The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Lee, Chair
Senator Soto, Vice Chair

MEETING DATE: Tuesday, March 25, 2014
TIME: 9:00 —11:00 a.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Lee, Chair; Senator Soto, Vice Chair; Senators Bradley, Gardiner, Joyner, Latvala, Richter, Ring, and Thrasher

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 926** Simpson (Similar CS/H 957)	Local Regulation of Wage Theft; Providing requirements for county ordinances regulating wage theft; authorizing county funding to assist in addressing claims of wage theft; preempting further regulation of wage theft to the state; providing an exception for an ordinance enacted by a specified date, etc. CA 03/05/2014 Favorable JU 03/18/2014 Temporarily Postponed JU 03/25/2014 RC	
2	**CS/SB 586** Environmental Preservation and Conservation / Altman (Similar CS/CS/H 325)	Brownfields; Revising legislative intent with regard to community revitalization in certain areas; revising procedures for designation of brownfield areas by local governments; providing procedures for adoption of a resolution; providing requirements for notice and public hearings; authorizing local governments to use a term other than “brownfield area” when naming such areas; providing an exemption from liability for property damages for entities that execute and implement certain brownfield site rehabilitation agreements, etc. EP 02/05/2014 Fav/CS CA 03/05/2014 Favorable JU 03/18/2014 Not Considered JU 03/25/2014	
3	**CS/SB 602** Ethics and Elections / Latvala (Similar H 495, Compare H 571)	Residency of Candidates and Public Officers; Requiring a candidate or public officer required to reside in a specific geographic area to have only one domicile at a time; providing factors that may be considered when determining residency; providing exceptions for active duty military members, etc. EE 03/03/2014 Fav/CS JU 03/18/2014 Not Considered JU 03/25/2014 RC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SB 72** Flores (Similar CS/H 9)	Legislature; Fixing the date for convening the regular session of the Legislature in even-numbered years, etc. EE 09/23/2013 Favorable JU 03/25/2014 RC	
5	**SB 386** Hays (Identical H 903)	Application of Foreign Law in Certain Cases; Specifying the public policy of this state on the application of a foreign law, legal code, or system in proceedings brought under or relating to chapter 61 or chapter 88, F.S., which relate to dissolution of marriage, support, time-sharing, the Uniform Child Custody Jurisdiction and Enforcement Act, and the Uniform Interstate Family Support Act; providing for the construction of a waiver by a natural person of the person's fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution, etc. JU 03/25/2014 GO RC	
6	**SB 870** Smith (Compare CS/H 375)	Insurance; Providing that the absence of a countersignature does not affect the validity of a policy or contract, etc. BI 03/11/2014 Favorable JU 03/25/2014	
7	**CS/SB 1308** Banking and Insurance / Simmons (Similar H 1271, Compare H 471, CS/H 565, CS/H 1273, S 1260, Link CS/S 1300)	Insurer Solvency; Providing additional definitions applicable to the Florida Insurance Code; clarifying that production of documents does not waive the attorney-client or work-product privileges; requiring an insurer's annual statement to include an actuarial opinion summary; revising the Standard Valuation Law and the Standard Nonforfeiture Law; providing for the groupwide supervision of international insurance groups, etc. BI 03/11/2014 Fav/CS JU 03/25/2014 RC	
8	**SB 1496** Evers (Similar H 7039)	Unlicensed Practice of Law; Creating exceptions to the prohibition of unlicensed practice of law, etc. JU 03/25/2014 GO RC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
9	**SB 1626** Lee (Similar H 1355, Compare CS/H 975, S 600)	Administrative Procedures; Providing conditions under which a proceeding is not substantially justified for purposes of an award under the Florida Equal Access to Justice Act; authorizing certain parties to provide to an agency their understanding of how certain rules apply to specific facts; authorizing the administrative law judge to award attorney fees under certain circumstances; authorizing a party to request mediation of a rule challenge and declaratory statement proceedings, etc. JU 03/25/2014 GO AP	

Other Related Meeting Documents

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 926
INTRODUCER:	Senator Simpson
SUBJECT:	Wage Dispute Protection
DATE:	March 17, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stearns	Yeatman	CA	**Favorable**
2.	Munroe	Cibula	JU	**Pre-meeting**
3.			RC	

I. Summary:

SB 926 creates s. 448.111, F.S., to govern county and state regulation of wage theft. The bill provides requirements for county ordinances regulating wage theft and authorizes county funding to assist in addressing claims of wage theft. The bill provides an exemption for county ordinances enacted by a certain date, but otherwise preempts further regulation of wage theft to the state.

The bill provides definitions for "legal services organization" and "wage theft."

II. Present Situation:

Wage Theft

"Wage theft" is a general term sometimes used to describe the failure of an employer to pay any portion of wages due to an employee. Wage theft encompasses a variety of employer violations of federal and state law resulting in lost income to an employee. Wage theft may occur if:

- An employee is paid below the state or federal minimum wage;
- An employee is paid partial wages or not paid at all;
- A non-exempt employee is not paid time and a half for overtime hours;
- An employee is required to work off the clock;
- An employee has their time card altered;
- An employee is misclassified as an independent contractor; or
- An employee does not receive a final paycheck after the termination of employment.

Employee Protection: Federal and State

A variety of federal and state laws protect employees from wage theft. Federal laws are administered by the United States Department of Labor, and may be enforced by federal

authorities or by private lawsuits.[1] The Fair Labor Standards Act (FLSA)[2] is the federal law most often used to address wage theft. State court actions to recover unpaid wages can be brought under Florida's minimum wage laws or through a common law breach of contract claim.

Federal Protection of Employees: Fair Labor Standards Act

The FLSA establishes a federal minimum wage, which is the lowest hourly wage that can be paid in the United States. Currently, the federal minimum wage is $7.25 per hour.[3] A state may set the rate higher than the federal minimum but not lower.[4]

The FLSA also requires employers to pay one and one-half times regular wages for any time worked in excess of 40 hours during a workweek.[5] In addition, it establishes standards for recordkeeping and child labor. The FLSA applies to most classes of workers, but a major exception is that it does not apply to most employees of businesses doing less than $500,000 in annual business.[6]

The FLSA provides for enforcement in three separate ways:
- Civil actions or lawsuits by the federal government;
- Criminal prosecutions by the United States Department of Justice; or
- Private lawsuits by employees or workers, which includes individual lawsuits and collective actions.

An employer who violates section 206 (minimum wage) or section 207 (maximum hours) of the FLSA is liable to the employee for the amount of the unpaid wages and may be liable for liquidated damages equal to the amount of the unpaid wages.

State Protection of Employees

State law provides for protection of employees, including anti-discrimination,[7] work safety,[8] and a state minimum wage. Article X, s. 24(c) of the Florida Constitution provides that "Employers shall pay Employees Wages no less than the Minimum Wage for all hours worked in Florida."

If an employer does not pay the state minimum wage, the Constitution provides that an employee may bring a civil action in a court of competent jurisdiction for the amount of the wages withheld. If the employee prevails, in addition to the unpaid wages, a court may also award the employee liquidated damages in the amount of the wages withheld and reasonable attorney's fees and costs. Further, any employer that willfully violates the minimum wage law is subject to

[1] Links to most federal laws and regulations that affect wage and hour issues are located at www.dol.gov/whd/reg-library.htm (last visited March 13, 2014).
[2] 29 U.S.C. ch. 8.
[3] The U.S. Department of Labor Wage and Hour Division provides information about the minimum wage and minimum wage laws at http://www.dol.gov/whd/minimumwage.htm (last visited February 28, 2014).
[4] 29 U.S.C. s. 218(a).
[5] 29 U.S.C. s. 207(a)(1).
[6] The U.S. Department of Labor provides lists of the types of employees covered and exempt from the FLSA at http://www.dol.gov/compliance/guide/minwage.htm#who (last visited March 13, 2014).
[7] Section 760.10, F.S.
[8] Sections 448.20-26 and 487.2011-2071, F.S.

a fine of $1,000 for each violation. The Attorney General is also empowered to bring a civil action to enforce the state's minimum wage laws.

The current state minimum wage is $7.93 per hour, which is higher than the federal minimum wage.[9] Federal law requires the payment of the higher of the federal or state minimum wages.[10]

Chapter 448, F.S., includes the Florida Minimum Wage Act, which implements the constitutional minimum wage requirements. Chapter 448, F.S., also prohibits an employer from retaliating against the employee for enforcing his or her rights, and it preserves the rights that an employee has under any collective bargaining agreement or employee contract.[11]

In addition to remedies under state minimum wage laws, an employee may bring a common law breach of contract claim for unpaid wages. Section 448.08, F.S., allows the court to award attorney's fees and costs to the prevailing party in an action for unpaid wages.

Home Rule and Preemption

Article VIII, ss. 1 and 2 of the State Constitution establish two types of local governments: counties[12] and municipalities. Local governments have wide authority to enact various ordinances to accomplish their local needs.[13] Under home rule powers, a municipality or county may legislate concurrently with the Legislature on any subject that has not been preempted to the state.

Preemption reserves the power to legislate on specific topics exclusively to the state and thereby abrogates the typical broad home-rule powers of local governments.[14] Florida law recognizes two types of preemption: express and implied.[15] Express preemption requires that a statute contain specific language of preemption directed to the particular subject at issue.[16]

In the absence of express preemption a court may still find that the state's regulation of an area of law is so pervasive as to constitute implied preemption.[17] However, courts "are careful in imputing intent on behalf of the Legislature to preclude a local government from using its home rule powers."[18] A court will then consider whether strong public policy reasons exist for finding an area to be preempted by the Legislature.[19] Regulation of public records is an example of an area where the courts have found implied preemption.[20]

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[9] *See* http://www.floridajobs.org/minimumwage/Announcement_2014.pdf (last visited March 13, 2014).
[10] 29 U.S.C. §218(a).
[11] Section 448.105, F.S.
[12] Florida has both charter and non-charter counties.
[13] Article VIII of the State Constitution establishes the powers of charter counties, non-charter counties, and municipalities. Chapters 125 and 166, F.S., provide additional powers and constraints on counties and municipalities.
[14] *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006) (citations omitted).
[15] *Id*.
[16] *Id.*
[17] *See Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).
[18] *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d. 880, 886 (Fla. 2010) (citations omitted).
[19] *Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996) (citations omitted).
[20] *See Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).

Currently, there is no express preemption of the enforcement of wage laws to the federal or state government. It is unclear whether a court would find that the existing laws regarding employee wages are an implied preemption of the subject.

Local Regulation of Wage Theft

Florida's two most populous counties, Miami-Dade County and Broward County, have passed ordinances dealing with wage theft claims. Alachua County has also passed a wage theft ordinance.[21] In addition, Palm Beach County has passed a resolution condemning wage theft and has created a program for wage theft claimants to be represented by the Legal Aid Society of Palm Beach County.[22]

Miami-Dade's ordinance,[23] passed in February 2010, was one of the first local wage theft ordinances in the United States. The ordinance is administered by the county's Department of Small Business Development (SBD) and provides a local process for employees to file claims for unpaid wages. The process cannot be used if the employee has made a claim under state or federal law; however, a claim under the ordinance does not preclude later claims under state or federal law. The ordinance only applies to claims for payment of more than $60 in wages, and claims must be filed within one year after the last day the unpaid work was performed. Claims that are not resolved before the hearing are heard by a hearing examiner who is deemed to be qualified to hear wage theft matters. If the hearing officer determines by a preponderance of the evidence that back wages are owed, the employee must be awarded three times the amount of the wages found to be owed and the employer must pay the county's administrative processing costs and costs of the proceeding. If the employee is not successful, neither party reimburses the county's costs.

Broward County's ordinance took effect on January 2, 2013.[24] It provides a process that is similar to Miami-Dade County's ordinance but with some significant differences. These differences include:

- A claim cannot be considered unless the employee gave the employer written notice of the failure to pay wages within 60 days after the date the wages were due and the employer had a minimum of 15 days to pay or resolve the claim before it was filed.
- A successful claimant is awarded double the amount of unpaid wages, rather than triple wages as in the Miami-Dade County ordinance.
- In addition to paying the county's costs as is required by the Miami-Dade County ordinance, a losing employer is also required to reimburse the employee for reasonable costs and attorney's fees incurred in connection with the hearing.

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[21] Kelcee Griffis, Gainesville Sun, *County commission passes wage-theft ordinance Tuesday*, THE INDEPENDENT FLORIDA ALLIGATOR, April 17, 2013, http://www.alligator.org/news/local/article_7074e0f8-a710-11e2-bf3b-0019bb2963f4.html (last visited March 13, 2014).

[22] Andy Reid, *Palm Beach County renews compromise wage theft effort*, SUN-SENTINEL, January 15, 2014, http://articles.sun-sentinel.com/2014-01-15/news/sfl-palm-beach-county-renews-compromise-wage-theft-effort-20140115_1_wage-county-commission-low-income-workers (last visited March 13, 2014).

