

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

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Prepared By: Criminal Justice Committee

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BILL: CS/CS/CS/ SB 750

SPONSOR: Criminal Justice Committee, Judiciary Committee, Regulated Industries Committee, and Senator Baker

SUBJECT: Talent Agencies and Advance-Fee Talent Services

DATE: April 27, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>Maclure</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
3.	<u>Davis</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
4.	_____	_____	<u>GA</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

The committee substitute repeals the current provisions of part VII of ch. 468, F.S., and repeals the regulatory functions of the Department of Business and Professional Regulation regarding the licensure and regulatory requirements for talent agencies.

In place of regulation, the committee substitute provides requirements for talent agencies and advance-fee talent services, and provides civil and criminal remedies for violations of those requirements by talent agencies and advance-fee talent services.

The committee substitute provides a definition for advance-fee talent services, including the scope of services they are permitted to provide to artists. Entities performing as talent agencies or advance-fee talent services would be required to obtain and provide information on both a background check and a bond to artists.

Both talent agencies and advance-fee talent services would be required to maintain a permanent office with regular operating hours. Neither would be permitted to operate where gambling is permitted, where intoxicating liquors are served, or where acts of prostitution are committed.

The committee substitute provides specific information and documents that must be preserved by both talent agencies and advance-fee talent services for five years. Each state attorney would have the ability to inspect records.

The committee substitute requires a contract between the talent agency or advance-fee talent service and the artist. The committee substitute specifies several items that must be included in

the contract, including a list of the services to be provided and the fees or commissions to be charged. The contract between an advance-fee talent service and an artist would have to contain language explaining the artist's right to cancel and refund, as well as, a disclaimer that only talent agencies "may engage in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist."

The committee substitute permits artists to cancel contracts within 14 days of signing the contract. Artists would also have the ability to void a contract if it failed to meet the requirements of the act. Talent agencies and advance-fee talent services would be prohibited from attempting to have an artist waive their right to cancel a contract. It requires that a talent agency must pay an artist within seven days the money it has collected from an employer or buyer for the benefit of the artist.

The committee substitute provides artists with the ability to seek civil action through the court system, including a specific cause of action for violation of the provisions of the act. A harmed artist may seek injunctive relief as well as restitution, treble damages, court costs, and attorney fees.

The committee substitute repeals part VII of chapter 468, consisting of the following sections of the Florida Statutes: 468.401, 468.402, 468.403, 468.404, 468.405, 468.406, 468.407, 468.408, 468.409, 468.410, 468.411, 468.412, 468.413, 468.414, and 468.415. The committee substitute creates unnumbered sections of the Florida Statutes.

## II. Present Situation:

### **Talent Agencies: Overview**

A talent agency is defined in s. 468.401, F.S., to mean any person who, for compensation, engages in the occupation or business of procuring or attempting to procure engagements for an artist. Section 468.403, F.S., requires a talent agency license for any person who, for compensation, engages in the occupation or business of procuring or attempting to procure engagements for an artist. The Department of Business and Professional Regulation (department) regulates through the talent agency licensing program, which does not have a board, does not require an exam, and does not require pre-licensure education or continuing education. The statutory provisions relating to the regulation of talent agents and agencies are contained in part VII of ch. 468, F.S.

### **Regulatory Requirements and Criminal Violations**

Licensees are required to have a \$5,000 surety bond.<sup>1</sup> The department has the authority to revoke a license and can impose citations and fines.<sup>2</sup> However, the department has no authority over criminal violations, e.g., theft. According to the department, criminal violations are referred to the State Attorney's Office. Section 468.413(1), F.S., provides that the following acts constitute a third-degree felony:

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<sup>1</sup> Section 468.408, F.S.

<sup>2</sup> See ss. 455.224 and 468.402, F.S., and ch. 61-19, F.A.C.

- owning or operating, or soliciting business as, a talent agency in this state without first procuring a license from the department; or
- obtaining or attempting to obtain a license by means of fraud, misrepresentation, or concealment.

