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.)

Prepared By: Community Affairs Committee

BILL:	CS/SB 1536
INTRODUCER:	Regulated Industries Committee and Senator Jones
SUBJECT:	Indoor smoking places
DATE:	April 11, 2006
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Fav/CS**
2.	Gordon	Cooper	CM	**Favorable**
3.	Herrin	Yeatman	CA	**Favorable**
4.				
5.				
6.				

I. Summary:

This committee substitute (CS) amends provisions of the Florida Clean Air Act, which implements the tobacco smoking ban in s. 20, Art. X, Florida Constitution. It provides that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person to smoke in the workplace. It defines the term "person" to have the same meaning as in the rule of statutory construction in s. 1.01, F.S.

The CS prohibits alcoholic beverage licensed vendors from permitting smoking in their licensed premises, unless designated as a stand-alone bar. It provides that an alcoholic beverage licensee is subject to revocation or suspension of its alcoholic beverage license under s. 561.29, F.S., if the licensee knowingly makes a false statement on the annual affidavit required by s. 561.695, F.S. It also repeals the requirement that designated stand-alone bars must file with the Division of Alcoholic Beverage and Tobacco an agreed upon procedures report signed by a certified public accountant every three years after their initial designation.

The CS also deletes subsection (1) of s. 386.206, F.S., which requires that any person in charge of an enclosed indoor workplace who was required before the adoption of the smoking ban in the State Constitution to conspicuously post a sign wherever smoking is permitted. This subsection expired on July 1, 2005.

This CS substantially amends the following sections of the Florida Statutes: 386.203, 386.204, 386.2045, 386.206, 386.208, and 561.695.

II. Present Situation:

Florida Constitution - On November 5, 2002, the voters of Florida approved constitutional Amendment 6 to prohibit tobacco smoking in enclosed indoor workplaces. Codified at s. 20, Art. X, Florida Constitution, the amendment defines an "enclosed indoor workplace," in part, as "any place where one or more persons engages in work, and which place is predominantly or totally bounded on all sides and above by physical barriers…without regard to whether work is occurring at any given time." It defines "work" as "any persons providing any employment or employment-type service for or at the request of another individual or individuals or any public or private entity, whether for compensation or not, whether full or part-time, whether legally or not."

The constitutional amendment provides limited exceptions for private residences "whenever they are not being used commercially to provide child care, adult care, or health care, or any combination thereof," retail tobacco shops, designated smoking guest rooms at hotels and other public lodging establishments, and stand-alone bars.

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

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

The constitutional amendment directs the Legislature to implement the "amendment in a manner consistent with its broad purpose and stated terms." The constitutional amendment requires that the implementing legislation have an effective date of no later than July 1, 2003. The amendment requires that the implementing legislation must also provide civil penalties for violations; provide for administrative enforcement; and require and authorize agency rules for implementation and enforcement. It further provides that the Legislature may enact legislation more restrictive of tobacco smoking than that provided in the State Constitution.

Florida's Clean Indoor Air Act - The Legislature implemented the smoking ban by enacting ch. 2003-398, L.O.F., effective July 1, 2003, which amended Part II of ch. 386, F.S., and created a new s. 561.695, F.S., of the Beverage Law. Part II of ch. 386, F.S., constitutes the Florida Clean Indoor Air Act (act). Specifically, s. 386.204, F.S., prohibits smoking in an enclosed indoor workplace, unless the act provides an exception. The act adopts and implements the amendment's definitions and adopts the amendment's exceptions for private residences whenever it is not being used for certain commercial purposes,[1] stand-alone bars,[2] designated smoking rooms in hotels and other public lodging establishments,[3] and retail tobacco shops,

[1] Section 386.2045(1), F.S. *See also* definition of the term "private residence" in s. 386.203(1), F.S.
[2] Section 386.2045(4), F.S. *See also* definition of the term "stand-alone bar" in s. 386.203(11), F.S.
[3] Section 386.2045(3), F.S. *See also* definition of the term "designated guest smoking room" in s. 386.203(4), F.S.

including businesses that manufacture, import or distribute tobacco products and tobacco leaf dealers.[4]

Section 386.207, F.S., provides for enforcement of the act by the Department of Health (DOH) and the Department of Business and Professional Regulation (DBPR) within each department's specific areas of regulatory authority. Sections 386.207(1) and 386.2125, F.S., grant rulemaking authority to DOH and DBPR and require that the departments consult with the State Fire Marshal during the rulemaking process.