[23] Miami Dade County, Fla., Code ch. 22.

[24] Broward County Code of Ordinances, ch. 20½, Non-Payment of Earned Wages.

- Like the Miami-Dade County ordinance, an unsuccessful claimant is not required to pay either the employer's or the county's costs. However, under the Broward County ordinance the employee must be ordered to pay the employer's reasonable costs and attorney's fees and the county's costs if the hearing officer finds that the claim had no basis in law or fact.

Alachua County's ordinance was implemented on January 1, 2014. It is similar to the Broward ordinance in several respects. It also provides that an employee must contact an employer regarding a claim within 60 days after the date that wages were due to be paid and allow the employer 15 days to respond. The ordinance awards twice the amount of unpaid wages to a successful claimant. However, the Alachua County ordinance requires that a complaint be filed within 180 days after the date that wages were due to be paid (as opposed to one year). The Alachua County ordinance does not provide a minimum dollar threshold that claims must meet in order to be filed.

Palm Beach County has also considered passing a wage theft ordinance since a proposed ordinance was brought before the commissioners in February 2011. Following that time, Palm Beach County supported a Wage Recovery Program administered by the Legal Aid Society of Palm Beach County. The Legal Aid Society program assists employees in collecting unpaid wages through existing civil or administrative remedies. On January 11, 2014, the commission passed a resolution renewing a contract for $104,000 with the Legal Aid Society to manage the Wage Recovery Program.[25]According to the society, the program has recovered approximately $200,000 in back wages.[26]

Small Claims Court Costs

Fees for filing an action in Small Claims Court, which is a part of the County Court, are set by s. 34.041(1)(a), F.S., as follows:

- $50 for claims less than $100;
- $75 for claims from $100 - $500;
- $170 for claims from $500.01 - $2500; and
- $295 for claims of more than $2,500.

In addition to the filing fee, the claimant must serve the employer with notice of the suit. Process may be served on a Florida defendant by certified mail, which costs approximately $6. If that is unsuccessful, process must be served by the sheriff or an authorized process server. The cost for service by the sheriff is $40 as provided in s. 30.231(1)(a), F.S.

III. Effect of Proposed Changes:

Section 1 creates s. 448.111, F.S., to authorize county ordinances regulating wage theft so long as the ordinances meet certain requirements. If a county determines that local regulation of wage theft is necessary, it may adopt an ordinance with the following provisions:

[25] Andy Reid, *Palm Beach County renews compromise wage theft effort*, SUN-SENTINEL (January 15, 2014), http://articles.sun-sentinel.com/2014-01-15/news/sfl-palm-beach-county-renews-compromise-wage-theft-effort-20140115_1_wage-county-commission-low-income-workers (last visited March 13, 2014).
[26] *Id.*

- The county partners with a local legal services organization to establish a process for addressing wage theft claims by the legal services organization.
- Upon a request for assistance by an individual that has experienced wage theft, the legal services organization shall determine whether the individual has a bona fide claim.
- The legal services organization notifies the individual's employer and provides the employer with an opportunity to resolve the matter.
- The legal services organization works with the employee and employer to resolve the issue informally and quickly. Informal resolution may include obtaining attorney fees and costs from the employer.
- The legal services organization shall file court actions as appropriate and refer unresolved claims to local pro bono or other counsel for resolution.
- The county establishes a reporting mechanism to receive regular reports regarding the legal services organization's work on cases of wage theft.

A legal services organization is defined in the bill as "an organization that provides free or low-cost legal services to qualified persons and meets the minimum standards established by The Florida Bar for providing such services, including a legal practice clinic operated by an accredited Florida law school." A legal services organization qualifies as "local" under the bill if it is located within the relevant county or within an adjoining county.

The bill defines "wage theft" as "an illegal or improper underpayment or nonpayment of an individual employee's wage, salary, commission, or other similar form of compensation within a reasonable time after the date on which the employee performed the work to be compensated."

The bill authorizes counties to dedicate county funds to assist the legal services organization in addressing claims of wage theft.

The bill expressly preempts to the state any other regulation of wage theft by a county, municipality, or other political subdivision that exceeds the provisions described above. However, the bill provides an exemption from preemption for local ordinances governing wage theft that were enacted on or before January 1, 2014.

Section 2 provides that the bill shall take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

As noted in the discussion of the effects of the bill, the State Constitution sets forth certain requirements and remedies regarding minimum wage claims. This bill cannot be interpreted to preclude an employee from exercising those state constitutional rights, which are currently implemented in ch. 448, F.S.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill will preclude employees from pursuing the resolution of wage theft claims before local code enforcement bodies. This bill will allow employers to defend wage theft claims in courts instead of before local code enforcement bodies.

C. Government Sector Impact:

To the extent that the bill will increase the number of wage theft claims in courts, the bill may increase costs to the judiciary as a result of the increased number of claims. It is unknown how many additional claims will be filed therefore, the net impact on judicial workload cannot be predicted according to the Office of the State Courts Administrator.[27]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 448.111 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

[27] Office of the State Courts Administrator, *2014 Judicial Impact Statement, SB 926* (March 11, 2014).

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate	.	House
Comm: UNFAV	.	
03/18/2014	.	
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The Committee on Judiciary (Soto) recommended the following:

Senate Amendment (with title amendment)

Between lines 74 and 75
insert:
(6) PENALTY.—A person who commits wage theft under this section commits theft pursuant to s. 812.014.

========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:
Delete line 9
and insert:

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date; providing that a person who commits wage theft commits theft under s. 812.014, F.S.; providing an effective date.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Soto) recommended the following:

Senate Amendment (with title amendment)

Delete lines 32 - 74

and insert:

(2) LOCAL ORDINANCES.—Upon the determination by a county that a local solution to wage theft is necessary, the county shall adopt a local ordinance that includes one of the following processes:

(a) *Legal services organization process.*—The county may partner with a local legal services organization for the purpose of establishing a local process through which claims of wage

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theft shall be addressed by the legal services organization. The county may partner with a legal services organization located in that county or in an adjoining county.

1. An individual who has experienced wage theft may contact the legal services organization for assistance in recovering wages. The legal services organization shall determine whether the individual has a bona fide claim for unpaid wages.

2. The legal services organization shall notify the employer and provide the employer with an opportunity to resolve the matter of unpaid wages in the manner deemed most appropriate to each claim. The notification may occur by telephone, written correspondence, or any other means deemed appropriate by the legal services organization.

3. The legal services organization shall work with the employee and employer to resolve the issue informally but expeditiously. The informal resolution may include obtaining attorney fees and costs from the employer.

4. The legal services organization shall file court actions as appropriate and refer unresolved claims to local pro bono or other counsel for resolution.

5. The county shall establish a reporting mechanism through which the county receives regular reports regarding the legal services organization's work on cases of wage theft. The county may require periodic reports.

(b) *Administrative process.*—The county may establish an administrative process that gives the parties involved the opportunity to negotiate a resolution with regard to the wages in question.

1. The county shall establish a system that provides for:

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a. A complaint process by which a complaint, which must allege a wage theft violation, may be submitted to the county by or on behalf of an aggrieved employee; and

b. Service of the complaint and written notice on the respondent employer alleged to have committed a wage theft violation, which sets forth the allegations made in the complaint and the rights and obligations of the parties. Such rights and obligations shall include the right of the respondent to file an answer to the complaint and the rights of both parties to a conciliation process and to a hearing on the matter before a county hearing officer. The hearing officer must have either a legal background or specialized training in the subject matter. The final determination of a hearing officer is subject to appeal to a court of competent jurisdiction.

2. The system established must encourage the parties to conciliate the charges and resolve the matter. A hearing officer may not be appointed unless the matter is not resolved using the process established in this paragraph.

3. If a preponderance of the evidence demonstrates a wage theft violation, the hearing officer shall order the employer to pay wage theft restitution to the affected employee along with liquidated damages and any administrative costs.

4. The regulation of wage theft through local ordinance shall be limited to requiring that employers pay their employees for work performed at the agreed upon rate of pay plus any penalties as set forth herein and establishing a fair procedure and program to review and enforce wage agreements.

5. Any wage recovery system established pursuant to this paragraph must provide that an employee who is not timely paid

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wages, final compensation, or wage supplements by his or her employer as required is entitled to recover through a claim filed in a process or program established under this paragraph in the employee's county of employment or in a civil action, but not both.

6. The county shall establish a reporting mechanism through which the county receives regular reports regarding cases of wage theft. The county may require periodic reports.

7.a. Upon a finding of wage theft, the employer shall be liable for the actual back wages due and owing and may be liable for administrative costs in an amount not to exceed $1,500. If the employer is found to have acted in good faith or if the hearing officer has reason to believe that the act or omission was not intentional or was not wage theft, the administrative costs against the employer may be waived. In addition, liquidated damages shall be awarded to the employee but are limited to twice the amount a respondent employer is found to have unlawfully failed to pay the complainant employee.

b. In addition to the actual back wages due and liquidated damages, an employer found to have committed a second violation shall be fined $1,000 and an employer found to have committed a third and subsequent violation shall be fined $2,000. An employer who commits a second or subsequent violation may be liable for administrative costs in an amount not to exceed $2,500.

8. Any claim brought under this paragraph is subject to a statute of limitations of 1 year from the last date upon which wages were due to the employee for the wage theft incident that is the subject of the wage theft claim.

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(3) FUNDING.—The county may dedicate county funds to assist the legal services organization process or the administrative process under subsection (2) in addressing claims of wage theft.

(4) CURRENT ORDINANCES.—A local ordinance governing wage theft which was enacted on or before January 1, 2014, is not preempted by this section.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 3 - 7

and insert:

creating s. 448.111, F.S.; defining terms; requiring a county that decides to create a local solution to wage theft to adopt one of two processes and specifying the requirements of those processes; providing an

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Ring) recommended the following:

Senate Amendment (with title amendment)

Delete line 74

and insert:

before January 1, 2014, is not preempted by this section. A county, a municipality, or any other political subdivision that enacted a local ordinance governing wage theft on or before January 1, 2014, may amend or repeal the ordinance after January 1, 2014. Such county, municipality, or other political subdivision may receive assistance from an accredited law school in addressing claims of wage theft.

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13 ========== T I T L E A M E N D M E N T ==========
14 And the title is amended as follows:
15 Delete line 9
16 and insert:
17 date; authorizing certain counties, municipalities, or
18 other political subdivisions to amend or repeal such
19 an ordinance after a certain date and to partner with
20 a law school to assist in addressing claims of wage
21 theft; providing an effective date.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Ring) recommended the following:

Senate Amendment

Delete line 41

and insert:

an adjoining county. The legal services organization, except for a legal practice clinic operated by an accredited Florida law school, may receive assistance from an accredited law school in addressing claims of wage theft.

By Senator Simpson

18-01390-14 2014926__

A bill to be entitled

An act relating to local regulation of wage theft; creating s. 448.111, F.S.; defining terms; providing requirements for county ordinances regulating wage theft; authorizing county funding to assist in addressing claims of wage theft; preempting further regulation of wage theft to the state; providing an exception for an ordinance enacted by a specified date; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 448.111, Florida Statutes, is created to read:

448.111 Local regulation of wage theft.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Legal services organization" means an organization that provides free or low-cost legal services to qualified persons and meets the minimum standards established by The Florida Bar for providing such services, including a legal practice clinic operated by an accredited Florida law school.

(b) "Wage theft" means an illegal or improper underpayment or nonpayment of an individual employee's wage, salary, commission, or other similar form of compensation within a reasonable time after the date on which the employee performed the work to be compensated. A wage theft occurs when an employer fails to pay a portion of the wages, salary, commissions, or other similar forms of compensation due to an employee within a reasonable time after the date on which the employee performed

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the work, according to the current applicable rate and the pay schedule of the employer established by policy or practice.

(2) LOCAL ORDINANCES; REQUIRED PROVISIONS.—Upon the determination by a county that a local solution to wage theft is necessary, the county may adopt a local ordinance that includes the following provisions:

(a) The county shall partner with a local legal services organization for the purpose of establishing a local process through which claims of wage theft shall be addressed by the legal services organization. The county may partner with a legal services organization located within the county itself or within an adjoining county.

(b) An individual who has experienced wage theft may contact the legal services organization for assistance in recovering wages. The legal services organization shall determine whether the individual has a bona fide claim for unpaid wages.

(c) The legal services organization shall notify the employer and provide the employer with an opportunity to resolve the matter of unpaid wages in the manner deemed most appropriate to each claim. The notification may occur by telephone, written correspondence, or any other means deemed appropriate by the legal services organization.

