## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 317 CS Stand-Alone Bars
**SPONSOR(S):** Domino
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 600

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Business Regulation Committee | 18 Y, 0 N, w/CS | Morris | Liepshutz |
| 2) Commerce Council | | | |
| 3) | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

For purposes of ensuring compliance with provisions of the Clean Indoor Air Act limiting those indoor work areas where smoking is allowed, Florida law requires certain alcoholic beverage establishments that also serve food [stand-alone bars] to annually submit to the Division of Alcoholic Beverages and Tobacco [Division] in the Department of Business and Professional Regulation an affidavit that certifies compliance with the 10 percent threshold limitation for food sales. Thereafter, every three years after the initial designation as a stand alone bar, the licensee must submit an “agreed upon procedures report” prepared by a certified public accountant that attests to the licensee’s compliance with the food sales limitation for the preceding 36-month period.

This legislation repeals the requirement that a stand-alone bar submit a CPA-prepared agreed upon procedures report to the Division every three years after receiving the designation as a stand-alone bar. The legislation retains the requirement that a stand-alone bar submit an affidavit to the Division certifying compliance with the food sales limitation on an annual basis and provides additional penalties for knowingly making a false statement on the affidavit.

The provisions of this legislation do not appear to have any fiscal impact on state or local government revenue expenditures or collections.

The bill provides that the act will take effect upon becoming a law.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government**—This bill eliminates a requirement that certain alcoholic beverage establishments [stand-alone bars] submit an "agreed upon procedures report" prepared by a certified public accountant to the Division of Alcoholic Beverages and Tobacco in the Department of Business and Professional Regulation.

B. EFFECT OF PROPOSED CHANGES:

**Article X, Section 20 – Smoking in Enclosed Indoor Workplaces**

At the November 2002 General Election, voters approved Constitutional Amendment No. 6, to prohibit tobacco smoking in enclosed indoor workplaces. The stated purpose of this constitutional revision, codified as s. 20, art. X, Florida Constitution, was to protect people from the health hazards of second-hand tobacco smoke by prohibiting workplace smoking. The constitutional amendment provided limited exceptions to the prohibition on indoor smoking including an exception for "stand-alone bars". The constitutional amendment required the Legislature to implement the "amendment in a manner consistent with its broad purpose and stated terms." Implementing legislation [HB 63A – Chapter No. 2003-398, LOF] was subsequently enacted by the 2003 Legislature.

**Food Service in Stand-Alone Bars**

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

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

Section 561.695, Florida Statutes, created three specific requirements for a stand-alone bar. First, a stand alone bar must be "devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises." Second, the serving of food, if any, must be "merely incidental" to the consumption of alcoholic beverages. Third, the business must not be "located within, [or] share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue."

An important caveat of the stand-alone bar definition is the requirement that the serving of food must be "merely incidental" to the consumption of alcoholic beverages. Section 561.695(5), F.S., defines "merely incidental" as a limit that a stand-alone bar derive no more than 10 percent of its gross revenue from the sale of food. Further, s. 561.695(5)(b), F.S., prohibits stand-alone bars from serving free-food, but does allow customary bar snacks to be served without charge.

**Reporting Requirement for Stand-Alone Bars**

To verify compliance with the food sales limitation, s. 561.695(5), F.S., requires that after the initial designation in order to continue to qualify as a stand-alone bar the licensee must submit to the division, on or before the licensee's annual renewal date, an affidavit that certifies compliance. Moreover, subsection (6) of s. 561.695, requires that every third year after the initial designation and on or before the annual license renewal, a stand-alone bar that serves food, other than pre-packaged items, must file with the DABT, in a format established by rule of the division, an "agreed upon procedures report" prepared by a Florida Certified Public Accountant attesting to licensee's compliance with the food sales limitation for the preceding 36-month period. The first triennial report is due by September 30, 2006, which is the first applicable renewal date for designated stand-alone bars.