Section 386.207(3), F.S., provides penalties for violations of the act by proprietors or persons in charge of an enclosed indoor workplace.[5] The penalty for a first violation is a fine of not less than $250 and not more than $750. The act provides fines for subsequent violations in the amount of not less than $500 and not more than $2,000. Penalties for individuals who violate the act are provided in s. 386.208, F.S., which provides penalties in the amount of not more than $100 for a first violation and not more than $500 for a subsequent violation. The penalty range for an individual violation is identical to the penalties for violations of the act before the implementation of the constitutional smoking prohibition.

Stand-Alone Bar Provisions - Section 561.695, F.S., implements the exception for stand-alone bars. The constitutional amendment established three requirements for stand-alone bars. First, a stand-alone bar must be "devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises." Second, the serving of food, if any, must be "merely incidental" to the consumption of any alcoholic beverages. Third, the business must not be "located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue."

The constitutional amendment does not define the term "merely incidental." Section 561.695(5), F.S., defines "merely incidental" to limit a stand-alone bar from deriving more than 10 percent of its gross revenue from the sale of food. In order to permit tobacco smoking in its business location, a stand-alone bar must receive a designation as a stand-alone bar from the Division of Alcoholic Beverages and Tobacco (DABT) within DBPR. To qualify for a stand-alone bar designation, an establishment must have an active alcoholic beverage license permitting consumption on the premises and must notify the division of its intent to allow smoking.[6] There is no fee for this designation.

Triennial Reporting Requirement for Stand-Alone Bars - Every third year after the initial designation, a stand-alone bar that serves food, other than pre-packaged items, must file a procedures report prepared by a Certified Public Accountant with DABT attesting to the percentage of food sales on or before the annual license renewal.[7] The first triennial report is due

[4] Section 386.2045(2), F.S. *See also* definition of the term "retail tobacco shop" in s. 386.203(8), F.S.
[5] The applicable penalties for violations by designated stand-alone bars are set forth in s. 561.695(8), F.S.
[6] An applicant for the stand-alone bar designation must file form DBPR ABT-6039, "Notification of Election to Permit Tobacco Smoking in the Licensed Premises," with the Division of Alcoholic Beverages and Tobacco.
[7] Section 561.695(6), F.S.

by September 30, 2006, which is the first applicable renewal date for designated stand-alone bars.

Penalties for Stand-Alone Bars - Section 561.695(8), F.S., provides specific penalties for violations by stand-alone bars that range from a warning for a first violation to revocation of the ability to allow smoking on the premises for a fourth violation. The applicable fines range from $500 to $2,000.

The division enforces the Beverage Law in chs. 562, 563, 564, 565, 567, and 568, F.S. The Beverage Law prohibits, as a third degree felony, a person from willfully and knowingly making false entries in records required by the Beverage Law concerning the excise tax.[8] However, there is no comparable provision in s. 561.29, F.S., which provides the grounds for suspension or revocation of an alcoholic beverage license, for willfully or knowingly making false and misleading statements in regards to other reports required under the Beverage Law.

DBPR Rulemaking - The DABT and the Division of Hotels and Restaurants are the principal agencies within DBPR that are responsible for the enforcement of the act. Section 561.695(8), F.S., grants DABT the authority to adopt rules governing the designation process, criteria for qualification, required recordkeeping, auditing, and other rules necessary for the effective enforcement and administration of the act.