(d) The legal services organization shall work with the employee and employer to resolve the issue informally but expeditiously. The informal resolution may include obtaining attorney fees and costs from the employer.

(e) The legal services organization shall file court actions as appropriate and refer unresolved claims to local pro

bono or other counsel for resolution.

(f) The county shall establish a reporting mechanism through which the county receives regular reports regarding the legal services organization's work on cases of wage theft. The county may require monthly, quarterly, or annual reports, or any combination thereof.

(3) FUNDING.—The county may dedicate county funds to assist the legal services organization in addressing claims of wage theft.

(4) PREEMPTION.—Except as provided in subsection (5), any regulation of wage theft by a county, municipality, or other political subdivision that exceeds the provisions in this section is preempted to the state.

(5) CURRENT ORDINANCES.—Notwithstanding subsection (4), a local ordinance governing wage theft which was enacted on or before January 1, 2014, is not preempted by this section.

Section 2. This act shall take effect upon becoming a law.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 586
INTRODUCER:	Environmental Preservation and Conservation Committee and Senator Altman
SUBJECT:	Brownfields
DATE:	March 17, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gudeman	Uchino	EP	**Fav/CS**
2.	Stearns	Yeatman	CA	**Favorable**
3.	Davis	Cibula	JU	**Pre-meeting**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 586 clarifies procedures for brownfield designation under the Brownfields Redevelopment Act. The bill provides additional liability protection for individuals responsible for rehabilitating brownfield sites.

II. Present Situation:

The Brownfields Redevelopment Act

The term "brownfield" came into existence in the 1970s and originally referred to any previously developed property, regardless of any contamination issues. The term, as it is currently used, originated in 1992 during a U.S. Congressional field hearing and is defined by the U.S. Environmental Protection Agency (EPA) as, "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[1] In 1995, the EPA created the Brownfields Program in order to manage contaminated property through site remediation and redevelopment. The program was designed to provide local communities access to federal funds allocated for

[1] Robert A. Jones and William F. Welsh, *Michigan Brownfield Redevelopment Innovation: Two Decades of Success*, (September 2010), *available at* http://www.miseagrant.umich.edu/downloads/focus/brownfields/10-201-EMU-Final-Report.pdf (last visited March 14, 2014).

redevelopment, including environmental assessments and cleanups, environmental health studies, and environmental training programs.[2]

In 1997, the Florida Legislature enacted the Brownfields Redevelopment Act (Act).[3] The Act provides financial and regulatory incentives to encourage voluntary remediation and redevelopment of brownfield sites in order to improve public health and reduce environmental hazards.[4] The Act required the Department of Environmental Protection (DEP) to adopt rules to determine site-specific investigation methods, clean-up methods, and cleanup target levels by incorporating risk based corrective action (RBCA) principles,[5] which it did in 1998.[6] In 2013, in an effort to provide consistency and consolidate the cleanup criteria rules, the DEP repealed Rule 62-785, Florida Administrative Code, and is currently merging the rules with Rule 62-780, Florida Administrative Code.

The Act provides liability protection for program participants who have not caused or contributed to the contamination of a brownfield site on or after July 1, 1997. A person who successfully completes a brownfield site rehabilitation agreement (BSRA) is relieved from further liability for remediation of the contaminated site or sites to the state and to third parties.[7] The Act also provides protection from liability for contribution to any other party who has or may incur liability for cleanup of the contaminated site.[8] The Act does not limit the right of a third party, other than the state, to pursue an action for damages to property or person. An action may not require rehabilitation in excess of what is outlined in the approved BSRA, or required by the DEP or the local pollution control program.[9]

The Act provides lenders the same liability protections as program participants as long as the lender has not caused or contributed to the contamination of a brownfield site. The lender liability protections are provided to encourage financing of real-property transactions involving brownfield sites.[10]

The Act also created the brownfield redevelopment bonus refund to provide a refund to qualified businesses for new jobs that are created in a brownfield area.[11] The Act identifies specific

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[2] The Florida Brownfields Association, *Brownfields 101, available at* http://floridabrownfields.org/associations/11916/files/Brownfields101.pdf (last visited March 14, 2014).
[3] *See* ch. 97-277, Laws of Fla.
[4] Department of Environmental Protection, *Florida Brownfields Redevelopment Act-1998 Annual Report, available at* http://www.dep.state.fl.us/waste/quick_topics/publications/wc/brownfields/leginfo/1998/98final.pdf (last visited March 14, 2014).
[5] ASTM International defines "risk based corrective action principles" as consistent decision-making processes for assessment and response to chemical releases. *See* http://www.astm.org/Standards/E2081.htm (last visited March 14, 2014).
[6] See Rule 62-785, F.A.C.
[7] *Id*. "Brownfield site rehabilitation agreement (BSRA) means an agreement entered into between the person responsible for brownfield site rehabilitation and the DEP or a delegated local program. The BSRA shall at a minimum establish the time frames, schedules, and milestones for completion of site rehabilitation tasks and submission of technical reports, and other commitments or provisions pursuant to s. 376.80(5), F.S., and [Rule 62-780, F.A.C.]"
[8] Todd S. Davis, Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property, 525 (2d ed. 2002).
[9] Section 376.82, F.S.
[10] *Id*.
[11] Section 288.107, F.S.

procedures and criteria for the designation of a brownfield area by local governments, counties, and municipalities.[12]

Economic Incentives

In 1998, the Legislature passed SBs 244, 1202, and 1204, providing economic and financial incentives to promote the redevelopment of brownfield areas.[13] Senate Bill 1202 created the Brownfield Area Loan Guarantee Program, which authorizes up to 5 years of state loan guarantees for redevelopment and applies to 50 percent of the primary lender loan.[14] The loan guarantee applies to 75 percent of the lender loan if the brownfield area redevelopment is for "affordable" housing.[15] Senate Bill 244 authorized a voluntary cleanup tax credit of up to 35 percent of the costs of voluntary cleanup activity of brownfield areas with a maximum allowable amount of $250,000 per site per year.[16] Senate Bill 1204 authorized the Brownfield Property Ownership Clearance Assistance and Revolving Loans Trust Fund to facilitate the redevelopment of properties that may be more difficult to redevelop due to various liens on the property or complications from bankruptcy. The trust fund was created to help clear prior liens on the property through the negotiation process. The loans would then be repaid by the resale of the brownfield property and other activities that may have enhanced the property's value.[17] This trust fund was never capitalized or used for its intended purpose and was later repealed.[18]

In 2006, the Legislature passed HB 7131, which substantially increased the economic and financial incentives for redevelopment of brownfield areas and repealed the Brownfield Property Ownership Clearance Assistance and Revolving Loans Trust Fund.[19] The voluntary cleanup tax credit increased from 35 percent to 50 percent, which may be applied against intangible property tax and corporate income tax for the remediation of the brownfield area with a maximum allowable amount of $500,000 per year per site. The Brownfield Areas Loan Guarantee Program increased from 10 percent to 25 percent. The percentage of tax credit that may be received during the final year of cleanup was increased from 10 percent to 25 percent and the amount was increased from $50,000 to $500,000. The total amount of tax credits that may be granted for brownfield cleanup was increased from $2 million annually to $5 million annually. The law also provides incentives for cleaning unlicensed or historic solid waste dumpsites and requires Enterprise Florida, Inc., to market brownfields for redevelopment and job growth.[20]

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[12] See ss. 376.80, 125.66, and 166.041, F.S., respectively.
[13] See chs. 98-198, 98-75, and 98-118, Laws of Fla., respectively.
[14] Section 376.86, F.S.
[15] "Affordable" housing, as defined in s. 420.0004, F.S., means that monthly rents or monthly mortgage payments including taxes, insurance, and utilities do not exceed 30 percent of that amount which represents the percentage of median adjusted gross annual income for the households as indicated in ss. 420.0004(9), (11), (12), or (17), F.S.
[16] Section 220.1845, F.S.
[17] *See* ch. 98-118, Laws of Fla.
[18] The Florida Senate, Comm. On Government Efficiency Appropriations, *Senate Bill CS/SB 1092 Staff Analysis*, (April 4, 2006), *available at* http://archive.flsenate.gov/data/session/2006/Senate/bills/analysis/pdf/2006s1092.ge.pdf (last visited February 4, 2014).
[19] See ch. 2006-291, Laws of Fla.
[20] See ss. 196.012, 196.1995, 199.1055, 220.1845, 288.9015, 376.30781, 376.80, and 376.86, F.S. Sections 376.87 and 376.875, F.S., were repealed.

In 2008, the Legislature passed HB 527 providing additional tax credits for brownfield area developers.[21] The law allows a tax credit for the costs incurred to remove solid waste from a brownfield site. The tax credit applicant may claim 50 percent of the cost of solid waste removal, not to exceed $500,000. An additional 25 percent of the total site rehabilitation costs, up to $500,000, may be claimed if a health care facility is constructed on the brownfield site.[22] The DEP must submit an annual report to the President of the Senate and Speaker of the House by August 1 each year. The annual report must include the number, locations and sizes of the brownfield sites that have been remediated or are currently being rehabilitated under the provisions of the Act.[23]

Brownfield Designation Procedures

Currently, a local government that has jurisdiction over a proposed brownfield area is required to notify the DEP of the decision to designate the brownfield area for rehabilitation according to the Act. The notification must include a resolution containing a map of the proposed area and the parcels to be included in the brownfield designation. Municipalities and counties that propose to designate a brownfield area must do so according to the resolution adoption procedures outlined in ss. 166.041 and 125.66, F.S., respectively, and notice the public hearing according to ss. 166.041(3)(c)2. and 125.66(4)(b)2., F.S., respectively.[24]

The Act requires a local government that proposes to designate a brownfield area that is outside of a community redevelopment area, enterprise zone, empowerment zone, closed military base, or designated brownfield pilot project, to notify the DEP of the proposed designation. The notification must include a resolution that contains a map of the proposed area and the parcels to be included in the brownfield designation. The local government is also required to consider if the area warrants development, confirm the area is not too large, determine if the area has the potential for the private sector to participate in the rehabilitation, and determine whether the area has sites that can be used for recreation, cultural or historical preservation.[25]

The Act allows a local government to designate a brownfield area if the person who owns or controls a potential brownfield area is requesting the designation and has agreed to rehabilitate and redevelop the area. The redevelopment must provide an economic benefit to the area and create at least five permanent new jobs. The redevelopment of the proposed area must be consistent with the local comprehensive plan and be able to be permitted. Notice of the proposed designation must be provided to the residents of the area and published in a newspaper of local circulation. The person requesting the designation must also provide reasonable assurance of sufficient financial resources to complete the rehabilitation and redevelopment of the brownfield area and enter into a site rehabilitation agreement with the department or local pollution control program.[26]

[21] See ch. 2008-238, Laws of Fla.
[22] Section 376.30781, F.S.
[23] Section 376.85, F.S.
[24] Chapter 97-277, Laws of Fla.
[25] *Id*.
[26] *Id*.

The Act also requires that if property owners within the proposed designation area request in writing to the local government to have their properties removed from the designation, then the request must be granted.[27]

As of November 22, 2013, local governments have adopted 352 resolutions to officially designate brownfield areas and 190 BSRAs have been executed. A total of 69 Site Rehabilitation Completion Orders or "No Further Action" orders have been issued since the inception of the program for sites that have been remediated to levels protective of human health and the environment. The remaining sites are in some phase of site assessment or cleanup. [28]

III. Effect of Proposed Changes:

Section 1 amends s. 376.78, F.S., to clarify that the redevelopment of a brownfield area within a community redevelopment area, empowerment zone, closed military base, or designated brownfield pilot project area has a positive impact on these areas. By specifying these areas, the bill prioritizes them over non-specified areas.

Section 2 amends s. 376.80, F.S., to clarify, reorganize, and revise the procedures for the designation of a brownfield area for the purpose of rehabilitation under the Brownfields Redevelopment Act.

The bill specifies the following procedures for the designation of a brownfield area:

- A local government with jurisdiction over the brownfield area must adopt a resolution to designate the proposed area.
- The local government must notify the DEP, and, if applicable, the local pollution control program within 30 days of the adoption of the resolution.
- The resolution must continue to include a detailed map of the parcels to be designated or a legal description of the parcels along with a less detailed map.
- Municipalities must adopt the resolution according to s. 166.041, F.S., and the procedures for public hearings must comply with s. 166.041(3)(c)2, F.S.
- Counties must adopt the resolution according to s. 125.66, F.S., and the procedures for the public hearings must comply with s. 125.66(4)(b), F.S.
- Property owners within the proposed brownfield area who make written requests to have their properties removed from the designation before the adoption of the resolution must be granted the request.

