of Governors for the state universities and the State Board of Education for Florida College System institutions, career centers operated by a school district under s. 1001.44, and charter technical career centers shall annually certify within its legislative budget request that the percentage of resident students enrolled systemwide is

at least the same as the 2013-2014 resident student enrollment systemwide. A student who is undocumented for federal immigration purposes is not eligible for state financial aid provided pursuant to part III of chapter 1009.

Section 5. Subsection (10) of section 1009.98, Florida Statutes, is amended to read:

1009.98 Stanley G. Tate Florida Prepaid College Program.—

(10) PAYMENTS ON BEHALF OF QUALIFIED BENEFICIARIES.—

(a) As used in this subsection, the term:

1. "Actuarial reserve" means the amount by which the expected value of the assets exceeds ~~exceed~~ the expected value of the liabilities of the trust fund.

2. "Dormitory fees" means the fees included under advance payment contracts pursuant to paragraph (2)(d).

3. "Fiscal year" means the fiscal year of the state pursuant to s. 215.01.

4. "Local fees" means the fees covered by an advance payment contract provided pursuant to subparagraph (2)(b)2.

5. "Tuition differential" means the fee covered by advance payment contracts sold pursuant to subparagraph (2)(b)3. The base rate for the tuition differential fee for the 2012-2013 fiscal year is established at $37.03 per credit hour. The base rate for the tuition differential in subsequent years is the amount assessed ~~paid by the board~~ for the tuition differential for the preceding year adjusted pursuant to subparagraph (b)2.

(b) Effective with the 2009-2010 academic year and thereafter, and notwithstanding the provisions of s. 1009.24, the amount paid by the board to any state university on behalf of a qualified beneficiary of an advance payment contract whose

contract was purchased before July 1, 2024 ~~2009~~, shall be:

1. As to registration fees, if the actuarial reserve is less than 5 percent of the expected liabilities of the trust fund, the board shall pay the state universities 5.5 percent above the amount assessed for registration fees in the preceding fiscal year. If the actuarial reserve is between 5 percent and 6 percent of the expected liabilities of the trust fund, the board shall pay the state universities 6 percent above the amount assessed for registration fees in the preceding fiscal year. If the actuarial reserve is between 6 percent and 7.5 percent of the expected liabilities of the trust fund, the board shall pay the state universities 6.5 percent above the amount assessed for registration fees in the preceding fiscal year. If the actuarial reserve is equal to or greater than 7.5 percent of the expected liabilities of the trust fund, the board shall pay the state universities 7 percent above the amount assessed for registration fees in the preceding fiscal year, whichever is greater.

2. As to the tuition differential, if the actuarial reserve is less than 5 percent of the expected liabilities of the trust fund, the board shall pay the state universities 5.5 percent above the base rate for the tuition differential fee in the preceding fiscal year. If the actuarial reserve is between 5 percent and 6 percent of the expected liabilities of the trust fund, the board shall pay the state universities 6 percent above the base rate for the tuition differential fee in the preceding fiscal year. If the actuarial reserve is between 6 percent and 7.5 percent of the expected liabilities of the trust fund, the board shall pay the state universities 6.5 percent above the

base rate for the tuition differential fee in the preceding fiscal year. If the actuarial reserve is equal to or greater than 7.5 percent of the expected liabilities of the trust fund, the board shall pay the state universities 7 percent above the base rate for the tuition differential fee in the preceding fiscal year.

3. As to local fees, the board shall pay the state universities 5 percent above the amount assessed for local fees in the preceding fiscal year.

4. As to dormitory fees, the board shall pay the state universities 6 percent above the amount assessed for dormitory fees in the preceding fiscal year.

5. Qualified beneficiaries of advance payment contracts purchased before July 1, 2007, are exempt from paying any tuition differential fee.

(c) Notwithstanding the amount assessed for registration fees, the tuition differential fee, or local fees, the amount paid by the board to any state university on behalf of a qualified beneficiary of an advance payment contract purchased before July 1, 2024, may not exceed 100 percent of the amount charged by the state university for the aggregate sum of those fees.

(d) Notwithstanding the amount assessed for dormitory fees, the amount paid by the board to any state university on behalf of a qualified beneficiary of an advance payment contract purchased before July 1, 2024, may not exceed 100 percent of the amount charged by the state university for dormitory fees.