After adopting its initial emergency rules,[9] DBPR initiated rulemaking for rules 61A-7.001 through 61A-7.015, F.A.C., on September 29, 2003.[10] These proposed rules pertained to the implementation of the stand-alone bar exception, and established a methodology for determining the percentages of food and alcoholic beverages sold in a purported stand-alone bar, record keeping requirements, penalty guidelines, and investigative and enforcement procedures. Rules 61A-7.006 – 61A-7009, F.A.C., were challenged and were subsequently withdrawn. They were rewritten and filed as proposed rules on March 11, 2005.[11] The proposed rules were again challenged.[12] The remainder of the rules were effective on June 14, 2005.[13]

Certified Public Accountant Concerns - The Florida Institute of Certified Public Accountants (FICPA) expressed concerns regarding the department's rules during the rulemaking process. According to the FICPA, rule 61A-7.005, F.A.C., should define the term "procedures report." According to the FICPA, in an agreed-upon procedures engagement or report, a certified public accountant (CPA) does not render an opinion regarding the sufficiency of the records provided by the client, including the accuracy and completeness of the records. In the context of the proposed rules, a CPA could only certify that the records provided by the stand-alone bar reflected a stated percentage of gross food sales. In an agreed upon procedures report, the CPA

[8] *See* s. 562.45, F.S.
[9] *See* Emergency Rule 61AER03-1 as noticed in Florida Administrative Weekly, Vol. 29, No. 26, June 27, 2003.
[10] Proposed Rules 61A-7.001, 61A-7.002, 61A-7003, 61A-7004, 61A-7005, 61A-7006, 61A-7007, 61A-7008, 61A-7009, 61A-7010, 61A-7011, 61A-7012, 61A-7013, 61A-7015 and 61A.7.015 were noticed in Florida Administrative Weekly, Vol. 29, No. 41, October 10, 2003.
[11] Proposed Rules 61A-7006, 61A-7007, 61A-7008, and 61A-7009 as noticed in Florida Administrative Weekly, Vol. 31, No. 10, March 11, 2005.
[12] *Bowling Centers Association of Florida, Inc., et al. v. Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco*, DOAH Case No. 05-1882RP, filed May 20, 2005.
[13] *See* Florida Administrative Weekly, Vol. 31, No. 23, June 10, 2005.

would not attest to the completeness or accuracy of the records provided. The FICPA recommends that the department's rules should define the term "procedures report" in a manner consistent with how the term "agreed upon procedures engagement" is defined by the American Institute of Certified Public Accountants Statement on Standards for Attestation Engagements.

Following passage of the implementing legislation, the Florida Institute of Certified Public Accountants (FICPA) assigned a task force of CPAs that practice in the area of tax administration to review and comment on the legislation and the DBPR proposed rules.[14] The FICPA has since expressed concern regarding the required agreed upon procedures report.

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

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

Further, Section 101 of the Attestation Standards of the American Institute of Certified Public Accountants defines an "examination" in which an opinion is given as:

[14] Public hearings were requested by the Bowling Centers Association of Florida on rules implementing the Clean Indoor Air Act, including rules addressing the records required to maintain the stand alone bar designation. Subsequently, a Petition challenging the validity of the proposed rules was filed on May 20, 2005. A hearing was held before the Division of Administrative Hearings on August 30, 2005. On December 7, 2005, the administrative law judge entered a final order declaring all of the proposed rules as valid exercises of delegated legislative authority and denied the Bowling Centers' petition. *Supra* at n. 12, decided December 7, 2005. This Final Order has been appealed to the 1st District Court of Appeal. The Notice of Appeal was filed on January 3, 2006. *Bowling Centers Association of Florida, Inc., et al. v. Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco*, No. 1D06-32 (Fla. 1st DCA).

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

The Florida Board of Accountancy adopts the AICPA standards into their administrative rules.[15]

According to the FICPA, a CPA could be disciplined by the Board of Accountancy[16] for a violation of professional standards if, in the course of preparing an agreed upon procedures report, the CPA observes irregularities in the client's records[17] or the CPA determines that the client may have committed fraud or other malfeasance,[18] and does not note them in the report. Moreover, the FICPA asserts that the department should clarify whether a CPA may be disciplined by the board if he or she fails to report fraud or other malfeasance that may be observed by the CPA in the process of preparing the report.