The bill specifies that if a designation is proposed by a local government that has jurisdiction over the area and the area is located outside an existing community redevelopment area, or if designation is proposed by a non-governmental entity, then the following public hearing and notification procedures are required:

- At least one of the required public hearings must be conducted as close to the proposed area as possible to provide an opportunity for public input on the size of the area, the objectives

[27] *Id*.
[28] Department of Environmental Protection, *Senate Bill 586 Agency Analysis* (January 2014) (on file with the Senate Committee on Environmental Preservation and Conservation).

for rehabilitation, job opportunities and economic development, and residents' considerations.

- Notice of the public hearing must be published in a newspaper of general circulation, published in ethnic newspapers or community bulletins, posted in the affected area, and announced at a scheduled meeting of the local governing body held prior to the public hearing.
- At the public hearing, the local government must consider whether the proposed brownfield area:
  - Warrants development;
  - Covers an overly large area;
  - Has the potential for the private sector to participate in the rehabilitation; and
  - Contains sites that may be used for recreational open space, cultural, or historical preservation purposes.

The bill specifies that if the designation is proposed by a local government that has jurisdiction over the area and the area is located inside an existing community redevelopment area, an enterprise zone, an empowerment zone, a closed military base, or a designated brownfield pilot project, then the public hearing considerations outlined above are not required. However, the local government must comply with the notification and resolution adoption procedures outlined earlier.

The bill specifies that if the designation is proposed by individuals, corporations, partnerships, limited liability corporations, community-based organizations, not-for-profit corporations, or other non-governmental entities, then the following public hearing and notification procedures are required:

- A public hearing must be conducted as close to the proposed area as possible to provide an opportunity for public input on the size of the area, the objectives for rehabilitation, job opportunities and economic developments, and local residents' considerations.
- Notice of the public hearing must be published in a newspaper of general circulation, published in an ethnic newspaper or community bulletin, posted in the affected area, and announced at a scheduled meeting of the local governing body held prior to the public hearing.
- The person proposing the designation must also meet the following criteria:
  - The person owns or controls the proposed area;
  - The rehabilitation and redevelopment of the proposed area will be economically beneficial and include the creation of at least five new, permanent jobs;
  - The redevelopment is consistent with the local comprehensive plan and is able to be permitted;
  - The person has provided reasonable assurance of sufficient financial resources to complete the rehabilitation and redevelopment of the brownfield area; and
  - The person must enter into a site rehabilitation agreement with the DEP or local pollution control program. The person is entitled to negotiate the terms of the agreement.

The bill specifies that a local government that designates a brownfield area according to these procedures is not required to use the term "brownfield area" within the name of the brownfield area designated by the local government.

Section 3 amends s. 376.82, F.S., to revise the liability protection for a person who executes and implements a successful BSRA to include liability protection for:

- Claims of any person for property damage;
- Diminished value of real property or improvements;
- Lost or delayed rent, sale, or use of real property or improvements; and
- The stigma to real property or improvements caused by the contamination that was addressed in the BSRA.

The liability protection applies to causes of action occurring on or after July 1, 2014. The bill specifies that the liability protection does not apply to a person who commits fraud in demonstrating site conditions, in completing a site rehabilitation agreement, or who exacerbates contamination of a property subject to a BSRA in violation of applicable laws, which causes property damage.

Section 4 provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article I, section 21 of the State Constitution guarantees access to the courts and provides that "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay."

Section 376.82(2), F.S., as discussed above, extends certain immunities from liability to a person who executes and successfully completes a brownfield site rehabilitation agreement. When immunity from liability is legislatively provided to a person, a potential constitutional challenge could be raised that the law violates the right of access to the courts for redress of an injury. The Florida Supreme Court held in *Kluger v. White*[29] that the Legislature cannot abolish a person's right to file certain actions "without providing a reasonable alternative to protect the rights of the people … unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting the public necessity can be shown."[30]

[29] *Kluger v. White*, 281 So. 2d 1, (Fla. 1973).
[30] *Id*., at 4.

In this instance, there is not sufficient information to determine whether the expanded liability protections in the bill violate the clause guaranteeing access to the courts. Historically, property owners responsible for pollution have been liable to adjoining property owners for the diminution in the value of the adjoining properties.[31]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill eliminates the right of a third party to pursue an action for property damages, unless a person commits fraud in demonstrating site conditions, in completing a site rehabilitation agreement, or exacerbates contamination of a property subject to a BSRA in violation of applicable laws. The elimination of this legal remedy may harm third parties whose properties are damaged. However, individuals, corporations, community-based organizations, and not-for-profit corporations proposing to designate brownfield areas should benefit from this limitation of liability provision. The fiscal impacts are too remote to determine at this time.

C. Government Sector Impact:

Local governments may incur costs associated with damages to public property that has been impacted by contamination from a brownfield site due to the limitation of liability provisions in the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 376.78, 376.80, and 376.82.

[31] *See Courtney Enterprises, Inc., v. Publix Supermarkets, Inc.*, 788 So. 2d 1045 (Fla. 2d DCA 2001).

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Environmental Preservation and Conservation on February 5, 2014:
The committee substitute:

- resolves the technical deficiency that was present in the bill by requiring the municipalities and counties to adhere to the public hearing procedures outlined in ss. 166.041(3)(c)2. and 125.66(4)(b), F.S., respectively;
- resolves the technical deficiency that was present in the bill by eliminating the conflicting newspaper publication size requirement; and
- allows the local government that designates a brownfield area to eliminate the term "brownfield area" within the name of the brownfield area once it has been designated by the local government.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Latvala) recommended the following:

Senate Amendment

Delete lines 75 - 79

and insert:

in s. 166.041, except that the notice for the public hearings on the proposed resolution must be in the form established in s. 166.041(3)(c)2. For counties, the governing body shall adopt the resolution in accordance with the procedures outlined in s. 125.66, except that the notice for

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Latvala) recommended the following:

Senate Amendment

Delete lines 224 - 229
and insert:
does not apply to a person who:
a. Commits fraud in demonstrating site conditions or completing site rehabilitation of a property subject to a brownfield site rehabilitation agreement;
b. Exacerbates contamination of a property subject to a brownfield site rehabilitation agreement in violation of applicable laws, which causes property damages;

219016

c. Causes a new release at a property subject to a brownfield site rehabilitation agreement;

d. If any of the reopeners in s. 376.82(3)(b)-(d) apply, is responsible for brownfield site rehabilitation and who fails to comply with the requirements or timeframes of the brownfield site rehabilitation agreement or fails to comply with applicable timeframes pursuant to department rules;

e. Caused the contamination that is the subject of the brownfield site rehabilitation agreement; or

f. Is determined by a court of competent jurisdiction to be the mere continuation or alter ego of the person identified in sub-subparagraph e. under successor liability principles under applicable law.

By the Committee on Environmental Preservation and Conservation; and Senator Altman

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A bill to be entitled

An act relating to brownfields; amending s. 376.78, F.S.; revising legislative intent with regard to community revitalization in certain areas; amending s. 376.80, F.S.; revising procedures for designation of brownfield areas by local governments; providing procedures for adoption of a resolution; providing requirements for notice and public hearings; authorizing local governments to use a term other than "brownfield area" when naming such areas; amending s. 376.82, F.S.; providing an exemption from liability for property damages for entities that execute and implement certain brownfield site rehabilitation agreements; providing for applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (8) of section 376.78, Florida Statutes, is amended to read:

376.78 Legislative intent.—The Legislature finds and declares the following:

(8) The existence of brownfields within a community may contribute to, or may be a symptom of, overall community decline, including issues of human disease and illness, crime, educational and employment opportunities, and infrastructure decay. The environment is an important element of quality of life in any community, along with economic opportunity, educational achievement, access to health care, housing quality

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and availability, provision of governmental services, and other socioeconomic factors. Brownfields redevelopment, properly done, can be a significant element in community revitalization, especially within community redevelopment areas, enterprise zones, empowerment zones, closed military bases, or designated brownfield pilot project areas.

Section 2. Subsections (1) and (2) of section 376.80, Florida Statutes, are amended, and subsection (12) is added to that section, to read:

376.80 Brownfield program administration process.—

(1) The following general procedures apply to brownfield designations:

(a) The local government with jurisdiction over a proposed brownfield area shall designate such area pursuant to this section.

(b) For a brownfield area designation proposed by:

1. The jurisdictional local government, the designation criteria under paragraph (2)(a) apply unless the local government proposes to designate a brownfield area within a specified redevelopment area as provided in paragraph (2)(b).

2. Any person other than a governmental entity, including, but not limited to, individuals, corporations, partnerships, limited liability companies, community-based organizations, or not-for-profit corporations, the designation criteria under paragraph (2)(c) apply.

(c) Except as otherwise provided, the following provisions apply to all proposed brownfield area designations:

1. Notification to the department following adoption.—A local government with jurisdiction over the brownfield area must

notify the department, and, if applicable, the local pollution control program under s. 403.182, of its decision to designate a brownfield area for rehabilitation for the purposes of ss. 376.77-376.86. The notification must include a resolution adopted~~,~~ by the local government body. The local government shall notify the department and, if applicable, the local pollution control program under s. 403.182, of the designation within 30 days after adoption of the resolution.

2. Resolution adoption.—The brownfield area designation must be carried out by a resolution adopted by the jurisdictional local government, ~~to~~ which includes ~~is attached~~ a map adequate to clearly delineate exactly which parcels are to be included in the brownfield area or alternatively a less-detailed map accompanied by a detailed legal description of the brownfield area. For municipalities, the governing body shall adopt the resolution in accordance with the procedures outlined in s. 166.041, except that the procedures for the public hearings on the proposed resolution must be in the form established in s. 166.041(3)(c)2. For counties, the governing body shall adopt the resolution in accordance with the procedures outlined in s. 125.66, except that the procedures for the public hearings on the proposed resolution must be in the form established in s. 125.66(4)(b).

3. Right to be removed from proposed brownfield area.—If a property owner within the area proposed for designation by the local government requests in writing to have his or her property removed from the proposed designation, the local government shall grant the request. ~~For municipalities, the governing body shall adopt the resolution in accordance with the procedures~~

~~outlined in s. 166.041, except that the notice for the public hearings on the proposed resolution must be in the form established in s. 166.041(3)(c)2. For counties, the governing body shall adopt the resolution in accordance with the procedures outlined in s. 125.66, except that the notice for the public hearings on the proposed resolution shall be in the form established in s. 125.66(4)(b)2.~~

4. Notice and public hearing requirements for designation of a proposed brownfield area outside a redevelopment area or by a nongovernmental entity.—Compliance with the following provisions is required before designation of a proposed brownfield area under paragraph (2)(a) or paragraph (2)(c):

a. At least one of the required public hearings shall be conducted as close as is reasonably practicable to the area to be designated to provide an opportunity for public input on the size of the area, the objectives for rehabilitation, job opportunities and economic developments anticipated, neighborhood residents' considerations, and other relevant local concerns.

b. Notice of a public hearing must be made in a newspaper of general circulation in the area, must be made in ethnic newspapers or local community bulletins, must be posted in the affected area, and must be announced at a scheduled meeting of the local governing body before the actual public hearing.

(2)(a) Local government-proposed brownfield area designation outside specified redevelopment areas.—If a local government proposes to designate a brownfield area that is outside a community redevelopment area ~~areas~~, enterprise zone ~~zones~~, empowerment zone ~~zones~~, closed military base ~~bases~~, or

designated brownfield pilot project area ~~areas~~, the local government shall provide notice, adopt the resolution, and conduct ~~the~~ public hearings pursuant to paragraph ~~in accordance with the requirements of subsection~~ (1)(c)~~, except at least one of the required public hearings shall be conducted as close as reasonably practicable to the area to be designated to provide an opportunity for public input on the size of the area, the objectives for rehabilitation, job opportunities and economic developments anticipated, neighborhood residents' considerations, and other relevant local concerns. Notice of the public hearing must be made in a newspaper of general circulation in the area and the notice must be at least 16 square inches in size, must be in ethnic newspapers or local community bulletins, must be posted in the affected area, and must be announced at a scheduled meeting of the local governing body before the actual public hearing~~. At a public hearing to designate the proposed brownfield area ~~In determining the areas to be designated~~, the local government must consider:

1. Whether the brownfield area warrants economic development and has a reasonable potential for such activities;

2. Whether the proposed area to be designated represents a reasonably focused approach and is not overly large in geographic coverage;

3. Whether the area has potential to interest the private sector in participating in rehabilitation; and

4. Whether the area contains sites or parts of sites suitable for limited recreational open space, cultural, or historical preservation purposes.

(b) Local government-proposed brownfield area designation

within specified redevelopment areas.—Paragraph (a) does not apply to a proposed brownfield area if the local government proposes to designate the brownfield area inside a community redevelopment area, enterprise zone, empowerment zone, closed military base, or designated brownfield pilot project area and the local government complies with paragraph (1)(c).