(e) ~~(c)~~ The board shall pay state universities the actual amount assessed in accordance with law for registration fees,

the tuition differential, local fees, and dormitory fees for advance payment contracts purchased on or after July 1, 2024 ~~2009~~.

(f) ~~(d)~~ The board shall annually evaluate or cause to be evaluated the actuarial soundness of the trust fund.

Section 6. A dependent child who is a citizen of the United States of America may not be denied residency classification for tuition purposes based solely on the parent's undocumented immigration status. All applicable laws apply.

Section 7. This act shall take effect July 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1526
INTRODUCER:	Senator Thrasher
SUBJECT:	Public Records/Department of Legal Affairs
DATE:	March 31, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	**Pre-meeting**
2.			RC	

I. Summary:

SB 1526 provides the public records exemptions for CS/SB 1524, which establishes the Florida Information Protection Act of 2014. The Act requires commercial entities and certain government agencies to provide notice to the Department of Legal Affairs and affected individuals when a security breach occurs and personal information held in electronic form is illegally accessed.

The bill provides that certain information reported to the Department of Legal Affairs relating to security breaches is confidential and exempt from public inspection pursuant to statute and the State Constitution and provides a statement of public necessity as required by law.

II. Present Situation:

Public Records - Access

The state's public records laws, which guarantee access to government records, are contained in both the State Constitution and Florida Statutes.

State Constitution

The State Constitution, in article I, section 24, guarantees every person the right to inspect or copy any public record of:

- The legislative, executive, and judicial branches;
- Each agency or department of those branches;
- Counties, municipalities, and districts; and
- Each constitutional officer, board, and commission, or entity created pursuant to law or the Constitution.[1]

[1] FLA. CONST. art. I, s. 24(a).

The Legislature is authorized, however, to exempt records by general law from that provision if the law:

- States with specificity the public necessity that justifies the exemption; and
- Is no broader than necessary to accomplish the stated purpose of the law.

The legislation proposing the exemption requires a two-thirds vote of each chamber for passage.[2]

State Statute

Section 119.07(1), F.S., requires every person who has custody of a public record to permit the record to be inspected and copied by any person desiring to do so at any reasonable time, under reasonable conditions, and under supervision by the custodian of public records.[3]

Public Records - Requirements

An exemption from the disclosure requirements must serve an identifiable public purpose and be no broader than necessary to meet the public purpose it serves.[4] An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program that would be significantly impaired without the exemption;
- Protects sensitive personal information that would be defamatory or cause unwarranted damage to a person's reputation or would jeopardize the person's safety if released; however, only information that would identify the individuals may be exempted; or
- Protects information of a confidential nature such as trade secrets.

Florida Information Protection Act of 2014 – CS/SB 1524

CS/SB 1524 creates the Florida Information Protection Act.[5] The bill[6] requires that certain commercial and governmental entities provide notice to the Department of Legal Affairs and affected individuals when a breach of security occurs involving the access of personal information.

A breach of security is defined as an unauthorized access of data in electronic form containing personal information. Personal information includes a person's name in combination with: a social security number; a driver license or identification card number, passport number, military identification number of other similar number issued on a government document used to verify identity; a financial account number or credit or debit card number in combination with a security or access code or password necessary to gain access to a person's financial account; certain medical information; or a person's health insurance policy number or subscriber identification number or similar identifier identification. Personal information also includes a

[2] FLA. CONST. art. I, s. 24(c).
[3] Section 119.07(1)(a), F.S.
[4] Section 119.15(5)(b), F.S.
[5] Much of the information in CS/SB 1524 is currently contained in s. 817.5681, F.S., which is repealed in that bill.
[6] See the Bill Analysis and Fiscal Impact Statement of CS/SB 1524 by the Commerce and Tourism Committee for more detailed information about the bill.

username or e-mail address in combination with a password or security question and answer that permits access to an online account.

III. Effect of Proposed Changes:

Confidential and Exempt Information

Under the bill, all information received by the Department of Legal Affairs pursuant to notification of a security breach or received pursuant to a subsequent information by the Department of Legal Affairs or another federal or state law enforcement agency is confidential and exempt from public records requirements as long as the investigation is considered to be an active investigation.

While an investigation is considered active, the Department of Legal Affairs may disclose confidential and exempt information:

- In furtherance of its official duties and responsibilities;
- For print, publication, or broadcast if the department determines that the release would assist in notifying the pubic or locating or identifying a person that the department believes to have been a victim of the breach; or
- To another governmental agency in the furtherance of its official duties and responsibilities.

