SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: April 21, 1998 Revised: _____ _____ _____ _____

Subject: Sales Tax (RAB)

	Analyst	Staff Director	Reference	Action
1.	Beggs	Smith	WM	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

SB 1688 provides specific statutory authority for Department of Revenue rules or parts thereof that have been identified by the department as subject to repeal under s. 120.536, F.S. These rules all relate to the sales and use tax.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 212.02, 212.03, 212.031, 212.04, 212.05, 212.06, and 212.18.

II. Present Situation:

During the 1996 legislative session a comprehensive rewrite of the Florida Administrative Procedures Act was adopted as CS/SBs 2290 and 2288. Among many other changes, the revised APA modified the standards which authorize rulemaking and included provision for periodic review of rules by agencies with rulemaking authority.

In the past, a number of court decisions held that a rule did not exceed the legislative grant of rulemaking authority if it was reasonably related to the stated purpose of the enabling legislation. Additionally, it was accepted that a rule was valid when it implemented general legislative intent or policy. Agencies had wide discretion to adopt rules whether the statutory basis for a rule was clearly conferred or implied from the enabling statute.

Section 120.536, F.S., effectively overturned this line of cases and imposed a much stricter standard for rulemaking authority. Under the new APA, existing rules and proposed rules must **implement, interpret, or make specific** the particular powers and duties granted by the enabling statute. It is important to note that the revised APA is not intended to eliminate administrative rules or even to discourage rulemaking, but to ensure that administrative rules are no broader than

the enabling statute. A grant of rulemaking authority by the Legislature is necessary but not enough by itself to allow an agency to adopt a rule. Likewise, agencies need more than a statement of general legislative intent for implementing a rule. Rules must be based on specific grants of powers and not address subjects on which the Legislature was silent.

In order to temporarily shield a rule or portion of a rule from challenge under the new provisions, agencies were to report rules which they believed did not meet the new criteria by October 1, 1997.

Section 120.536(2) also lays out the second step in the process, that of legislative review. The subsection provides:

> The Legislature shall, at the 1998 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 1999, each agency shall initiate proceedings pursuant to s. 120.54 to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist.

Thus, during the 1998 legislative session, each agency has the responsibility to bring forward legislative proposals, as appropriate, which will provide statutory authorization for existing rules or portions thereof which the agency deems necessary but which currently exceed the agencies' rulemaking authority. The Legislature is directed to consider whether such legislation authorizing the identified rules should be enacted.

According to the Joint Administrative Procedures Committee (JAPC), there are 3500-3600 grants of rulemaking authority contained in the Florida Statutes falling roughly into two categories: specific grants and general grants. Most of them are specific grants of authority, that is, the grant of authority is found coupled in a sentence with a specific power or duty of the agency. General grants of rulemaking authority authorize rulemaking in the context of the agency's mission or as it pertains to the stated purpose of the enabling legislation. Most agencies have a general grant of rulemaking authority and numerous specific grants of rulemaking authority. In most cases, it appears that existing rules exceed statutory authority because a "specific law to be implemented" is missing from the statute, not a legislative grant of rulemaking authority.

In response to the requirements of s. 120.536, F.S., the Department of Revenue identified 78 rules or portions of rules which they found exceeded their rulemaking authority and for which they recommended that the Legislature grant such authority. This bill addresses a number of these issues. The current situation and the effect of the changes proposed by this bill are detailed in the following section.

III. Effect of Proposed Changes:

Rule 12A-1.040: Sales of Containers, Wrapping and Packing Materials and Related Products

Present Situation:

The rule states that items actually accompanying a product sold to the final buyer or ultimate consumer without which delivery of the product is impracticable on account of the character of its contents and for which there is no separate charge are exempt. The rule also exempts such things as paper plates, napkins, and plastic utensils when sold to someone for use in a restaurant. Pallets, ice and salt when sold for one time use as part of packaging are also exempt under the rule. The Department also exempts paper and plastic bags given to customers for carrying out purchases. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed many items which are not strictly packaging but are intended for the convenience of the customer, such as pallets, stir sticks, paper plates and plastic utensils used by restaurants and paper and plastic bags given to customers to carry out purchases would be taxable.