(c)~~(b)~~ Brownfield area designation proposed by persons other than a governmental entity.—For designation of a brownfield area that is proposed by a person other than the local government, the local government with jurisdiction over the proposed brownfield area shall provide notice and adopt a resolution to designate the ~~a~~ brownfield area pursuant to paragraph (1)(c) if, at the public hearing to adopt the resolution, the person establishes all of the following ~~under the provisions of this act provided that~~:

1. A person who owns or controls a potential brownfield site is requesting the designation and has agreed to rehabilitate and redevelop the brownfield site.~~,~~

2. The rehabilitation and redevelopment of the proposed brownfield site will result in economic productivity of the area, along with the creation of at least 5 new permanent jobs at the brownfield site that are full-time equivalent positions not associated with the implementation of the brownfield site rehabilitation agreement and that are not associated with redevelopment project demolition or construction activities pursuant to the redevelopment of the proposed brownfield site or area. However, the job creation requirement does ~~shall~~ not apply to the rehabilitation and redevelopment of a brownfield site that will provide affordable housing as defined in s. 420.0004

or the creation of recreational areas, conservation areas, or parks.~~;~~

3. The redevelopment of the proposed brownfield site is consistent with the local comprehensive plan and is a permittable use under the applicable local land development regulations.~~;~~

4. Notice of the proposed rehabilitation of the brownfield area has been provided to neighbors and nearby residents of the proposed area to be designated pursuant to paragraph (1)(c), and the person proposing the area for designation has afforded to those receiving notice the opportunity for comments and suggestions about rehabilitation. Notice pursuant to this subparagraph ~~must be made in a newspaper of general circulation in the area, at least 16 square inches in size, and the notice~~ must be posted in the affected area.~~; and~~

5. The person proposing the area for designation has provided reasonable assurance that he or she has sufficient financial resources to implement and complete the rehabilitation agreement and redevelopment of the brownfield site.

(d)~~(c)~~ Negotiation of brownfield site rehabilitation agreement.—The designation of a brownfield area and the identification of a person responsible for brownfield site rehabilitation simply entitles the identified person to negotiate a brownfield site rehabilitation agreement with the department or approved local pollution control program.

(12) A local government that designates a brownfield area pursuant to this section is not required to use the term "brownfield area" within the name of the brownfield area designated by the local government.

Section 3. Paragraphs (a) and (b) of subsection (2) of section 376.82, Florida Statutes, are amended to read:

376.82 Eligibility criteria and liability protection.—

(2) LIABILITY PROTECTION.—

(a) Any person, including his or her successors and assigns, who executes and implements to successful completion a brownfield site rehabilitation agreement, is ~~shall be~~ relieved of:

1. Further liability for remediation of the contaminated site or sites to the state and to third parties. ~~and of~~

2. Liability in contribution to any other party who has or may incur cleanup liability for the contaminated site or sites.

3. Liability for claims of any person for property damage, including, but not limited to, diminished value of real property or improvements; lost or delayed rent, sale, or use of real property or improvements; or stigma to real property or improvements caused by contamination addressed by a brownfield site rehabilitation agreement. Notwithstanding any other provision of this chapter, this subparagraph applies to causes of action accruing on or after July 1, 2014. This subparagraph does not apply to a person who commits fraud in demonstrating site conditions or completing site rehabilitation of a property subject to a brownfield site rehabilitation agreement or who exacerbates contamination of a property subject to a brownfield site rehabilitation agreement in violation of applicable laws, which causes property damages.

(b) This section does not limit ~~shall not be construed as a limitation on~~ the right of a third party other than the state to pursue an action for damages to persons for bodily harm ~~property~~

~~or person~~; however, such an action may not compel site rehabilitation in excess of that required in the approved brownfield site rehabilitation agreement or otherwise required by the department or approved local pollution control program.

Section 4. This act shall take effect July 1, 2014.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 602
INTRODUCER:	Ethics and Elections Committee and Senator Latvala
SUBJECT:	Residency of Candidates and Public Officers
DATE:	March 17, 2014 REVISED: 03/21/14

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carlton	Roberts	EE	**Fav/CS**
2.	Davis	Cibula	JU	**Pre-meeting**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 602 clarifies what the term "residence" means when used in "residence" requirements for candidates and public officers in the Florida Constitution and Florida Statutes. The bill provides a non-exhaustive list of factors that a court may consider in determining where a candidate or officer resides. The analysis for determining a person's "residence" applies to those subject to a residence requirement upon qualifying as a candidate, regardless of whether the person is seeking partisan office, and for the residence requirements that apply only when a person takes office.

II. Present Situation:

The Florida Constitution and Florida Statutes contain various provisions requiring that certain public officers "reside" in a prescribed geographic area. Some of the residence requirements apply at the time that a person qualifies as a candidate for that office, while others apply only once a person takes office. For example, the Florida Constitution specifies that, unless otherwise provided in county charter, the counties must be divided into districts and that "One commissioner residing in each district shall be elected as provided by law."[1]

Currently, there is no definition of the term "residence" in the Florida Constitution or Florida Statutes that pertains to a candidate for office or a person once elected to office. However, over

[1] FLA. CONST. Article VIII, s. 1(e).

the past 100 years, the courts have consistently opined that, for purposes of residence requirements, a person's residence is his or her domicile.[2] "Domicile" is a legal term of art. The courts have explained domicile as follows:

> One can have only one domicile.[3] Legal residence, or domicile, means a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.[4] Legal residence consists of the concurrence of both fact and intention. In terms of establishing residence, the bona fides of the intention is a highly significant factor.[5] Historically, the place where a married person's family resides is generally deemed to be his legal residence. However, this presumption can be overcome by other circumstances.[6] Absence from one's current domicile or legal residence without the intent to abandon it does not result in the obtainment of a new domicile at wherever one might be presently located, even where the absence may be for an extended period of time.[7] Establishment of residence will usually depend on a variety of acts or declarations all of which must be weighed in the particular case as evidence would be weighed upon any other subject.[8]

Some of the factors that have been considered by the courts are:

- selling the home where one was previously domiciled;[9]
- transferring one's bank accounts to where one maintains a residence;[10]
- maintaining a residence with one's family;[11]
- where one conducts business affairs;[12]
- where one leases an apartment;[13]
- where one plans the construction of a new home;[14]
- where one registers as a voter;[15]
- where one maintains a homestead exemption;[16]

---

[2] "The rule is well settled that the terms 'residence,' 'residing,' or equivalent terms, when used in statutes, or actions, or suits relating to taxation, right of suffrage, divorce, limitations of actions, and the like, are used in the sense of 'legal residence'; that is to say, the place of domicile or permanent abode, as distinguished from temporary residence." *Herron v. Passailaigue*, 110 So. 539, 543 (Fla. 1926).

[3] *Minick v. Minick*, 111. Fla. 469, (Fla. 1933).

[4] *Bloomfield v. City of St. Petersburg Beach*, 82 So. 2d 364, 368 (Fla. 1955).

[5] *Id.*

[6] *Smith v. Croom*, 7 Fla. 81 (Fla. 1857).

[7] *See e.g. Bloomfield v. City of St. Petersburg Beach*, 82 So. 2d 364 (Fla. 1955); *Wade v. Wade*, 113 So. 374 (Fla. 1927); and *Dennis v. State*, 17 Fla. 389 (1879).

[8] *Wade v. Wade, 113 So. 374, 376 (Fla. 1927).*

[9] *See Bloomfield v. City of St. Petersburg Beach*, 82 So. 2d 364 (Fla. 1955).

[10] *Id.*

[11] *See id.*; *see also Smith v. Croom*, 7 Fla. 81 (1857).

[12] *See Bloomfield v. City of St. Petersburg Beach*, 82 So. 2d 364 (Fla. 1955).

[13] *See Frank v. Frank*, 75 So. 2d 282 (Fla. 1954).

[14] *See Biederman v. Cheatham*, 161 So. 2d 538 (Fla. 2d DCA 1964).

[15] *See* Op. Atty. Gen. 063-31 (March 20, 1963).

[16] *Weiler v. Weiler*, 861 So. 2d 472, 477 (Fla. 5th DCA 2003).

- where one has identified the residence on his or her driver's license or other government documents;[17]
- where one receives mail and correspondence;
- where one customarily resides;[18]
- whether the structure has the normal features of a home;[19] and
- statements made indicating intention to move to the district.[20]

In essence, any evidence that would indicate that one has adopted a particular location as one's home and the "chief seat of [one's] affairs and interests" would be instrumental in proving permanent residency when combined with one's intent to make that location one's permanent residence.[21] Although some authorities suggest that factors such as where one possesses and exercises political rights might be given less weight,[22] the better course indicates that all the evidence should be weighed in the totality of the circumstances.[23]

Failure to maintain the legal residence required results in a vacancy in office.[24] The Legislature has codified Article X, s. 3, Fla. Const., and provided a mechanism to address such vacancies.[25] Specifically, if an officer fails to maintain the residence required of him or her by law, the Governor is required to file an Executive Order with the Secretary of State setting forth the facts which give rise to the vacancy.[26] The office shall be considered vacant as of the date specified in the Executive Order or, in the absence of such a date, as of the date the order is filed with the Secretary of State. The office would then be filled as provided by law.[27]

III. Effect of Proposed Changes:

CS/SB 602 creates two new statutes codifying the criteria used by courts to determine whether a candidate or state officer is complying with residency requirements. Newly created s. 99.0125, F.S., applies to all candidate residence requirements regardless of whether the office sought is partisan.[28] Newly created s. 111.015, F.S., applies to residence requirements once a person assumes office. Both new sections establish statutory guidance for determining whether a candidate or officer is a resident of the geographic area. Specifically, the bill states that a person

[17] *See id.*
[18] *See id.*
[19] *See Perez v. Marti*, 770 So. 2d 284 (Fla. 3rd DCA 2000).
[20] *See Walker v. Harris*, 398 So. 2d 955 (Fla. 4th DCA 1981) and *Butterworth v. Espey*, 565 So. 2d 398 (Fla. 2nd DCA 1990).
[21] *See Bloomfield v. City of St. Petersburg Beach*, 82 So. 2d 364, 368 (Fla. 1955).
[22] *Smith v. Croom*, 7 Fla. 81, 159 (1857).
[23] *See Bloomfield v. City of St. Petersburg Beach*, 82 So. 2d 364, 368 (Fla. 1955).
[24] *Article X, s. 3, Fla. Const.*, provides, "Vacancy in office shall occur upon the creation of an office, upon the death, removal from office, or resignation of the incumbent or the incumbent's succession to another office, unexplained absence for sixty consecutive days, ***or failure to maintain the residence required when elected or appointed***, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term."(Emphasis supplied.)
[25] *Section 114.01, F.S.*
[26] *Section 114.01(2), F.S.*
[27] *Section 114.04), F.S.*
[28] Historically, courts have been reluctant to insert themselves into the political realm of whether a member can occupy a seat. Article III, s. 2, Fla. Const., provides that "Each house of the Legislature is the sole judge of the qualifications, election, and returns of its members..." As such, complaints concerning residence of a member of the Legislature should be sent to each house pursuant to its rules. Those complaints would be governed by Florida's Constitution, the Joint Rules of the Florida Legislature, and the rules of the respective house.

may have only one domicile. CS/SB 602 provides that the address of a person's domicile must be used to determine whether the residence requirement is satisfied. The building claimed as the domicile must be zoned for residential use and must comply with all requirements necessary to obtain a certificate of occupancy or certificate of completion pursuant to applicable building codes. The bill provides a non-exhaustive list of factors that may be considered in determining whether a residence requirement is satisfied. Those factors are:

- A formal declaration of domicile in the public records of the county;
- A statement, whether oral or written, indicating the intention to establish a place as his or her domicile;
- Whether he or she transferred the title to his or her previous residence;
- The address at which he or she claims a homestead exemption;
- An address at which he or she has purchased, rented, or leased property;
- The address where he or she plans to build a new home;
- The amount of time that he or she spends at property he or she owns, leases, or rents;
- Proof of payment for, and usage activity of, utilities at property owned by the candidate or public officer;
- The address at which he or she receives mail and correspondence;
- The address provided to register his or her dependent children for school;
- The address of his or her spouse or immediate family members;
- The physical address of his or her employment;
- Previous permanent residency in a state other than Florida or in another country, and the date his or her residency was terminated;
- The address on his or her voter information card or other official correspondence from the supervisor of elections providing proof of voter registration;
- The address on his or her valid Florida driver license issued under s. 322.18, F.S., valid Florida identification card issued under s. 322.051, F.S., or any other license required by law;
- The address on the title to, or a certificate of registration of, his or her motor vehicle;
- The address listed on filed federal income tax returns;
- The location where his or her bank statements and checking accounts are registered;
- A request made to a federal, state, or local government agency to update or change his or her address; and
- Whether he or she has relinquished a license or permit held in another jurisdiction.