After the completion of an investigation, the following information shall remain confidential and exempt from public record requirements:

- All information to which another public records exemption applies;
- Personal information as defined in the bill;
- A computer forensic report;
- Information what would reveal weaknesses in a covered entity's data security; and
- Information that would disclose a covered entity's trade secrets or proprietary information.

Statement of Public Necessity

The bill provides a statement of public necessity as required in the State Constitution. The statement provides that the public records exemption is necessary because the original breach of an electronic system is likely the result of criminal activity which will probably lead to additional criminal activity. A release of the notice information obtained during an investigation would likely contain proprietary information, which if released, could result in identifying areas in which the system is vulnerable and additional breaches of the system. By exempting this information, the security of the breached system is protected as well as the personal information of individuals stored in the system. Additionally, information obtained during an investigation is likely to contain personal information that could be used for identity theft or financial harm if disclosed. The exemption protects the security of the personal information by excluding it from public access.

The bill contains a contingent effective date. It takes effect on the same date that CS/SB 1524, or similar legislation takes effect, if that legislation is adopted in the same legislative session or an extension thereof and becomes law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill creates a public records exemption that must be approved by a two-thirds vote of the membership of each house of the Legislature.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The Open Government Sunset Review Act is contained in s. 119.15, F.S. The act requires the automatic repeal of a newly created exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption. This bill creates a public record exemption for information relating to the newly created Florida Information Protection Act of 2014, however, the bill does not provide for automatic repeal of the exemption on October 2, 2019 in accordance with the Open Government Sunset Review Act.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 501.171 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

434458

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Thrasher) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Subsection (11) is added to section 501.171, Florida Statutes, as created by SB 1524, 2014 Regular Session, to read:

501.171 Security of confidential personal information.—

(11) PUBLIC RECORDS EXEMPTION.—

(a) All information received by the department pursuant to a notification required by this section, or received by the

434458

department pursuant to an investigation by the department or a law enforcement agency, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, until such time as the investigation is completed or ceases to be active. This exemption shall be construed in conformity with s. 119.071(2)(c).

(b) During an active investigation, information made confidential and exempt pursuant to paragraph (a) may be disclosed by the department:

1. In the furtherance of its official duties and responsibilities;

2. For print, publication, or broadcast if the department determines that such release would assist in notifying the public or locating or identifying a person that the department believes to be a victim of a data breach or improper disposal of customer records; or

3. To another governmental entity in the furtherance of its official duties and responsibilities.

(c) Upon completion of an investigation or once an investigation ceases to be active, the following information received by the department shall remain confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

1. All information to which another public records exemption applies.

2. Personal information.

3. A computer forensic report.

4. Information that would otherwise reveal weaknesses in a covered entity’s data security.

434458

5. Information that would disclose a covered entity's proprietary information.

(d) For purposes of this subsection, the term "proprietary information" means information that:

1. Is owned or controlled by the covered entity.

2. Is intended to be private and is treated by the covered entity as private because disclosure would harm the covered entity or its business operations.

3. Has not been disclosed except as required by law or a private agreement that provides that the information will not be released to the public.

4. Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as received by the department.

5. Includes:

a. Trade secrets as defined in s. 688.002.

b. Competitive interests, the disclosure of which would impair the competitive business of the covered entity who is the subject of the information.

(e) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that all information received by the Department of Legal Affairs pursuant to a notification of a violation of s. 501.171, Florida Statutes, or received by the department pursuant to an investigation by the department or a law enforcement agency, be made confidential and exempt from s.

434458

119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution for the following reasons:

(1) A notification of a violation of s. 501.171, Florida Statutes, is likely to result in an investigation of such violation because a data breach is likely the result of criminal activity that may lead to further criminal activity. The premature release of such information could frustrate or thwart the investigation and impair the ability of the Department of Legal Affairs to effectively and efficiently administer s. 501.171, Florida Statutes. In addition, release of such information before completion of an active investigation could jeopardize the ongoing investigation.

(2) The Legislature finds that it is a public necessity to continue to protect from public disclosure all information to which another public record exemption applies once an investigation is completed or ceases to be active. Release of such information by the Department of Legal Affairs would undo the specific statutory exemption protecting that information.