Effect of Proposed Change:

The bill amends s. 212.02(14)(c), F.S., to broaden the exemption to include materials accompanying products sold to a final buyer or ultimate consumer without which delivery would be impracticable and such materials provided for the convenience of the customer.

Rule 12A-1.022: Federal Excise Taxes

Present Situation:

The rule provides that federal excise taxes imposed on retailers are not included in sales price and therefore not subject to Florida sales tax. The rule also provides that federal excise taxes imposed on manufacturers are to be included in the taxable sales price even when separately stated on the bill. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, federal excise taxes on retailers which are separately stated on the bill would become taxable. Federal excise taxes on the manufacturer, because they are part of the price to the retailer, would continue to be taxable.

Effect of Proposed Changes:

The bill amends s. 212.02(16), F.S., to state that “sales price” does not include federal excise taxes imposed on the sale of tangible personal property by retailers. The language also clarifies

that federal excise taxes on manufacturers would be part of "sales price" even if separately stated on the invoice.

Rule 12A-1.007(8)(g): Loans of Driver Education Automobiles

Present Situation:

The rule provides that automobiles exclusively used by motor vehicle dealers for loan to a high school driver education and safety program is exempt from sales taxation. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, motor vehicle dealers would be considered to be using such cars for their own use and required to pay a use tax.

Effect of Proposed Changes:

The bill amends s. 212.02(20), F.S., to state that the term "use" does not include the loan of an automobile by a motor vehicle dealer to a high school for use in its driver education and safety program.

Rule 12A-1.061: RV Park Facilities Exemption

Present Situation:

Trailer camps and recreational vehicle parks are entitled to a sales tax exemption on the rental of all spaces if more than 50 percent of the total rental units available are occupied by tenants who have been continuous residence for more than three months. The rule requires the park owner to make a redetermination of the park's status with regard to this exemption each year and notify the Department in writing if the park no longer qualifies for exemption. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, park owners would no longer be required to notify the Department if their park did not meet the requirements for exemption.

Effect of Proposed Changes:

The bill amends s. 212.03(7), F.S., to require owners of parks receiving a facilities exemption to notify the department at the end of their accounting year if the park no longer qualifies for exemption. Owners are permitted to use any consecutive 3-month period, at least one month of which is within the accounting year, for the determination of their status. Tax is applicable for those parks no longer qualifying from the first day of the month of the park owner's succeeding fiscal year.

Rule 12A-1.070(14): For Profit Nursing Homes, Assisted Living Facilities and Hospices

Present Situation:

Rental of residential property is exempt from sales tax. When property serves both an exempt residential use and a taxable commercial use, only that portion of the rent not for residential purposes is to be taxed. The rule allows the determination of taxable rent for for-profit nursing homes, assisted living facilities, and hospices to be determined based on the portion of square footage of the facility used for exempt purposes. The rule details those portions deemed residential. A recent court case, however, requires the focus of the determination be based on areas used for both patient rooms and patient care. The Department of Revenue has identified the portion of this rule allowing apportionment based on square footage as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, determination of taxable portions of rents for such facilities will have to be done on a case by case basis using market considerations.

Effect of Proposed Changes:

The bill amends s. 212.031(1), F.S., to specifically allow for the apportionment of taxable rent in residential facilities for the aged to be based on the square footage of the facility used for residential purposes, areas normally accessed and used by residents, and areas used for the care of the residents. “Residential facilities for the aged” are defined to be facilities licensed or certified under chapters 400 or 651, facilities providing residences to the elderly financed by a mortgage made by or financed by the U.S. Department of Housing and Urban Development under s. 202, s. 202 with a s. 8 subsidy, s. 221(d)(3) or (4), s. 232, or s. 236 of the National Housing Act, or other such similar facility which provides residences primarily for the elderly.

Rule 12A-1.070(4): Utility Charges Passed Through to Tenants; Payment to Terminate Lease

Present Situation:

Commercial rents for real property are subject to sales tax. For sales tax purposes, rents include all considerations due and payable from the tenant for the privilege to use or occupy real property. The rule provides that utility charges on which the landlord has paid taxes to the utility company and which are stated separately on the bill to the tenant at the same or lower price than that paid by the landlord are not to be considered part of taxable rent. In addition, the rule provides that payments by a tenant to the landlord to cancel or terminate a lease agreement are to be taxed only if the tenant or the landlord records such payments as rental income in their books. The Department of Revenue has identified the portion of this rule exempting utility pass through charges and determining whether payments to terminate lease agreements are taxable as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If

authorizing language is not passed, utility charges passed through to the tenant by the landlord would be considered part of the rent and become taxable. It is unclear how lease termination payments would be taxed.