According to the FICPA, s. 561.695(6), F.S., and the division's rules[19] are not sufficiently clear regarding the specific records a stand-alone bar is required to maintain under the rules. Also according to the FICPA, the division's rules do not require that a CPA document the findings in the report. The FICPA further indicated that CPA standards of professional conduct require greater specificity regarding the form in which the records must be kept than the rule provides.[20] The FICPA maintains that the rules also need greater specificity regarding the steps or procedures that a CPA must take to address any apparent lack of internal controls that can result in unreliable records.

Without an adequate resolution of these matters, the FICPA believes that a CPA's performance of an agreed upon procedures report would most likely be a violation of professional standards, and, consequently, the FICPA would be compelled to advise its CPA members to refrain from performing the service for stand-alone bars. The FICPA further asserts that the determination of a stand-alone bar's compliance with the requirements of the act is a function that should more appropriately be performed by the department's own inspectors and auditors.

Smoking Violations by Patrons and Employees - A Division of Administrative Hearings (DOAH) decision has raised concerns regarding whether DBPR has sufficient authority to

[15] *See* Rule 61H1-20.0099, F.A.C., which reads in part: "Standards for Attestation Engagements shall be deemed and construed to mean Statements on Standards for Attestation Engagements published by the American Institute of Certified Public Accountants…"
[16] The Board of Accountancy within the Department of Business and Professional Regulation regulates the practice of public accountancy pursuant to ch. 473, F.S.
[17] For example, the client is intentionally withholding records from the CPA.
[18] For example, tax evasion.
[19] Rule 61A-7005, F.A.C., provides the triennial renewal reporting requirements.
[20] For example, the rule is unclear whether a CPA can rely upon records maintained in an electronic format.

sanction the proprietor or other person in charge of an enclosed indoor workplace with a violation of the act, if a person other than the proprietor or other person in charge of the location is smoking. Section 386.204, F.S., provides that a person may not smoke in an enclosed indoor workplace. Section 386.204, F.S., is the substantive smoking prohibition. Section 386.207(3), F.S., requires that DBPR or DOH, upon notification of observed violations of the act, issue to the proprietor or other person in charge of the enclosed indoor workplace a notice to comply with the act. Section 386.207(3), F.S., provides fines for subsequent violations of the act.

In *DBPR v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.*,[21] DBPR attempted to discipline Old Cutler Oyster Co., an alcoholic beverage licensee in Miami, for permitting several patrons to smoke in the licensed premises in violation of s. 386.204, F.S. The licensee did not hold a stand-alone bar designation under s. 561.695, F.S. The Administrative Law Judge (ALJ), in his Recommended Order, held that there is no requirement in the statute that a proprietor or other person in charge of an enclosed indoor workplace must take any specific action when he or she observes a patron (or other non-employee) smoking in the enclosed indoor workplace. The ALJ also questioned whether the civil penalties in s. 386.207(3), F.S., which may be assessed against "the person" who fails to comply with a previously issued "notice to comply," apply to corporate or other non-human juridical entities. The ALJ held that, in the context of s. 386.207(3), F.S., the term "person" appears to be limited to an individual human being. The Recommended Order does not reference the rule of statutory construction in s. 1.01, F.S., which provides that, where the context permits, the term person "includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."

The division rejected the ALJ's determination that the term "person" did not include a corporation. However, due to the criteria and limitations in s. 120.57(1)(l), F.S., for agency review of an ALJ's findings of fact, conclusions of law, and recommended disposition, the division adopted the recommendations of the ALJ and dismissed the case.[22]

Old Cutler Oyster Co., Inc., does not address the issue of whether the division can sanction an alcoholic beverage licensee under the division's disciplinary authority in s. 561.29, F.S., which authorizes discipline of alcoholic beverage licensees for violations of any law in this state or permits another person on the licensed premises to violate the laws of this state or the United States,[23] and for maintaining a nuisance on the licensed premises.[24] Although the licensee in *Old Cutler Oyster Co., Inc.*, is an alcoholic beverage licensee, the division did not seek to discipline the licensee pursuant to s. 561.29, F.S. The division has previously utilized s. 561.29, F.S., to successfully sanction alcoholic beverage licensees for violations of state law by patrons and other non-employees on the licensed premises.[25] In order to sanction a licensee for the conduct of