Additionally, the bill provides that active duty military members do not automatically establish or abandon domicile in the state of Florida solely by virtue of where he or she is stationed. However, the bill does not impair the right of active duty military members to establish a new domicile.

Because the State Constitution provides that "Each house shall be the sole judge of the qualifications, elections, and returns of its members…"[29] this bill does not apply to members of the Legislature. However, on March 4, 2014, the opening day of the legislative session, the Senate and House of Representatives adopted Joint Rule Seven, Qualifications of Members, which establishes residency requirements for the members of the Legislature.

[29] FLA. CONST. Article III, s. 2.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The issue might be raised that this legislation imposes additional residency requirements on candidates that are not required under the State Constitution. The Florida Supreme Court held in *State v. Grassi*[30] that the Legislature is prohibited from imposing any additional qualifications on a candidate beyond what is required in the State Constitution. In response, it could be asserted that this bill only codifies existing case law and that the bill does not actually place any residency requirements on a candidate; it provides factors that may be considered in determining whether a candidate or public officer satisfies a residency requirement.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[30] *State v. Grassi*, 532 So. 2d 1055 (Fla. 1988).

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 99.0125, and 111.015.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Ethics and Elections on March 3, 2014:
The committee substitute clarifies that active duty military members do not automatically establish or abandon domicile in the state of Florida ***solely*** by virtue of where he or she is stationed.

B. Amendments:

None.

358564

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Latvala) recommended the following:

Senate Amendment (with title amendment)

Between lines 134 and 135
insert:
Section 3. In accordance with s. 2, Art. III of the State Constitution, this act does not apply to members of the Legislature.

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:
Delete line 8

358564

and insert:

exceptions for active duty military members; providing for applicability; providing

By the Committee on Ethics and Elections; and Senator Latvala

582-02089-14 2014602c1

A bill to be entitled

An act relating to the residency of candidates and public officers; creating ss. 99.0125 and 111.015, F.S.; requiring a candidate or public officer required to reside in a specific geographic area to have only one domicile at a time; providing factors that may be considered when determining residency; providing exceptions for active duty military members; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 99.0125, Florida Statutes, is created to read:

99.0125 Residency; candidates.—

(1) The address at which a candidate maintains his or her domicile must be used to satisfy any candidate residency requirement. A candidate may have only one domicile at a time. The building claimed as a domicile must be zoned for residential use and must comply with all requirements necessary to obtain a certificate of occupancy or certificate of completion pursuant to applicable building codes.

(2) Factors that may be considered in determining whether a candidate meets a residency requirement include, but are not limited to:

(a) A formal declaration of domicile in the public records of the county.

(b) A statement, whether oral or written, indicating the intention to establish a place as his or her domicile.

582-02089-14 2014602c1

(c) Whether he or she transferred the title to his or her previous residence.

(d) The address at which he or she claims a homestead exemption.

(e) An address at which he or she has purchased, rented, or leased property.

(f) The address where he or she plans to build a new home.

(g) The amount of time that he or she spends at property he or she owns, leases, or rents.

(h) Proof of payment for, and usage activity of, utilities at property owned by the candidate.

(i) The address at which he or she receives mail and correspondence.

(j) The address provided to register his or her dependent children for school.

(k) The address of his or her spouse or immediate family members.

(l) The physical address of his or her employment.

(m) Previous permanent residency in a state other than Florida or in another country, and the date his or her residency was terminated.

(n) The address on his or her voter information card or other official correspondence from the supervisor of elections providing proof of voter registration.

(o) The address on his or her valid Florida driver license issued under s. 322.18, valid Florida identification card issued under s. 322.051, or any other license required by law.

(p) The address on the title to, or a certificate of registration of, his or her motor vehicle.

(q) The address listed on filed federal income tax returns.

(r) The location where his or her bank statements and checking accounts are registered.

(s) A request made to a federal, state, or local government agency to update or change his or her address.

(t) Whether he or she has relinquished a license or permit held in another jurisdiction.

(3) An active duty military member may not be deemed to have acquired a domicile in this state solely by reason of being stationed on duty in this state; nor shall an active duty military member be deemed to have abandoned domicile in this state solely because he or she is stationed in another municipality, state, or country. However, this subsection does not prohibit an active duty military member from establishing a new domicile where he or she is stationed.

Section 2. Section 111.015, Florida Statutes, is created to read:

111.015 Residency; public officers.—

(1) The address at which a public officer maintains his or her domicile must be used to satisfy any residency requirement. A public officer may have only one domicile at a time. The building claimed as a domicile must be zoned for residential use and must comply with all requirements necessary to obtain a certificate of occupancy or certificate of completion pursuant to applicable building codes.

(2) Factors that may be considered in determining whether a public officer meets a residency requirement include, but are not limited to:

(a) A formal declaration of domicile in the public records

of the county.

(b) A statement, whether oral or written, indicating the intention to establish a place as his or her domicile.

(c) Whether he or she transferred the title to his or her previous residence.

(d) The address at which he or she claims a homestead exemption.

(e) An address at which he or she has purchased, rented, or leased property.

(f) The address where he or she plans to build a new home.

(g) The amount of time that he or she spends at property he or she owns, leases, or rents.

(h) Proof of payment for, and usage activity of, utilities at property owned by the public officer.

(i) The address at which he or she receives mail and correspondence.

(j) The address provided to register his or her dependent children for school.

(k) The address of his or her spouse or immediate family members.

(l) The physical address of his or her employment.

(m) Previous permanent residency in a state other than Florida or in another country, and the date his or her residency was terminated.

(n) The address on his or her voter information card or other official correspondence from the supervisor of elections providing proof of voter registration.

(o) The address on his or her valid Florida driver license issued under s. 322.18, valid Florida identification card issued

under s. 322.051, or any other license required by law.

(p) The address on the title to, or a certificate of registration of, his or her motor vehicle.

(q) The address listed on filed federal income tax returns.

(r) The location where his or her bank statements and checking accounts are registered.

(s) A request made to a federal, state, or local government agency to update or change his or her address.

(t) Whether he or she has relinquished a license or permit held in another jurisdiction.

(3) An active duty military member may not be deemed to have acquired a domicile in this state solely by reason of being stationed on duty in this state; nor shall an active duty military member be deemed to have abandoned domicile in this state solely because he or she is stationed in another municipality, state, or country. However, this subsection does not prohibit an active duty military member from establishing a new domicile where he or she is stationed.

Section 3. This act shall take effect January 1, 2015.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 72
INTRODUCER:	Senators Flores and Others
SUBJECT:	Legislature
DATE:	March 24, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carlton	Roberts	EE	**Favorable**
2.	Davis	Cibula	JU	**Pre-meeting**
3.			RC	

I. Summary:

SB 72 requires the Regular Session of the Legislature to convene on the first Tuesday after the second Monday in January of even-numbered years beginning in 2016.

II. Present Situation:

The date to convene the 60-day Regular Session[1] of the Legislature is prescribed by the State Constitution. Specifically, Subsection (b) of Section 3 of Article III of the State Constitution provides:

> A regular session of the legislature shall convene on the first Tuesday after the first Monday in March of each odd-numbered year, and on the first Tuesday after the first Monday in March, or such other date as may be fixed by law, of each even-numbered year.[2]

Because the Legislature has not chosen to establish another date in law for the beginning of the legislative session in an even-numbered year, the session begins on the first Tuesday after the first Monday in March. The exception to this generally occurs in an apportionment year which is the second year following the decennial census. For example, in 2012, the Legislature chose an early start date and convened on January 10, 2012.[3]

[1] The length of the Regular Session is prescribed in article III, s. 3(d) of the Florida Constitution.
[2] FLA. CONST. article III, s. 3(b).
[3] Chapter 2010-91, s. 1, Laws of Fla.

III. Effect of Proposed Changes:

SB 72 requires that the Regular Session of the Legislature convene on the first Tuesday after the second Monday in January of even-numbered years beginning in 2016. For the 2016 legislative session, the Legislature will convene on Tuesday, January 12, 2016.

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not appear to be a mandate. The bill does not require counties or municipalities to spend funds or take action requiring the expenditure of funds, reduce the authority counties or municipalities have to raise revenue, or reduce the percentage of a state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

By moving the legislative session 6 weeks earlier into the year, this bill will require the Legislature to enact the state budget 6 weeks earlier than otherwise would occur. Staff has been unable to find any statutory conflict with this earlier start date. However, the Governor is required to submit a copy of his or her recommended balanced budget[4] for the state at least 30 days before the scheduled annual legislative session, unless a later date is requested and approved in writing by the President of the Senate and the Speaker of the House of Representatives. This bill will require the submission of the Governor's budget several weeks earlier than usual. Additionally, revenue estimates for the projected budget would be based on data further removed from the beginning of the fiscal year.

[4] Section 216.162(1), F.S.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates an unnumbered section of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

461808

LEGISLATIVE ACTION

Senate . House

. . . . . .

The Committee on Judiciary (Lee) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. In accordance with subsection (b) of Section 3 of Article III of the State Constitution and in lieu of the date fixed therein, the 2016 Regular Session of the Legislature shall convene on January 12, 2016.

Section 2. This act shall take effect upon becoming a law.

================ T I T L E A M E N D M E N T ================

461808

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to the Legislature; fixing the date for convening the regular session of the Legislature in the year 2016; providing an effective date.

By Senator Flores

37-00140-14 201472__

A bill to be entitled

An act relating to the Legislature; fixing the date for convening the regular session of the Legislature in even-numbered years; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. In accordance with subsection (b) of Section 3 of Article III of the State Constitution and in lieu of the date fixed therein, the Regular Session of the Legislature shall convene on the first Tuesday after the second Monday in January of each even-numbered year beginning in calendar year 2016.

Section 2. This act shall take effect upon becoming a law.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 386
INTRODUCER:	Senator Hays
SUBJECT:	Application of Foreign Law in Certain Cases
DATE:	March 21, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	**Pre-meeting**
2.			GO	
3.			RC	

I. Summary:

SB 386 restricts courts and arbitration tribunals from applying foreign law, legal codes, and systems to disputes brought under chapters 61 and 88, F.S. These chapters relate to divorce, alimony, division of marital assets, child support, and child custody.

The bill restricts courts from applying foreign laws that do not grant the parties to litigation the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.

Specifically, the bill prohibits the courts of this state from:

- Basing a decision on a foreign law that does not grant the parties to litigation the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforcing a choice of law clause in a contract which requires a dispute to be resolved under a foreign law that does not grant the parties the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforcing a forum selection clause in a contract which requires a dispute to be resolved in a forum in which a party would be denied his or her fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Granting a motion to dismiss a lawsuit based on forum non conveniens if granting the motion would likely result in the denial of a party's fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.

The bill authorizes a party to a contract to waive his or her rights, but requires the court to narrowly construe the scope of a waiver.

This bill does not apply to the following:

- Corporations, partnerships, and other types of business associations, unless chapters 61 or 88, F.S., govern the dispute;
- Ecclesiastical matters; and
- Matters governed by federal treaty or international agreements to which the United States is a party and which preempt state law.

This bill creates section 45.022, Florida Statutes.

II. Present Situation:

Choice of Law and Choice of Forum

Questions of choice of law or forum generally arise when a case involves parties or situations with connections to multiple states or countries.

Domestic Law

The Full Faith and Credit Clause, found in section 1, Article IV of the U.S. Constitution, provides, in part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The question of full faith and credit may arise after a state refuses to enforce another state's judgment, considered to be a "sister state."[1] A full faith and credit issue may also arise when a party to a case involving contacts in one state seeks to have the law of another state apply.

In choice of law cases, a court typically requires proof of sufficient contacts to a state, such as through residency, home ownership, or place of work to apply the law of that state. This test remains the prevailing standard in choice of law cases.[2]

Foreign Law

Choice of Law

Some contracts stipulate a choice of law, defined as "A contractual provision by which the parties designate the jurisdiction whose law will govern any disputes that may arise between the parties."[3]

Numerous policies exist which favor application of foreign law by U.S. state and federal courts.[4] These policies are based on principles of international comity, reciprocity,

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[1] William B. Sohn, *Supreme Court Review of Misconstructions of Sister State Law*, 98 VA. L. REV. 1861, 1864-65 (December 2012).

[2] In the seminal case of *Allstate Insurance Co. v. Hague*, the Supreme Court considered whether Minnesota law could apply where the widow established the following state ties to Minnesota: the decedent's long-term workplace, a daily commute between states, the insurer's place of operation, and the wife's new place of residency. The Court required proof of a singular or aggregate significant contact to a state so that choice of its law is not arbitrary or fundamentally unfair. Here, the court determined that the aggregate of contacts justified application of Minnesota law. 449 U.S. 302, 313-319 (1981).