Effect of Proposed Changes:

The bill creates s. 212.031(7) and (8), F.S., to exempt utility charges paid by the tenant to the landlord when the landlord has paid taxes to the utility company and separately states such charges with no mark-up on the tenants bill. In addition, payments to cancel or terminate a lease agreement would be presumed taxable if the landlord records the payments as rental income on his books. This presumption could be overcome with sufficient documentation to the contrary by either the landlord or the tenant.

Rule 12A-1.005(7): Vacation Packages

Present Situation:

By statute, no additional tax is due on an admission when the admission is incorporated as part of a package sold by a travel agent if that package also includes transient rentals, transportation or meals, if tax was paid on the purchase of the admission, and if the admission is not separately itemized. The rule states that no sales tax is due on any vacation package as long as the components of the package are not itemized. The dealer must have paid tax on the purchase of any taxable components included in the package. The Department of Revenue has identified the portion of this rule exempting vacation packages which do not include admissions as part of the package as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, dealers putting together vacation packages which do not contain admissions would have to buy other taxable components, such as hotel accommodations, tax exempt as a sale for resale and charge tax on these components to the customer.

Effect of Proposed Changes:

The bill amends s. 212.04(1), F.S., to broaden the application of the treatment of vacation packages with taxable admissions to include all vacation packages with taxable components.

Rule 12A-1.005(4): Entry Fees to Events Where Admission is Charged

Present Situation:

Entry fees for participation in sporting, recreational and other events are subject to sales tax as an admission. The rule exempts participation or entry fees to events for which a taxable admission charge is made to spectators. The Department of Revenue has identified the portion of this rule exempting entry fees to events where spectators are charged a taxable admission as exceeding the

rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, such entry fees would be taxable.

Effect of Proposed Changes:

The bill amends s. 212.04(2), F.S., to exempt participation or entry fees charged to participants in a game, race, or other sport or recreational event if spectators are charged a taxable admission to such event.

Rule 12A-1.007(10): Designation of Selling Dealer for Boat and Airplane Sales

Present Situation:

A sales tax exemption is provided for sales of boats and airplanes through a registered dealer to an out-of-state purchaser. The rule allows the registered dealer making the sale, or selling dealer, to be either the registered dealer operating on behalf of the seller or the purchaser. The Department of Revenue has identified the portion of this rule allowing the dealer for the purchaser to be the selling dealer as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, applying the exemption for the sale of boats and airplanes to out-of-state residents would become more administratively complicated.

Effect of Proposed Changes:

The bills amends s.212.05(1), F.S., to state that the selling dealer can be either a registered dealer acting on his or her own behalf as seller, acting on behalf of another seller, or acting on behalf of the purchaser.

Rule 12A-1.007(10): Out-of-State Boat and Aircraft Repairs and Sales

Present Situation:

The law provides special treatment for the purchase of boats and airplanes by out-of-state entities. Out-of-state purchasers of boats on which sales tax has not been paid are allowed to bring them back into the state for repairs without incurring tax. The rule extends this treatment to airplanes sold in Florida to out-of-state entities. With regard to sales of boats and aircraft to out-of-state residents, current law prohibits tax-free sales to corporations with directors or officers resident in Florida. The rule extends this prohibition to non-corporate entities with an individual vested with authority to participate in management resident in this state. The Department of Revenue has identified these portions of rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, airplanes sold tax

exempt to out-of-state entities could no longer be brought back into the state for repairs without incurring sales tax on the purchase. Also, tax free sales of boats or airplanes could be made to non-corporate entities with managers resident in this state.

Effect of Proposed Changes:

The bill amends s. 212.05(1), F.S., to allow an aircraft purchased tax exempt in Florida to be brought back into the state for repairs during the first six months after purchase if it is removed within 20 after repairs are complete and if the removal can be demonstrated by fuel, tie-down, or hanger invoices or similar documentation. The bill also prohibits the tax-free sale of boats or airplanes to non-corporate entities with an individual vested with authority to participate in management resident in this state.