[21] *See* Recommended Order in *Dept. Business and Professional Regulation v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.*, DOAH Case No. 03-4681, Recommended Order issued September 24, 2004.
[22] Final Order No. BPR-2005-00162, Department of Business and Professional Regulation, January 13, 2005.
[23] Section 561.29(a), (b), and (e), F.S.
[24] Section 561.29(c), F.S.
[25] Regarding s. 561.29, F.S., an alcoholic beverage licensee is not an absolute insurer against violations on the licensed premises by patrons or employees, but where the licensee fails to exercise reasonable care or diligence in supervising or maintaining surveillance over the licensed premises, and violations occur in a flagrant, persistent and recurring manner then the licensee may be held culpable. *See, Pauline v. Lee*, 147 So.2d 359 (Fla. 2nd DCA 1962); *G & B of Jacksonville, Inc. v. Department of Business Regulation*, 366 So.2d 877 (Fla. 1st DCA 1978); *Woodbury v. State Beverage Department*, 219

a patron or other non-employee, the division would have to show that the licensee failed to exercise reasonable care or diligence in supervising or maintaining surveillance over the licensed premises, and that the violations occurred in a flagrant, persistent, and recurring manner such that the licensee knew or should have known that the state law violation was occurring. The licensee's failure to act could then be shown as evidence that the licensee fostered, condoned, or otherwise negligently permitted others to violate state law on the licensed premises.[26]

According to DBPR, the decision in *Old Cutler Oyster Co., Inc.*, has affected the department's ability to enforce the smoking ban and other licensees have raised this decision as a defense. At this point the department does not charge a licensee with a violation when the only evidence is that a customer is smoking. According to the department, it investigates whether the licensee has a smoking policy, which s. 386.206, F.S., requires that proprietors or other persons in charge of an enclosed indoor workplace must develop and implement regarding the smoking prohibition. If customers are smoking in a licensed premises, the department may charge the licensee for not having the required policy but does not charge the licensee for allowing customers to smoke.

The division's ability to charge a licensee with a smoking violation if he or she smokes in their licensed premises is also in question. In *Dept. of Business and Professional Regulation v. Barbara C. Clark d/b/a Buddy's Bar-B-Que*, the division alleged that the alcoholic beverage licensee, and sole owner of Buddy's Bar-B-Que, was observed smoking inside the restaurant with her patrons.[27] The Division of Administrative Hearings issued a Recommended Order finding the licensee in violation of the smoking ban in s. 386.204, F.S., on the basis that she and her patrons were observed smoking in the restaurant in an open manner, and imposed a $250 administrative penalty.[28] The division adopted the Administrative Law Judge's findings of fact, conclusions of law, and recommendation and ordered a $250 administrative penalty.[29] The licensee appealed this order and the division proceeded to dismiss the case against the licensee and ordered payment of $17,518.85 in attorney's fees and costs without providing any factual or legal conclusions to explain the dismissal.[30]

The DOAH decision is also relevant to the DOH enforcement of the act. It creates uncertainty regarding the extent to which DOH can sanction proprietors and persons in charge of an enclosed indoor workplace for smoking violations by patrons or other non-employees.

Signage Requirement - Section 386.206, F.S., (2002), required the posting of a sign in any area that was designated as a smoking area prior to the effective date of ch. 2003-398, L.O.F. Section

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So.2d 47 (Fla. 1st DCA 1969); *Taylor v. State Beverage Department*, 194 So.2d 321 (Fla. 2d DCA 1967) *cert. den.*, 201 So.2d 464 (Fla. 1967); *Golden Dolphin #2, Inc. v. Division of Alcoholic Beverages and Tobacco*, 403 So.2d 1372 (Fla. 5th DCA 1981); *Jones v. Division of Alcoholic Beverages and Tobacco*, 448 So.2d 1109 (Fla. 1st DCA 1984); *Pic N' Save v. Division of Alcoholic Beverages and Tobacco*, 601 So.2d 245 (Fla. 1st DCA 1992); and *Ganter v. Department of Insurance*, 620 So.2d 202 (Fla. 1st DCA 1993).

[26] *Id.*

[27] *See* Recommended Order in *Dept. of Business and Professional Regulation v. Barbara C. Clark d/b/a Buddy's Bar-B-Que.*, DOAH Case No. 06-1163, Recommended Order issued July 20, 2004.