[3] BLACK'S LAW DICTIONARY (9th ed. 2009).

[4] Nicholas M. McLean, *Intersystemic Statutory Interpretation in Transnational Litigation*, 122 YALE L.J. 303, 304 (October 2012). "A court sitting in diversity might apply a state choice-of-law rule that requires the court to apply the tort

predictability, fairness, and disapproval of forum shopping.[5] The term "comity" is defined as "A practice among political entities (as nations, states, or courts of different jurisdictions), involving esp[ecially] mutual recognition of legislative, executive, and judicial acts."[6] Principles of comity are the international equivalent of full faith and credit.[7]

A court does not take judicial notice of the law of another country.[8] Instead, if relevant to a case, a court reviews foreign statutes, case law, and secondary sources and heavily relies on expert testimony.[9]

Forum Non Conveniens

The term "forum non conveniens" is defined as:

> The doctrine that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place.[10]

Courts apply a strong presumption in favor of a plaintiff's choice of forum.[11] Still, the proponent must firmly establish bona fide connections to the forum choice to outweigh perceptions of forum shopping.[12] Courts typically allow a U.S. citizen to choose a U.S. forum, rather than have the case heard in a foreign jurisdiction. However, if a U.S. corporation operates in international commerce, not all litigation will be heard in the U.S.[13]

Courts place a high burden on a defendant who seeks dismissal of a case based on forum non conveniens. Although international treaty requirements promote the principle "equal access to courts," in practice, courts do not accord foreign plaintiffs the same deference to move a case to another jurisdiction as U.S. citizens.[14]

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law of a foreign nation. In a contract dispute, a federal court might apply foreign substantive law pursuant to an international agreement's choice-of-law clause. In the realm of corporate law, a court might find, based on an application of the internal affairs doctrine, that a foreign nation's procedural requirements govern a shareholder derivative suit (citation omitted)." *Id*.

[5] *Id*. at 304.

[6] BLACK'S LAW DICTIONARY (9th ed. 2009).

[7] James Botsford and Paul Stenzel, *The Wisconsin Way Forward with Comity: A Legal Term for Respect*, 47 TULSA L. REV. 659 (Spring 2012). "Full faith and credit is a constitutional principle requiring states to enforce fully the judgments and orders of other states. Comity is the principle of international law by which a sovereign gives deference to the judgments of another due to mutual respect." *Id*. at 660.

[8] Determination of question relating to foreign law as one of law or fact, 34 A.L.R. 1447.

[9] McLean, *supra* note 4, at 306-307.

[10] BLACK'S LAW DICTIONARY (9th ed. 2009).

[11] Plaintiff's choice of forum, 32A AM. JUR. 2D FED. CTS. § 1364.

[12] Forum Non Conveniens – Deference to Plaintiff's Forum Choice, 14D FED. PRAC. & PROC. JURIS. § 3828.2 (3d ed.)

[13] American citizenship of party; suits by aliens, 32A AM. JUR. 2D FED. CTS. §1365.

[14] 14D FED. PRAC. & PROC. JURIS. §3828.2 (3d ed.).

Validity of Judgment

U.S. courts are generally not bound by foreign judgments. Still, principles of comity dictate strong consideration of another country's judicial orders, based on deference and mutual respect. Criteria that courts apply in accepting a foreign judgment include proof that:

- The parties had access to a full and fair trial.
- The proceeding took place after due notice and voluntary appearance.
- The jurisdiction operates under impartiality, rather than prejudice, between its own citizens and those of other countries.
- No evidence of fraud existed in securing the judgment.[15]

Chapter 61, F.S.

Chapter 61, F.S., addresses dissolution of marriage including distribution of assets and liabilities, alimony, and child support and custody arrangements. Regarding child support, the public policy of the state is that each parent has a fundamental obligation towards dependent children.[16] Child support is based in part on a parent's income and the child's needs.[17] Child custody arrangements, whether developed by the parents or by a court, must comply with state law and international treaties.[18]

Florida courts distribute assets and liabilities through equitable distribution, rather than, for example, community property, as is done in California and a handful of other Western states. Under equitable distribution, a court considers various factors including contributions to the marriage, economic circumstances of the parties, and the length of marriage.[19] The court also considers various factors in awarding alimony and awards it on different bases such as monthly, lump sum, temporary, or permanent.[20]

Florida recognizes written, signed premarital agreements as enforceable contracts.[21] These agreements may include choice of law clauses.[22] An agreement cannot negatively affect the rights of a child to support.[23] Grounds for unenforceability of a premarital agreement include coercion, fraud, duress, or overreaching or that the agreement is unconscionable.[24]

To relocate with a child, absent an agreement between the parents, the relocating parent must petition the court or face contempt charges.[25]

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[15] 9 AM. JUR. *Proof of Facts* 3D 687 §1.5. Comity (December 2012).
[16] Section 61.29, F.S.
[17] Section 61.30, F.S.
[18] These laws include the Uniform Child Custody Jurisdiction and Enforcement Act, the International Child Abduction Remedies Act, the Parental Kidnapping Prevention Act, and the Convention on the Civil Aspects of International Child Abduction.
[19] Section 61.075(1), F.S.
[20] The law recognizes bridge-the-gap, rehabilitative, durational, and permanent forms of alimony. Section 61.08(1) and (2), F.S.
[21] Section 61.079, F.S.
[22] Section 61.079(4)(a)7., F.S.
[23] Section 61.079(4) (b), F.S.
[24] Section 61.079(7), F.S.
[25] Section 61.13001(3), F.S.

Chapter 88, F.S.

Federal law required each state to adopt the Uniform Interstate Family Support Act (UIFSA), codified in chapter 88, F.S.[26] The purpose of the UIFSA is to unify state law among the states regarding child support obligations, reconcile child support orders issued by multiple states, and streamline procedures for out-of-state petitioners.[27] Under the Act, only one court possesses jurisdiction and only one order is in effect at any given time.[28] This can change, however, to another court for modification, if that court has personal jurisdiction.[29]

The UIFSA applies to support proceedings involving a foreign support order (meaning an order entered into out-of-state), a foreign tribunal, or a case in which an obligee, obligor, or child lives in a foreign country.[30]

The UIFSA governs the:
- Establishment of a spousal or child support order.
- Enforcement of support orders and income-withholding orders without the registration of an order from out-of-state with a court in this state.
- Registration of a support order of another state for enforcement in this state.
- Modification of a child support order issued by a court of the state in which the support obligations originated.
- Registration of an order of another state for modification.
- Determination of parentage as it relates to child support.[31]

Jurisdiction

Section 88.2011, F.S., addresses a court's jurisdiction over parties to a support order or parentage determination. When a court exercises personal jurisdiction over a nonresident, in some circumstances, the state procedural and substantive laws apply, including choice of law rules, unless specified otherwise in the UIFSA:

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[26] Building on earlier federal efforts to address the complications of enforcing child support across state lines, Congress passed the original UIFSA in 1992, and later amended it in 1996 and 2001. Kimball Denton, *A Brief History of Uniform Laws for Private Interstate Support Enforcement*, 20 J. CONTEMP. LEGAL ISSUES 323, 326 (2011-12). "[T]he Act innovatively created a one-order system by including a long-arm jurisdiction provision, which provided that a case should be kept in the obligee's home state as often as possible. The long-arm provision called for 'extended personal jurisdiction over nonresidents'… ." This was thought to remove the noncustodial parent's advantage of having automatic case transfer to his or her home state. Nicole K. Bridges, *The "Strengthen and Vitalize Enforcement of Child Support (Save Child Support) Act: Can the Save Child Support Act Save Child Support from the Recent Economic Downturn?,"* 36 OKLA. CITY U.L. REV. 679, 692-93 (Fall 2011).

[27] Denton, *supra* note 26 at 326-328.

[28] Denton, *supra* note 26 at 327.

[29] *Id*. at 327. In Florida, a court may establish personal jurisdiction over an individual based on any of the following: The individual is served with citation, summons, or notice in-state; the individual consents to jurisdiction in the state; the individual lived with the child in-state and provided prenatal expenses or child support; the child lives in the state as a result of the acts or directives of the individual; the individual had sexual intercourse in this state which may have resulted in the conception of the child; the individual asserted parentage in a court or putative father registry in the state; or any other basis which is constitutional for the exercise of personal jurisdiction. Section 88.2011, F.S.

[30] Section 88.1041(1), F.S.

[31] 23 AM. JUR. 2D *Desertion and Nonsupport* § 74.

> Under … choice of law … the substantive law of an issuing state applies to petitions filed in a responding state to enforce the existing … orders of the issuing state; … the substantive law of the issuing state does not apply to petitions filed in a [subsequent] responding state to modify the existing child support orders of the issuing state.
>
> A foreign country may be a "state" for purposes of application of the UIFSA, but the Act does not apply to obligations established under the law of a foreign country where there is no state law or contravening treaty or federal statute recognizing the enforcement of support orders from the foreign country … .[32]

Enforcement of Income-Withholding Orders Without Registration

Part V of chapter 88, F.S., provides for income-withholding orders issued by another state to be self-executing and treated as if a Florida court issued them.[33] However, a Florida court can enforce out-of-state support and income-withholding orders once a party registers the order with the Florida court.[34]

Choice of Law

Under the UIFSA, the law of the issuing or originating state applies regarding the nature, extent, amount and duration of payments and other support obligations, including arrearages. In proceedings to collect arrearages under support orders, the statute of limitation that applies is whichever is longer, this state's or the issuing state's.[35]

Enforcement and Modification of Support Order After Registration

Under the UIFSA, jurisdiction to enforce or modify another state's child support order in a registration proceeding in this state is proper if all parties, including children, reside here.[36] To modify a support order from another state, an agency or party must register it in Florida.[37] Once the recipient meets personal jurisdiction and other factors, the court can enforce the order just as if it had been issued in-state.[38]

To enforce orders involving a foreign country, the UIFSA authorizes:

- A tribunal of this state to assume jurisdiction to modify an order and make it the controlling order if a foreign country lacks or refuses jurisdiction to modify its own order.[39]
- A party or support enforcement agency seeking to modify or enforce a foreign order which is not governed by an international convention to register the order in this state.[40]

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[32] Section 88.2021, F.S.; 67A C.J.S. *Parent and Child* § 267.
[33] Sections 88.5011 and 88.50211(2), F.S.
[34] Section 88.6011, F.S.
[35] Section 88.6041(1) and (2), F.S.
[36] Section 88.6131(1), F.S.
[37] Section 88.6091, F.S.
[38] Section 88.6101, F.S.; Requirements for modification of child support orders issued out-of-state are provided in s. 88.6111, F.S.
[39] Section 88.6151(1) and (2), F.S.
[40] Section 88.6161, F.S.

The UIFSA requires courts to recognize and enforce foreign support orders and agreements, unless:

- A court finds that a registered convention support order is manifestly incompatible with public policy. Incompatibility with public policy includes the failure of the issuing court to maintain minimum standards of due process such as notice and an opportunity to be heard.[41]
- A court finds that a registered foreign support agreement is manifestly incompatible with public policy."[42]

Use and Acceptance of Religious Law by U.S. Courts

The U.S. Constitution does not permit official adoption of religious law by federal, state, or local governments.[43] Examples exist, however, of judicial deference to religious edicts.