Section 468.413(2), F.S., provides that the following acts constitute a second-degree misdemeanor:

- (a) Relocating a business as a talent agency, or operating under any name other than that designated on the license, unless written notification is given to the department and to the surety or sureties on the original bond, and unless the license is returned to the department for the recording thereon of such changes.
- (b) Assigning or attempting to assign a license issued under this part.
- (c) Failing to show on a license application whether or not the agency or any owner of the agency is financially interested in any other business of like nature and, if so, failing to specify such interest or interests.
- (d) Failing to maintain the records required by s. 468.409, F.S., or knowingly making false entries in such records.
- (e) Requiring as a condition to registering or obtaining employment or placement for any applicant that the applicant subscribe to, purchase, or attend any publication, postcard service, advertisement, resume service, photography service, school, acting school, workshop, or acting workshop.
- (f) Failing to give each applicant a copy of a contract which lists the services to be provided and the fees to be charged, which states that the talent agency is regulated by the department, and which lists the address and telephone number of the department.
- (g) Failing to maintain a record sheet as required by s. 468.412(1), F.S.
- (h) Knowingly sending or causing to be sent any artist to a prospective employer or place of business, the character or operation of which employer or place of business the talent agency knows to be in violation of the laws of the United States or of this state.

According to the department, the laws governing talent agency regulation contain unclear provisions. For example:

- the definition of a talent agency does not include production companies, which are the companies that actually produce films;
- the statutes or rules do not prevent a talent agency that has lost its license from reopening under another name; and
- the requirement in s. 468.405(1), F.S., for “good moral character” as a qualification for licensure is vague.

### **Advance-fee Talent Services**

According to the department, advance-fee talent services are performed by entities that receive money from prospective artists to promote or advertise the artist. The advance-fee talent services do not attempt to procure employment or engagements for the artists. According to industry representatives, talent agents are only paid when they procure employment or engagement for the

talent. They typically are paid a predetermined percentage of the fee paid to the talent. However, many artists do not understand this distinction and believe that the persons providing advance-fee talent services do procure engagements. The department does not have regulatory jurisdiction over advance-fee talent service operations.

### **Fiscal Status of the Talent Agencies Program**

The Auditor General reviewed the department's Professional Regulation Trust Fund in an operational audit. The report, dated October 2001, noted that the department's regulation of talent agencies had experienced fiscal year-end deficits for the previous three years, and concluded that it was unlikely that the profession's 291 licensees would be able to eliminate the existing cash deficit and then continue to pay license fees in an amount sufficient to pay ongoing regulatory costs.<sup>3</sup>

Section 468.404(1)(b), F.S., requires that the department assess, for the 2004-2005 fiscal year only, talent agency license fees at a level sufficient to cover the cost of regulation appropriated in the 2004-2005 General Appropriations Act, or any other act passed by the 2004 Legislature containing appropriations for such purpose. This provision expires July 1, 2005.<sup>4</sup>

The department reports that the talent agencies program has a current deficit cash balance. The department notes that the talent agency licensee base is small and has approximately 271 current active licensees. According to the department, a fee of at least \$1,000 per licensee would be required to bring the program out of the deficit. Additionally, the renewal fee of \$400 for talent agencies has reached its statutory cap.<sup>5</sup>

Since the inception of the regulatory program, talent agencies have paid \$400 for the biennial license renewal, which is the statutory cap for this fee. According to the department, the fees have never supported the regulatory costs, and the account for talent agencies reflects a current deficit cash balance of \$484,298 as of June 30, 2004.

Section 455.219(1), F.S., requires the department to ensure that the license fees of each profession regulated by the department are adequate to cover costs and maintain a cash balance and that no profession operate with a negative cash balance. Chapters 2003-399 and 2004-269, L.O.F., mandated that the department assess talent agency fees at a level sufficient to cover the cost of regulation as appropriated. Based on these provisions, the department assessed a fee of \$1,800 per licensee to eliminate the talent agency account deficit. This fee is due May 31, 2006.

