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: Regulated Industries Committee

BILL:	SB 600
SPONSOR:	Senator Haridopolos
SUBJECT:	Stand-alone Bars/Licensed Vendors
DATE:	January 17, 2006 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Fav/1 amendment**
2.			CA	
3.			CM	
4.				
5.				
6.				

Please see last section for Summary of Amendments

- [ ] Technical amendments were recommended
- [ ] Amendments were recommended
- [X] Significant amendments were recommended

I. Summary:

The bill amends provisions that pertain to the exemption for stand-alone bars to the smoking prohibition in the Florida Clean Air Act, ch. 386, F.S., which implements the tobacco smoking ban in s. 20, Art. X, Florida Constitution. The bill deletes 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.

This bill would take effect upon becoming law.

This bill substantially amends section 561.695, Florida Statutes:

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, 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

[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.
[4] Section 386.2045(2), F.S. *See also* definition of the term "retail tobacco shop" in s. 386.203(8), F.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 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 by September 30, 2006, which is the first applicable renewal date for designated stand-alone bars.

[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.

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 Division of Alcoholic Beverage and Tobacco 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 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 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 departments rules during the rulemaking process. According to the FICPA, rule 61A-7.005 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

[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.

the records provided by the stand-alone bar reflected a stated percentage of gross food sales. In an agreed upon procedures report, the CPA 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.
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> 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. This Final Order has been appealed to the 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.

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[15] *See* Rule 61H1-20.0099, FAC., 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 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.

III. Effect of Proposed Changes:

The bill amends s. 561.695, F.S., to eliminate the required agreed upon procedures report from a CPA that attests to the licensee's compliance with the ten-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.

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 complying 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:

None.

VIII. Summary of Amendments:

Barcode 570080 by Regulated Industries
The amendment provides that an alcoholic beverage licensee may be 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. (WITH TITLE AMENDMENT)