Rule 12A-1.071(2): Conversion of Rental Property to One's Own Use

Present Situation:

Tangible personal property purchased tax exempt as rental property and later converted to the owner's own use is subject to the use tax. The rule provides that the use tax is due based on fair market value or, if that cannot be determined, on the original purchase price. Under no circumstances may the aggregate amount of sales tax paid on all the leases of the property and on the conversion be less than what would have been paid on the original acquisition cost. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, use tax would be due on either the cost price or the market value of rental property converted to the owner's own use. Taxes previously collected on rentals would not be taken into account.

Effect of Proposed Changes:

The bill amends s.212.05(1), F.S., to specifically require use tax at the time of conversion of rental property to one's own use to be based on fair market value at the time of conversion. If this cannot be determined tax would be due on the original acquisition cost. Under no circumstances could the aggregate amount of tax from the conversion and the rentals be less than what the owner would have paid on the original acquisition cost.

Rule 12A-1.007(14): Rental of Motor Vehicles.

Present Situation:

The rule provides that sales tax is due on a rental car based on where the car is paid for. If payment is made in Florida, sales tax is due even if the car is immediately driven out of the state. Likewise, if payment is made in another state, no Florida tax is due even if the car is returned in this state. The Department of Revenue has identified the this portion of the rule as exceeding the

rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, it is unclear how rental car transactions would be taxed. Because some of the use would be outside the state, general sales tax rules would probably require some sort of calculation based on the time the vehicle spent in Florida. This would be very difficult, if not impossible, to administer.

The actual calculation of tax by rental car companies appears to be different than that stated in rule. For cars either rented in Florida and returned in another state or rented in another state and returned in Florida, rental companies are basing tax on the state in which the contract was signed. The contract is apparently deemed signed when the car is picked up.

Effect of Proposed Changes:

The bill amends s. 212.05(1), F.S., to state that for motor vehicles rented for less than 12 months, sales tax is due if a vehicle is rented in Florida, regardless of where it is dropped off. The subsection is also amended to state the current administration of sales tax with regard to motor vehicle leases of 12 months or longer. Such vehicles are presumed to be taxable if they are registered in this state. No tax is due, however, if the taxpayer documents use of the motor vehicle outside Florida and tax is being paid on the lease or rental payments to another state.

Rule 12A-1.008: Newspaper and Magazine Inserts.

Present Situation:

By rule, inserts printed for inclusion in a magazine or newspaper are not subject to sales or use tax if they are distributed as a component part of the newspaper or magazine and are labeled as part of the newspaper or magazine into which they are inserted. This exemption applies to inserts printed both by the newspaper or magazine or by third party printers. Also, the rule allows newspapers to act as agents for their carriers and rack distributors. The newspapers may remit tax based on the final selling price of their carriers and distributors. This rule has also been the basis for allowing other dealers, such as kitchen plasticware sellers, to act as agents in the remittance of sales tax for their independent sellers. The Department of Revenue has identified this portion of the rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, inserts printed for the use of advertisers to be distributed with newspapers or magazines would be subject to the sales or use tax. Newspapers and other dealers could no longer act as agents for their distributors and remit sales tax for them.

Effect of Proposed Changes:

The bill amends ss. 212.05(1) and 212.18(3), F.S., to exempt inserts for newspapers and magazines from the sales or use tax if they are distributed as component parts of the newspaper or

magazine and labeled as such. Also, newspapers and other dealers would be allowed to act as agents in the remittance of sales tax for their independent sellers.

Rule 12A-1.047: Florists

Present Situation:

By rule, sales tax on payments received by a florist who receives an order from out-of-state for delivery in Florida are not subject to Florida sales tax. Likewise, payments received by Florida florists for flowers to be delivered by a florist outside of the state are fully subject to Florida sales tax. The Department of Revenue has identified this portion of the rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, florists receiving payment from out-of-state florists for flowers delivered in Florida would be subject to sales tax on those payments. Likewise, sales tax on payments to a Florida florist for delivery outside the state would not be taxable.

Effect of Proposed Changes:

The bill amends s. 212.05(1), F.S., to state that florists in Florida are liable for tax on sales to retail customers regardless of where the flowers are to be delivered. Also, the language exempts payments received by florists from other florists for flowers delivered to customers in Florida.