[28] *Id.*

[29] *See* Amended Final Order in *Dept. of Business and Professional Regulation v. Barbara C. Clark d/b/a Buddy's Bar-B-Que.*, DOAH Case No. 06-1163. Amended Final Order issued November 18, 2004.

[30] *See* Second Amended Final Order in *Dept. of Business and Professional Regulation v. Barbara C. Clark d/b/a Buddy's Bar-B-Que.*, DOAH Case No. 06-1163. Amended Final Order issued July 1, 2005.

386.206(1), F.S., (2005), maintains this requirement. It requires that any person in charge of an enclosed indoor workplace who was required before the adoption of the smoking ban in the State Constitution to post a sign under s. 386.206, F.S., to continue to conspicuously post such a sign. Section 386.206(5), F.S., provides that s. 386.206(1), F.S., shall expire on July 1, 2005.

Interim Project 2005-156 - As noted above, the Senate President approved Interim Project Report 2005-156 to evaluate the implementation of the smoking ban.[31] The interim project resulted in the following staff recommendations:

- The Clean Indoor Air Act should be amended to clarify that local law enforcement officers have jurisdiction to enforce the smoking prohibition in s. 386.204, F.S.;
- The smoking prohibition in s. 386.204, F.S., should be amended to clarify that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person, including patrons and employees, to smoke in the workplace;
- The act should be amended to clarify that the term "person," as used in the act, has the same meaning as in the rule of statutory construction in s. 1.01, F.S.; and
- The Legislature should delay the implementation of the triennial renewal reports required by s. 561.695(6), F.S., by one year in order to permit affected stand-alone bars to adjust the recordkeeping and reporting requirements which have yet to be adopted as rules of the Department of Business and Professional Regulation.

III. Effect of Proposed Changes:

Section 1 amends s. 386.203, F.S., to provide that the term "person" has the same meaning as in the rule of statutory construction in s. 1.01, F.S.

Section 2 amends s. 386.204, F.S., to provide that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person to smoke in the workplace.

Section 3 amends s. 386.2045, F.S., to conform cross-references.

Section 4 amends s. 386.206, F.S., to delete subsection (1), which, pursuant to s. 386.206(5), F.S., expired on July 1, 2005. It also deletes the obsolete expiration date in subsection (5).

Section 5 amends s. 386.208, F.S., which provides the penalty for violations by a person, to conform the cross-reference to s. 386.204(1), F.S.

Section 6 amends s. 561.695, F.S., to prohibit alcoholic beverage licensed vendors from permitting smoking in their licensed premises, unless designated as a stand-alone bar. It eliminates the required agreed upon procedures report from a CPA that attests to the licensee's compliance with the 10 percent requirement in s. 386.203(11), F.S. Designated stand-alone bars are required to file this report with the division every three years after their initial designation. This CS prohibits a vendor from knowingly making a false statement on the annual compliance

[31] *See Evaluate the Implementation of the Smoking Ban*, Report No. 2005-156, Florida Senate Committee on Regulated Industries, November 2004.

affidavit. A person who knowingly makes a false statement on the affidavit may be subject to revocation of his or her alcoholic beverage license under s. 561.29, F.S.[32] It also conforms cross-references.

Section 7 provides the act shall take effect July 1, 2006.

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:

Designated stand-alone bars would not have to incur expenses attributable to hiring a CPA to comply with the reporting requirement in s. 561.695(6), F.S., which designated stand-alone bars must file with the division every three years after their initial designation.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Governor vetoed CS/CS/SB 1348, which passed the 2005 Regular Session. The CS provided an exception to the smoking ban for stand-alone bars listed in the National Register of Historic Places and provided mechanisms for enforcement of the smoking ban. The Governor stated that he was troubled by the CS's mechanisms for enforcement of the smoking ban. The Governor

[32] Section 561.29, F.S., sets forth several specific grounds for revocation or suspension, including violating any law of this state.

observed that while proprietors have an obligation to comply with state law, the CS holds proprietors responsible for enforcing state law, and responsible if their patrons violate the law. The Governor stated that making proprietors enforcement agents of the state is an unusual and troubling precedent.