(3) An investigation of a data breach or improper disposal of customer records is likely to result in the gathering of sensitive personal information, including social security numbers, identification numbers, and personal financial and health information. Such information could be used for the purpose of identity theft. In addition, release of such information could subject possible victims of the data breach or improper disposal of customer records to further financial harm. Furthermore, matters of personal health are traditionally private and confidential concerns between the patient and the health care provider. The private and confidential nature of

personal health matters pervades both the public and private health care sectors.

(4) Release of a computer forensic report or other information that would otherwise reveal weaknesses in a covered entity's data security could compromise the future security of that entity, or other entities, if such information were available upon conclusion of an investigation or once an investigation ceased to be active. The release of such report or information could compromise the security of current entities and make those entities susceptible to future data breaches. Release of such report or information could result in the identification of vulnerabilities and further breaches of that system.

(5) Notices received by the Department of Legal Affairs and information received during an investigation of a data breach are likely to contain proprietary information, including trade secrets, about the security of the breached system. The release of the proprietary information could result in the identification of vulnerabilities and further breaches of that system. In addition, a trade secret derives independent, economic value, actual or potential, from being generally unknown to, and not readily ascertainable by, other persons who might obtain economic value from its disclosure or use. Allowing public access to proprietary information, including a trade secret, through a public records request could destroy the value of the proprietary information and cause a financial loss to the covered entity submitting the information. Release of such information could give business competitors an unfair advantage and weaken the position of the entity supplying the proprietary

434458

information in the marketplace.

Section 3. This act shall take effect on the same date that SB 1524 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to public records; amending s. 501.171, F.S.; creating an exemption from public records requirements for information received by the Department of Legal Affairs pursuant to a notice of a data breach or pursuant to certain investigations; authorizing disclosure under certain circumstances; defining the term "proprietary information"; providing for future review and repeal of the exemption under the Open Government Sunset Review Act; providing a statement of public necessity; providing a contingent effective date.

By Senator Thrasher

6-01034A-14 20141526__

A bill to be entitled

An act relating to public records; amending s. 501.171, F.S.; providing exemptions from public records requirements for the notice of a data breach and information held by the Department of Legal Affairs pursuant to certain investigations; authorizing disclosure under certain circumstances; providing for future review and repeal of the exemption under the Open Government Sunset Review Act; providing a statement of public necessity; providing a contingent effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (11) is added to section 501.171, Florida Statutes, as created by SB ____, 2014 Regular Session, to read:

501.171 Security of confidential personal information.—

(11) PUBLIC RECORDS EXEMPTION.—

(a) All information received by the department pursuant to notifications required by this section, or received pursuant to a subsequent investigation by the department or another federal or state law enforcement agency, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, so long as the investigation is considered an active investigation. This exemption shall be construed in conformity with s. 119.071(2)(c). However, during an active investigation, such information may be disclosed by the department in the furtherance of its official duties and responsibilities; for

6-01034A-14 20141526__

print, publication, or broadcast if the department determines that such release would assist in notifying the public or locating or identifying a person that the department believes to have been a victim of the breach; or to another governmental agency in the furtherance of its official duties and responsibilities.

(b) Notwithstanding subsection (a), the following information received by the department shall remain confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution after completion of an investigation:

1. All information to which another public records exemption applies.

2. Personal information as such term is defined in this section.

3. A computer forensic report.

4. Information that would otherwise reveal weaknesses in a covered entity's data security.

5. Information that would disclose a covered entity's trade secrets or proprietary information.

Section 2. The Legislature finds that it is a public necessity that information held by the Department of Legal Affairs pursuant to an investigation of a violation of s. 501.171, Florida Statutes, relating to information security, be confidential and exempt from public records requirements for the following reasons:

(1) A data breach is likely the result of criminal activity that will likely lead to further criminal activity. Notices provided to the department and materials obtained during investigations of a violation of s. 501.171, Florida Statutes,

are likely to contain proprietary information about the security of the breached system. The release of the proprietary information could result in the identification of vulnerabilities and further breaches of that system. This exemption protects the security of the breached systems, thus protecting the personal information of Floridians stored within the systems.

(2) Notices provided to the Department of Legal Affairs and materials obtained during investigations of a violation of s. 501.171, Florida Statutes, may contain personal information that could be used for the purpose of identity theft or some other financial harm. The release of this information by the department in response to a public records request could be just as problematic as the breach or improper disposal of customer records. This exemption protects the security of the personal information by excluding it from public records requirements.

Section 3. This act shall take effect on the same date that SB ___ or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.