Rule 12A-1.080(1): Game Concessionaires.

Present Situation:

Under usual sales tax administration, tangible personal property purchased by a game concessionaire would be subject to tax at the time of purchase by the concessionaire or use tax on the cost price of the items if purchased outside of Florida. No tax is due on payments to play the game. By rule, game concessionaires are allowed to pay sales tax based on 25% of the gross receipts from the game. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, concessionaires would have to pay tax either on the purchase of the prizes if in Florida or based on the cost of the prizes that are awarded in Florida if purchased elsewhere.

Effect of Proposed Changes:

The bill amends s. 212.05(1), F.S., to allow concessionaires to pay sales tax based on 25 percent of the gross receipts of their games conducted in Florida.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18(b) of the Florida Constitution requires a two-thirds vote of the membership of each house of the Legislature to enact general laws if the anticipated effect is to reduce revenue raising authority of counties or municipalities, as such authority existed on February 1, 1989. Since the revenue raising authority addressed in this bill results from rules to be repealed in 1999, the bill does not affect local revenue raising authority as it existed in 1989 and therefore does not qualify as a mandate under section 18.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

This bill provides statutory authority for a number of the rules identified by the Department of Revenue as exceeding their rulemaking authority permitted by s. 120.536, F.S. If these rules are allowed to be repealed, as current law requires, there would be a significant increase in sales tax revenue beginning in the 1999-00 fiscal year. This bill provides statutory authority for these rules and would have the effect of eliminating any revenue increases caused by the rule repeal process. The following table shows estimates of the fiscal impact of providing statutory authorization for these rules. While these estimates show a revenue decrease, passage of the bill will not affect the budget process. The revenue estimates being used for the appropriations bill have not recognized any revenue impact from these issues.

	General Revenue		Trust		Local		Total	
Issue/Fund	1st Year $	Recurring $	1st Year $	Recurring $	1st Year $	Recurring $	1st Year $	Recurring $
1. Packaging Material	0.0	(32.3)	0.0	(.1)	0.0	(5.1)	0.0	(37.5)
2. Federal Excise Taxes	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
3. Driver Educ. MVs	0.0	*	0.0	*	0.0	*	0.0	*
4. RV Parks	0.0	**	0.0	**	0.0	**	0.0	**
5. Nursing Homes, etc.	0.0	**	0.0	**	0.0	**	0.0	**
6. Utility Pass Thrus	0.0	(10.6)	0.0	*	0.0	(1.7)	0.0	(12.3)
7. Vacation Packages	0.0	**	0.0	**	0.0	**	0.0	**

Issue/Fund	1st Year	Recurring	1st Year	Recurring	1st Year	Recurring	1st Year	Recurring
8. Participation Fees	0.0	*	0.0	*	0.0	*	0.0	*
9. Boat Selling Dealer	0.0	**	0.0	**	0.0	**	0.0	**
10. Aircraft Repairs	0.0	(1.1)	0.0	*	0.0	(.2)	0.0	(1.3)
11. Rental Property	0.0	**	0.0	**	0.0	**	0.0	**
12. MV Rental	0.0	**	0.0	**	0.0	**	0.0	**
13. Newspaper Inserts	0.0	(29.8)	0.0	*	0.0	(4.8)	0.0	(34.6)
14. Florists	0.0	**	0.0	**	0.0	**	0.0	**
15. Game Concessions	0.0	*	0.0	*	0.0	*	0.0	*
Total	0.0	(73.8)	0.0	(.1)	0.0	(11.8)	0.0	(85.7)

* Insignificant
** Indeterminate

B. Private Sector Impact:

This bill would counteract the effect of the rule repeal process for those issues addressed, resulting in lower taxes and reduced administrative burden than would have occurred in many industries had the rules been repealed. Industries with revenue impact include retail and wholesale industries purchasing packaging materials for their own use or their customer's use, commercial renters of real property where the landlord pays for utilities, and advertising inserts included in magazines and newspapers. Travel agencies putting together vacation packages, for-profit nursing homes and hospices, boat dealers, game concessionaires, and car rental agencies should experience reduced administration burden.

C. Government Sector Impact:

The Department of Revenue should experience reduced sales tax administrative burden in a number of areas including rental cars, boat dealers, vacation packages, for-profit nursing homes and hospices, and game concessionaires.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.