### **III. Effect of Proposed Changes:**

The committee substitute repeals the current provisions of part VII of ch. 468, F.S., and repeals the regulatory functions of the Department of Business and Professional Regulation regarding the licensure and regulatory requirements for talent agencies. In place of regulation, the committee substitute provides requirements for talent agencies and advance-fee talent services,

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<sup>3</sup> Auditor General, *Professional Regulation Trust Fund, Florida Department of Business and Professional Regulation Operational Audit*, Report No. 02-059, October 2001.

<sup>4</sup> Section 40, ch. 2004-269, L.O.F., amended subsection (1) "[i]n order to implement Specific Appropriations 2160-2184 of the 2004-2005 General Appropriations Act."

<sup>5</sup> See s. 468.404(1), F.S.

and provides civil and criminal remedies for violations of those requirements by talent agencies and advance-fee talent services. Following is a section-by-section analysis of the committee substitute.

### **Repealed Sections**

Section 1 repeals part VII of ch. 468, F.S., which contains the current statutory framework governing talent agencies.

### **No Pre-emption of Local Governments**

Section 2 provides that although the state no longer regulates the talent agencies, counties and municipalities are not pre-empted from regulating talent agencies or advanced-fee talent services.

### **Definitions**

Section 3 defines several terms.

“Advance-fee talent service” means a service which charges, or attempts to charge, or receives an advance-fee from an artist for the purpose of promoting, but not procuring, the employment or engagement.

“Advance-fee” means a fee paid or due from an artist before the artist obtains employment or receives earnings as an artist. The term also includes money paid by the artist that exceeds the earnings received by the artist. An “advance-fee” does not include reimbursement for out-of-pocket costs incurred by an advance-fee talent service on behalf of an artist when paying for services rendered or goods provided to the artist by an independent third party, if all of the following conditions are met:

- the advance-fee talent service does not have a direct or indirect interest in the third party;
- the advance-fee talent service does not accept a referral fee;
- the service rendered is not a condition for the advance-fee talent service to register or list the artist; and
- adequate records are maintained.

If these listed conditions are met, a reimbursement for out-of-pocket expenses would not be an advance-fee.

“Artist” includes an actor, actress, writer, director, cinematographer, composer, lyricist, arranger, model, extra, or other person rendering professional services on the legitimate stage or in the production of motion pictures, radio productions, musicals, television productions, print advertisements, or other entertainment enterprises.

“Divided fee” means the process by which, without written approval from the artist, two or more persons receive a fee from the artist for performing services for the artist, and the total compensation paid to the agents exceeds the compensation that would have been received by only one agent acting on behalf of the artist.

The committee substitute also defines the terms “buyer,” “compensation,” “engagement,” “operator,” “owner,” and “talent agency” or “agency.”

**Bond Required**

Section 4 requires that each talent agency or advance-fee talent service maintain a surety bond on not less than \$10,000. The current bond requirement for talent agents is a \$5,000 surety bond. The bond is conditioned upon the talent agency or advance-fee talent service conforming to and not violating any duty, term, condition, provision, or requirement of the act. The committee substitute requires that the agency must provide the artist with a copy of the bond, and that failure to obtain or maintain the bond is a second-degree misdemeanor for a first violation and a second or subsequent violation is a first degree misdemeanor.

**Office and Records**

Section 5 requires that a talent agency or advance-fee talent service must maintain a permanent office with regular business hours. The office may not be located in any property where intoxicating liquor is served,<sup>6</sup> where gambling is permitted, or where acts of prostitution are committed.

The committee substitute provides recordkeeping requirements, including documentation of compensation and all attempts to procure employment. Knowingly making false entries is prohibited. The records must be kept for five years, and must be made available, or copies provided, for inspection by the state attorney upon request. Failure to disclose information to the state attorney is a second degree misdemeanor.

A person commits a second degree misdemeanor for a first offense and a first degree misdemeanor for a second or subsequent offense if that person fails to maintain a permanent office and keep regular office hours, fails to maintain records and files required by the section, or knowingly makes false entries in an artist's files.