Subsection (8) of s. 561.695, F.S., establishes penalties for violations of the food sales limitation. For a first violation the vendor may receive a warning or a penalty of up to $500; for a second violation within two years after the first violation, the vendor is subject to a penalty of not less than $500 or more than $2,000; for a third or subsequent violation within two years after the first violation, the vendor's stand-alone bar designation is suspended for up to 30 days and the vendor is subject to a fine of not less than $500 or more than $2,000; and for the fourth or subsequent violation the vendor shall receive a 60-day suspension of the right to maintain a stand-alone bar and be subject to a fine of not less than $500 or more than $2,000 or the designation may be revoked.

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.[1] 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.

[1] 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. This Final Order has been appealed to the 1st DCA.

> 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:

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

It is relevant to note that the Florida Board of Accountancy adopts the AICPA standards into their administrative rules.[2]

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 statute and rules, a CPA could only certify that the records provided by the stand-alone bar to a CPA reflect a stated percentage of gross food sales. The FICPA maintains that a Florida CPA could be disciplined by the Board of Accountancy within the DBPR for a violation of professional standards if, in the course of preparing the report, the CPA observes irregularities in the client's records, e.g., that the client is withholding pertinent records from the CPA, or the CPA determines that the client may have committed fraud or other malfeasance such as tax evasion and does not note them in the report. Further, the FICPA has expressed the concern that what the CPA is attesting to may not actually meet the Legislature's original expectation.

The FICPA maintains that the statutes and rules do not adequately address the licensee's required record retention and other internal control procedures while CPA standards of professional conduct require great specificity regarding the form in which records must be kept, e.g. whether a CPA can rely upon records maintained in an electronic format. Moreover the FICPA is concerned that the statutes or rules do not adequately identify what specific steps or procedures are required by the CPA when addressing the lack of internal controls and the resultant reliability of the records.

The FICPA believes that a CPA's performance of an agreed upon procedures report under the current rules may likely be a violation of professional standards, and, consequently, the FICPA will advise its CPA members to refrain from performing the service for stand-alone bars.

**Effect of Proposed Change**

This legislation repeals the requirement that a stand-alone bar submit a CPA-prepared agreed upon procedures report to the Division every three years after receiving the designation as a stand-alone bar. The legislation retains the requirement that a stand-alone bar submit an affidavit to the Division certifying compliance with the food sales limitation on an annual basis. Further, the bill creates new penalty provisions which provide that a vendor's *alcoholic beverage license* may be subject to revocation if the vendor knowingly makes a false statement on the annual affidavit required by s. 561.695(5), F.S.

[2] 61H1-20.0099, FAC – Standards for Attestation Engagements reads in part: "Standards for Attestation Engagements" shall be deemed and construed to mean Statements on Standards for Attestation Engagements published by the American Institute of Certified Public Accountants…"

The bill does not appear to have a fiscal impact on state or local revenue expenditures or collections; however, it may reduce costs to the business entity.

The bill provides that the act will take effect upon becoming a law.

C. SECTION DIRECTORY:

Section 1. Amends subsection (5), deletes subsection (6), and renumbers subsections (7) through (9) of s. 561.695, F.S., as subsections (6) through (8).

Section 2. Provides that the act will take effect upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None. The Division currently conducts complaint-driven compliance audits of alcoholic beverage vendors.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to the Division of Alcoholic Beverages and Tobacco as of January 3, 2006, there are 1013 stand-alone bars that serve food.[3] These stand alone bars will no longer be required to incur the cost of a CPA to complete an "agreed upon procedures report." The cost savings to these businesses is indeterminate.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

[3] According to the Division of Alcoholic Beverages and Tobacco there are 731 stand alone bars that serve no food.

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not grant any new rule-making authority. The bill will require repeal of existing rules as to the method and form for the report.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 10, 2006, the Business Regulation Committee adopted one amendment to this legislation and passed HB 317 with CS. That amendment added a new penalty provision which provides that a stand-alone bar's alcoholic beverage license may be subject to revocation if the vendor knowingly makes a false statement on the annual affidavit required by s. 561.695(5), F.S.