The enforcement provisions in this CS differ from the provisions in CS/CS/SB 1348. The principal difference between the bills relates to their explicit directives to proprietors and persons in charge of an enclosed indoor workplace. Although both bills prohibit proprietors and persons in charge of an enclosed indoor workplace from permitting other persons to smoke in the location, this CS does not provide the exception from the smoking prohibition for stand-alone bars listed in the National Register of Historic Places. The CS does not explicitly provide that proprietors and persons in charge of an enclosed indoor workplace must remove the violator from the premises if any person refuses to comply with a proprietor's request to stop smoking. The CS also does not provide that a law enforcement officer may issue a citation to any person who violates the provisions of the Clean Indoor Air Act, and provide the minimum information that a citation must contain.

Concerns raised by the Governor's Veto - The enforcement mechanisms in this CS stemmed from the staff recommendations of an interim project by the Committee on Regulated Industries, which evaluated the implementation of the smoking ban.[33] The interim report addressed the concerns raised by the decision of the Administrative Law Judge in *DBPR v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.*[34] This decision raises concerns regarding whether DBPR or DOH have sufficient authority to sanction the proprietor or other person in charge of an enclosed indoor workplace with a violation of the act, if a person other than the proprietor or other person in charge of the location is smoking. Section 386.204, F.S., provides that a person may not smoke in an enclosed indoor workplace. Section 386.204, F.S., is the substantive smoking prohibition. Section 386.207(3), F.S., requires that DBPR or DOH, upon notification of observed violations of the act, issue to the proprietor or other person in charge of the enclosed indoor workplace a notice to comply with the act. Section 386.207(3), F.S., provides fines for subsequent violations of the act.

The Administrative Law Judge (ALJ), in his Recommended Order, held that there is no requirement in the smoking ban that a proprietor or other person in charge of an enclosed indoor workplace must take any specific action when he or she observes a patron (or other non-employee) smoking in the enclosed indoor workplace, and that the proprietor cannot be sanctioned under the smoking ban for violations of the ban by the proprietors patrons.

In effect, this interpretation of the smoking ban raises concerns regarding the effective enforcement of the smoking ban. For example, a restaurant's patrons who smoke tobacco inside the restaurant are subject only to detection and enforcement of the ban by local or state law enforcement authorities. The proprietor may permit the establishment's patrons to freely smoke inside the premises, the proprietor could even set out ashtrays for the patrons, but the proprietor would not be subject to any discipline for permitting, or encouraging, patrons to smoke in

[33] *See* footnote 31, *supra.*
[34] *See* Recommended Order in *Dept. Business and Professional Regulation v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.*, DOAH Case No. 03-4681, Recommended Order issued September 24, 2004.

violation of the law. Only the patron who smokes tobacco could be subject to discipline. The CS's enforcement mechanisms were designed to address this concern.

Additionally, s. 20, Art. X of the Florida Constitution prohibits tobacco smoking in enclosed indoor workplaces. By limiting the prohibition to persons who smoke in these locations and not to the proprietors and other persons in charge who may permit such violation in the premises, the current prohibition in the Clean Indoor Air Act, is arguably less restrictive than the prohibition in the Florida Constitution.

Proprietors and other persons in charge of places where smoking has been prohibited under the Clean Indoor Air Act have been required to enforce the provisions of the act for many years prior to the enactment of ch. 2003-298, L.O.F. Prior to 2003, the Clean Indoor Air Act prohibited smoking in a public place or at a public meeting except in designated smoking areas. The smoking areas could be designated by the person in charge of a public place with consideration to physical barriers and ventilation to minimize smoke in adjacent non-smoking areas.[35] The person in charge of a public place was required to post signs designating smoking areas.[36] As noted by the Attorney General in AGO 92-89:

> The Department of Health and Rehabilitative Services (department) and the Division of Hotels and Restaurants of the Department of Business Regulation (division) is [sic] charged with the enforcement of ss. 386.205 and 386.206, F.S. . . . The department or division, upon notification of an alleged violation, issues to the proprietor or other person in charge of the public place a notice to comply with ss. 386.205 and 386.206 F.S. Failure to comply with the act within thirty days subjects the person to a civil penalty not to exceed $100 for the first violation and a fine not to exceed $500 for each subsequent violation.