A person commits a felony of the third degree if that person establishes or keeps an office where intoxicating liquor is sold, where gambling is permitted, or where acts of prostitution are committed.

**Contracts and Fees**

Section 6 requires each talent agency or advance-fee talent service to conspicuously post, in 30-point boldfaced type, an itemized schedule of maximum fees, charges, and commissions it intends to charge. If the talent agency uses a written contract containing the schedule of maximum fees, charges, and commissions, it is not required to post the schedule. The committee substitute specifies that failure to comply with this provision is a second-degree misdemeanor for a first violation and a first degree misdemeanor for a second or subsequent violation.

The committee substitute requires that the artist and the talent agency or advance-fee talent service must enter into a written contract for services. The contract must be executed no later than seven days after the artist's first performance.

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<sup>6</sup> The term "intoxicating liquor" is defined in s. 561.01(5), F.S., as "only those alcoholic beverages containing more than 4.007 percent of alcohol by volume."

The committee substitute also specifies the provisions that must be contained in the contract, and provides that a notice regarding the right to a refund and cancellation of the contract must be included in each advance-fee talent service contract. The notice must be in a type no smaller than 10-point boldfaced type and in close proximity to the artist's signature. The notice provides that the artist has a right to a refund within 48 hours of requesting a refund if the artist pays an advance-fee and fails to receive the promised service. The notice provides the artist with a right to cancel the contract without penalty or obligation within 14 days after the transaction. The cancellation must be made in writing.

The notice also specifies that only a talent agency may engage in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist.

At the time the contract is signed, the talent agency or advance-fee talent service must give each artist a copy of the signed or authenticated contract that includes a listing of the services to be provided and the applicable fees, charges, and commissions.

The committee substitute provides that a contract that does not conform to the requirements of the act is voidable by the artist. If the contract is voided by the artist, the artist would not be required to pay any consideration or return any compensation received from the agency. The committee substitute also provides artists with the right to cancel a contract within 14 days after a contract is signed. An artist may not waive this cancellation right, and any attempt by the agency to have the artist waive this right would constitute a violation of the act. The committee substitute also provides that an artist who cancels a contract cannot be required to return or pay any consideration received from the agency.

The bill also provides a timetable for refund of fees to the artist. An advance-fee talent service must pay an artist within 48 hours of his or her demand for a refund. If the artist cancels the contract, the refund must be made within fourteen days.

The committee substitute provides that violation of any provision in subsections (2) – (6), pertaining to contracts, is a second-degree misdemeanor for a first offense and a first degree misdemeanor for a second or subsequent offense.

### **Fingerprinting Requirements**

Section 7 establishes a fingerprinting requirement. The committee substitute requires employees, agents, owners, and operators of the talent agency or advance-fee talent service to submit a full set of fingerprints to the Department of Business and Professional Regulation, to be forwarded to FDLE and to the Federal Bureau of Investigation for criminal background checks. The department shall notify the talent agency or advance-fee talent service via letter of the results. The artist must be given a copy of the letter before a contract is executed. Failure to provide the letter to a client is a second degree misdemeanor for a first violation and a first degree misdemeanor for a second or subsequent violation. Failure to submit fingerprints as required is a second-degree felony.

### **Prohibitions and Penalties**

Section 8 provides that a person, business entity, talent agency, or advance-fee talent service may not accept an advance-fee for procuring, offering, promising, or attempting to procure

employment or engagements for an artist. An advance-fee talent service may not make any false statement, representation, promise, or implication by its choice of name that it is a talent agency. Nor may an advance-fee talent service state, promise, or represent that it will procure employment or engagements for the artist. A violation of any of these provisions constitutes a third degree felony.

The committee substitute specifies several prohibited acts that constitute third degree felonies in which a talent agency, advance-fee talent service, or other persons may not engage:

- acts involving false statements, fraud, misrepresentation, or coercion;
- sending an artist to a house of ill fame or a place of amusement for immoral purposes or resorted to for prostitution;
- sending an artist to a place for photographing a minor in the nude without the parents' or legal guardian's consent;
- conspiring with another agency or person to commit an act that would tend to coerce, intimidate, or preclude another agency from advertising its services;
- exercising undue influence on the artist in a manner that exploits the artist for financial gain of the agency or a third party;
- committing sexual misconduct; or
- employing any person who has been convicted of sexual battery, lewd acts, or other sexual misconduct.

The bill specifies numerous prohibited acts that constitute second or first degree misdemeanors in which a talent agency, advance-fee talent service, or other persons may not engage, including:

- charging, collecting, or receiving compensation for any service performed by the agency greater than specified in its schedule of maximum fees, charges, and commissions;
- charging a registration fee, except as permitted for advance-fee talent services;
- dividing fees with anyone, including, but not limited to, an agent or other employee of an employer, a buyer, a casting director, a producer, a director, or any venue that uses entertainment;
- advertising goods or services in a manner that is fraudulent, false, deceptive, or misleading in form or content;
- failing to notify an artist prior to sending an artist to an engagement that there is a strike, lockout, or other labor dispute in active progress; or
- failing to maintain records required to be maintained by the act.

### **Remedies**

Section 9 provides for judicial enforcement by state attorneys. The bill authorizes state attorneys to seek, and the courts to grant, temporary or permanent injunctions for violations of the act. It also authorizes civil actions by persons harmed by a violation of a prohibited act if the state has probable cause of a violation or has received a sworn affidavit from a person of the violation. It allows an injured person to file a civil action against the bond required by the act. The committee substitute limits the damages that may be obtained through a civil action in circuit court to a civil penalty not to exceed \$5,000 for each violation, restitution, treble damages for injured parties, court costs, and reasonable attorney's fees.



**Abolition of Regulation**

Section 10 abolishes the regulation of talent agencies by the Department of Business and Professional Regulation. The committee substitute requires that any funds and balances associated with the department's regulation of talent agencies remaining in the Professional Regulation Trust Fund after the effective date of this committee substitute must be used to pay any remaining expenses associated with this regulation. It requires the department to rebate talent agency fees on a prorata basis, for the period beginning July 1, 2005, through the period for which the license fees have been paid. Any deficit may be paid from the General Revenue Fund. The committee substitute also requires that any funds or balances remaining in the trust fund after January 1, 2006, must be transferred to the General Revenue Fund.

**Ongoing Prosecution**

Section 11 authorizes the department to continue to prosecute pending legal proceedings in existence after the effective date of this committee substitute.

**Effective Date**

Section 12 provides an effective date of July 1, 2005.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Talent agents would not have to pay the \$400 biennial renewal fee, or the \$1,800 assessment that is due May 31, 2006. Under the new statutory framework, in addition to potential criminal penalties, violators may be subject to civil damages, including a civil penalty not to exceed \$5,000 for each violation, restitution, treble damages for injured parties, court costs, and reasonable attorney's fees. The committee substitute also requires each talent agency or advance-fee talent service maintain a surety bond on not less than \$10,000. (The current bond requirement for talent agents is a \$5,000 surety bond.)

**C. Government Sector Impact:**

The Department of Business and Professional Regulation would not receive fees for new talent agent licensees or the biennial renewal fees from talents agents. The committee substitute provides for the payment of the current deficit cash balance related to the regulation of talent agents. It requires refunding talent agency fees on a pro-rata basis. Since the account is in deficit, any remaining deficit would be paid from the General Revenue Fund. Section 12 provides for \$59,331 in nonrecurring funds to be appropriated to DBPR to provide rebates of licenses paid by registrants.

For a discussion of the “Fiscal Status of the Talent Agencies Program,” see the Present Situation section of this staff analysis.

The Criminal Justice Estimating Conference met on April 15, 2005, and determined that the impact of this legislation would be insignificant.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill’s sponsor or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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