The division's disciplinary authority in s. 561.29, F.S., authorizes the discipline of alcoholic beverage licensees for violations of any law in this state or permits another person on the licensed premises to violate the laws of this state or the United States,[37] and for maintaining a nuisance on the licensed premises.[38] The division has utilized s. 561.29, F.S., to successfully sanction alcoholic beverage licensees for violations of state law by patrons and other non-employees on the licensed premises, typically for the sale of controlled substances, or possession of alcoholic beverages by persons under 21 years of age.[39] In order to sanction a licensee for the conduct of a patron or other non-employee, the division would have to show that the licensee failed to exercise reasonable care or diligence in supervising or maintaining surveillance over the licensed premises, and that the violations occurred in a flagrant, persistent, and recurring manner such that the licensee knew or should have known that the state law violation was occurring. The

[35] Section 386.205(1), F.S., (2002).
[36] Section 386.206, F.S., (2002).
[37] Section 561.29(a), (b), and (e), F.S.
[38] Section 561.29(c), F.S.
[39] *Simmons v. Dept. of Department of Business and Professional Regulation. Division of Alcoholic Beverage and Tobacco* 465 So.2d 578 (Fla. 1st DCA 1985); *Golden Dolphin No. 2. Inc., v. State, Division of Alcoholic Beverage and Tobacco*, 403 So.2d 1372 (Fla. 5th DCA 1981); *Pauline v. Lee*, 147 So.2d 359 (Fla. 2nd DCA 1962).

licensee's failure to act could then be shown as evidence that the licensee fostered, condoned, or otherwise negligently permitted others to violate state law on the licensed premises.[40]

Although the licensee in *Old Cutler Oyster Co., Inc.*, is an alcoholic beverage licensee, the division did not seek to discipline the licensee pursuant to s. 561.29, F.S. Therefore, DOAH's decision in *Old Cutler Oyster Co., Inc.*, does not limit the division's authority to sanction alcoholic beverages licensees for illegal acts, i.e., smoking violations by patrons. Although, the rational in *Old Cutler Oyster Co., Inc.*, may also affect DOH enforcement of the act, DOH has not reported any problems with enforcement.

However, the division's ability to charge a licensee with a smoking violation if he or she smokes in their licensed premises is also in question. In *Dept. of Business and Professional Regulation v. Barbara C. Clark d/b/a Buddy's Bar-B-Que*, the division alleged that the alcoholic beverage licensee, and sole owner of Buddy's Bar-B-Que, was observed smoking inside the restaurant with her patrons.[41] The Division of Administrative Hearings issued a Recommended Order finding the licensee in violation of the smoking ban in s. 386.204, F.S., on the basis that she and her patrons were observed smoking in the restaurant in an open manner, and imposed a $250 administrative penalty.[42] The division adopted the Administrative Law Judge's findings of fact, conclusions of law, and recommendation and ordered a $250 administrative penalty.[43] The licensee appealed this order and the division proceeded to dismiss the case against the licensee and ordered payment of $17,518.85 in attorney's fees and costs without providing any factual or legal conclusions to explain the dismissal.[44]

[40] *See* footnote 25, *supra.*
[41] *See* Recommended Order in *Dept. of Business and Professional Regulation v. Barbara C. Clark d/b/a Buddy's Bar-B-Que.*, DOAH Case No. 06-1163, Recommended Order issued July 20, 2004.
[42] *Id.*
[43] *See* Amended Final Order in *Dept. of Business and Professional Regulation v. Barbara C. Clark d/b/a Buddy's Bar-B-Que.*, DOAH Case No. 06-1163. Amended Final Order issued November 18, 2004.
[44] *See* Second Amended Final Order in *Dept. of Business and Professional Regulation v. Barbara C. Clark d/b/a Buddy's Bar-B-Que.*, DOAH Case No. 06-1163. Amended Final Order issued July 1, 2005.

VIII. Summary of Amendments:

None.