In the seminal case of *Wisconsin v. Yoder*, the U.S. Supreme Court reviewed a challenge by Amish parents of a Wisconsin law requiring mandatory school attendance.[44] At the time, the law did not recognize home schooling as alternative education. The parents asserted that high school would negatively impact their children through exposure to "worldly" views, self-distinction, and social life, all antithetical to Amish religion.[45] The Court noted the reputable work ethic, law-abiding nature, and potentially-compromised survival of the Amish.[46] The Court found the parents' violation of compulsory school attendance firmly rooted in Amish religion.[47] Requiring high school attendance would violate the defendants' rights to religious Free Exercise, under the First Amendment of the U.S. Constitution.[48]

Scholars suggest that the Court is inclined to uphold a religious practice that violates a law if the statute unduly burdens religious First Amendment rights. This is particularly so where the practice cannot be said to harm others.[49] Still, "American laws impose behavioral mandates on all citizens, regardless of faith, and to the extent that religious regimes tolerate behaviors that fall outside those mandates, the secular court system will always come down on the side of secular laws."[50]

Another group that the Court recognizes is the Beth Din of America (BDA), or a Jewish rabbinic court. The BDA established itself as a limited court alternative to civil

[41] Section 88.7081(1) and (2)(a), F.S.
[42] Section 88.7101(3), F.S.
[43] Jaron Ballou, *Sooners vs. Shari'a: The Constitutional and Societal Problems Raised by the Oklahoma State Ban on Islamic Shari'a Law*, 30 LAW & INEQ. 309, 314 (Summer 2012).
[44] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[45] *Id*. at 210-11.
[46] *Id*. at 212-13.
[47] *Id*. at 213-16.
[48] *Id*. at 234.
[49] Omar T. Mohammedi, *Sharia-compliant Wills: Principles, Recognition, and Enforcement*, 57 N.Y.L. SCH. L. REV. 259, 280 (2012-13).
[50] Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of American Precedent*, 57 N.Y.L. SCH. L. REV. 287, 303 (2012-13).

disputes.[51] Functioning primarily as a court of arbitration, BDA has undergone significant changes since its inception 50 years ago.[52] Present day proceedings include:

- A detailed and standardized rules of procedure.
- An internal appellate process.
- Consideration of choice of law.
- Testimony from experts on secular law and commercial practice.
- Recognition of common commercial custom.
- Belief in communal governance, as reflected in multiple individual arbitration.[53]

As noted, the BDA incorporated these features over time. "Recognizing this secular focus on procedure and procedural fairness, the BDA adopted detailed rules and procedures that contributed tremendously to the eventual secular acceptance of BDA decisions."[54]

The Beth Din of America (BDA) cases apply to situations in which:

- A contract contains an arbitration provision that designates the BDA as the preferred forum for arbitration; or
- A party to a dispute invites an opposing party to bring the case to the BDA.[55]

Anti-Foreign Law

In recent years, state legislatures have moved to limit Sharia law or the applicability of foreign law through choice of law and choice of forum clauses in contracts. Starting with Louisiana and Tennessee, 32 states have considered some limits on the application of foreign law, either through legislation or ballot initiative.[56]

Scholars generally classify initiatives or legislation in one of three ways:

- Bills that singularly restrict the use of Sharia law;[57]
- Bills that include Sharia as one of several banned types of law or tradition;[58] or

[51] *Id*. at 288.
[52] *Id*. at 288.
[53] *Id*. at 288-89. "Traditionally, Jewish law did not offer an appellate process like the American secular court system … . Over time, however, the BDA came to find that if it did not provide an internal mechanism by which parties could appeal perceived errors, secular judges would interject and substitute their own judgment. Because the ultimate goal for litigants submitting to a religious tribunals' jurisdiction (and for the tribunal itself) is to have matters resolved internally from start to finish, the BDA added an appellate process to its arbitration services." *Id*. at 293.
[54] *Id*. at 290.
[55] *Id*. at 291-92.
[56] Faiza Patel, Matthew Duss, and Amos Toh, *Foreign Law Bans: Legal Uncertainties and Practical Problems,* Center for American Progress at the Brennan Center for Justice, N.Y.U. School of Law 1 (May 2013).
[57] Alabama's proposed language read, in part: "The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia." H.R. 597 (Ala. 2011). Iowa, Missouri, and New Mexico proposed virtually the same language. Language before the Wyoming legislature would have prohibited the court from both direct use of Sharia law, and the citing of other states that use Sharia law. H.R. 8, (Wyo. 2011). Asma T. Uddin and Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363, 370-71, 373 (Winter 2012.)
[58] An example of this was the language initially proposed in Arizona, which provided, in part: "… court shall not use … [a] tenet of any body of religious sectarian law in to any decision, finding or opinion as controlling or influential authority." The bill defined "religious sectarian law", as including sharia law, canon law, halacha and karma … ." H.R. 2582 (Ariz. 2011). Udder and Pantzer, *supra* note 57, at 373-74.

- Prohibitions on foreign law generally, commonly known as a foreign or international law bill.[59]

Currently, six states have laws restricting foreign law in state courts. The states are Arizona, Kansas, Louisiana, North Carolina, South Dakota, and Tennessee.[60] Of these, South Dakota's law focuses exclusively on religious code, rather than foreign law, or foreign and religious law.[61] No foreign law bill identifies specific religions as disfavored.

The Missouri Legislature passed a foreign law bill, but the Governor vetoed the bill, citing concerns about the legislation's possible effect on international adoptions.[62]

Most recently, North Carolina passed foreign law legislation.[63] The Governor allowed it to become law without his signature.[64] The legislation does not specifically reference religions or ethnicities as disfavored, and limits the law's application to family law.

Perhaps the most notable attempt to limit court use of foreign law was the constitutional amendment placed on the ballot in Oklahoma in 2010. The amendment restricted courts to the use of federal and state law and expressly banned consideration of international and Sharia laws. The initiative defined Sharia law as Islamic law, based on the Koran and the teachings of Mohammed.[65] Fewer than 1 percent of Oklahoma's population self-identifies as Muslim.[66] Known as the "Save our State" amendment, the measure passed handily both in the legislature and through adoption by voters.[67]

A Muslim Oklahoma resident challenged the amendment on the basis that it violated his First Amendment rights under the Establishment Clause and the Free Exercise Clause of the U.S. Constitution. The U.S. District Court for the Western District of Oklahoma ruled in favor of the plaintiff. The plaintiff argued that the initiative unconstitutionally interfered with his ability to indicate his wishes as detailed in his will. Specifically, the will provided for:

> charitable allotments to be made "in a manner that does not exceed the proscribed limitations found in Sahih Bukhari … a highly respected collection of the "sayings

[59] *Id*. at 373-74. The more generalist approach was tried in Michigan. It defined foreign law as "any law, rule or legal code or system other than the constitution, laws and ratified treaties of the United States and the territories of the United States, or the constitution and laws of this state …. a court … shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States … ." *Id*. at 375.
[60] Sara Praasatik, *Assessing the Viability of State International Law Prohibitions*, 35 HOUS. J. INT'L L. 465, 467 (Spring 2013).
[61] South Dakota's HB 123 reads: "No court, administrative agency or other governmental agency may enforce any provisions of any religious code."
[62] http://www.huffingtonpost.com/2013/07/29/sharia-law-usa-states-ban_n_3660813.html.
[63] Known as HB 522, the North Carolina bill passed in July of 2013. http://www.newsobserver.com/2013/07/19/3042514/nc-senate-passes-sharia-law-bill.html.
[64] http://www.bizpacreview.com/2013/08/29/nc-shariah-ban-becomes-law-without-governors-signature-despite-cair-pressure-82373.
[65] *Id*. at 377.
[66] Ballou, *supra* note 43, at 310.
[67] Uddin and Pantzer, *supra* note 57, at 377.

> and deeds of Prophet Muhammad," and the cited provision appears to set a cap on the amount of property that a decedent may give to charity by will. It also provides for the preparation of Awad's body in a manner that "comports precisely with … Sahih Bukhari" … and for "a burial plot that allows my body to be interned [sic] with my head pointed in the direction of Mecca."[68]

His will, the plaintiff argued, would be rendered unenforceable under the amendment.[69]

The court noted that the amendment language subjected the plaintiff and other Muslims in the state to disfavored treatment.[70] In determining the proper test to apply, the Court reviewed the principles of the tests established in *Lemon v. Kurtzman*[71] and *Larson v. Valente*.[72] The Court cited *Larson* for the proposition that *Lemon* applies to laws providing a uniform benefit to all religions, while *Larson* applies in instances where a law discriminates among religions. Therefore, *Larson* provided the proper test in the Oklahoma challenge.[73] The *Larson* test requires both strict scrutiny, and more narrowly, language "closely fitting" to a compelling interest.[74]

> This case presents even stronger 'explicit and deliberate distinctions" among religions than the provision that warranted strict scrutiny in *Larson* …. *Larson* involved a … statute that imposed certain registration and reporting requirements upon only those religious organizations that solicited more than 50 percent of their funds from nonmembers …. Unlike the provision in *Larson*, the Oklahoma amendment specifically names the target of its discrimination.[75]

The court selected the *Larson* test as the proper test. To satisfy strict scrutiny, the state must show that the interest addresses a real, identified problem, rather than a mere perception of harm.[76] As the state could not identify even a single time when an Oklahoma court applied Sharia law, the court found that the state failed to illustrate an actual problem, and therefore, failed to show a compelling state interest.[77] As the state failed the first prong, the court did not reach whether the state complied with the "close fit" required of the second prong.[78]

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[68] *Id*. at 390.
[69] *Id.* at 390-91.
[70] *Awad v. Ziriax*, 670 F.3d 1111, 1123 (10th Cir. U.S.C.O.A. 2012).
[71] 403 U.S. 602 (1971). The *Lemon* test of constitutionality requires the language in question to have a secular legislative purpose, a primary effect that neither advances nor inhibits religion, and that does not foster an excessive government entanglement with religion. *Id.* at 612-13.
[72] *Larson v. Valente*, 456 U.S. 228 (1982).
[73] *Awad*, 670 F.3d at 1126-27, 1128.
[74] *Larson*, 456 U.S. at 246-248.
[75] *Awad*, 670 F.3d at 1128.
[76] *Awad*, 670 F.3d at 1129-30.
[77] Awad, 670 F.3d at 1129.
[78] *Awad*, 670 F.3d at 1130-31.

Constitutional Impairment of Contracts

Article 1, Section 10, of the Florida Constitution provides, "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

As a result of the constitutional limitation, the courts typically invalidate statutes that retroactively apply to existing contracts. In a 1940 Florida Supreme Court case, the Court ruled any statute enacted by the Legislature void which would impair the obligation of a contract.[79] Subsequent courts, however, carved out limited exceptions.

In *Pomponio v. Claridge of Pompano Condo, Inc.*, the Florida Supreme Court recognized that the state may have a legitimate interest in amending a law that impacts existing contracts based on its police power.[80] In determining legitimacy, the Court employed a balancing test to "weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy."[81]

The Court then applied the test established in the U.S. Supreme Court case of *Allied Structural Steel Co. v. Spannaus* to determine whether a law may apply to existing contracts.[82] Under the test, a law is more likely to be upheld if it meets the following three prongs of the test, which are, cumulatively that:

- The law was enacted to deal with a broad, generalized economic or social problem.
- The law operates in an area already subject to state regulation at the time the parties' contractual obligations were originally undertaken, rather than invading an area not previously subject to regulation by the state.
- The law effects a temporary alteration of the contractual relationships of those within its coverage, instead of working a severe, permanent, and immediate change in those relationships irrevocably and retroactively.[83]

In an impairment of contracts challenge to a local ordinance, the Fifth District Court of Appeal reiterated that laws reasonable and necessary to preserve public health, safety, and welfare are constitutional even if obligations of a private contract are impaired.[84] Still, governmental authority is not unrestrained."[85]

In *Cohn v. Grand Condominium Association, Inc.*, the statute changed voting arrangements in condominium governance. In employing the *Pomponio* test, the court determined that the state failed to identify a current social problem, the law did not

[79] *Bedell v. Lassiter*, 143 Fla. 43, 49 (Fla. 1940).
[80] *Pomponio v. Claridge of Pompano Condo, Inc.*, 378 So. 2d 774, 781 (Fla. 1979).
[81] *Id*. at 780.
[82] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978). "Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Id.* at 245.
[83] *Pomponio*, 378 So. 2d at 779.
[84] *Brevard County v. Florida Power & Light Co*., 693 So. 2d 77, 81 (Fla. 5th DCA 1997).
[85] *Id*. at 81.

regulate the specific area at issue at the time that the condo organized, and the resulting change from the law would be severe, permanent, and immediate.[86] Therefore, the state failed to meet its burden.[87] On appeal, the Florida Supreme Court affirmed but recognized that new laws apply to related contracts with provisions which incorporate future changes to the law.[88]

III. Effect of Proposed Changes:

SB 386 restricts courts from applying foreign law, legal codes, and systems to disputes brought under chs 61 and 88, F.S. These chapters relate to divorce, alimony, the division of marital assets, child support, and child custody

This bill restricts courts from applying foreign law to dissolution of marriage cases and issues involving multiple-state child support enforcement actions.

Specifically, under the bill, the courts of this state may not:

- Base a decision on a foreign law that does not grant the parties to litigation the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforce a choice of law clause in a contract which requires a dispute to be resolved under a foreign law that does not grant the parties the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforce a forum selection clause in a contract which requires a dispute to be resolved in a forum in which a party would be denied his or her fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Grant a motion to dismiss a lawsuit based on forum non conveniens if granting the motion would likely result in the denial of a party's fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution in the foreign forum.

This bill does not apply to:

- Corporations, partnerships, and other types of business associations, unless chs. 61 or 88, F.S., are implicated;
- Ecclesiastical matters; and

Matters governed by federal treaty or international agreements to which the United States is a party and which are preempted by federal law.

Although this bill recognizes that a party may waive his or her rights through a contract, the bill requires a court to narrowly construe the scope of the waiver
The bill does not identify any laws or conduct authorized under foreign laws within the family law context which would deny a person's fundamental liberties, rights, and privileges. As such, courts will likely determine the impact of the bill on a case-by-case basis.

[86] *Cohn v. Grand Condominium Assoc.*, 26 So. 3d 8, 11 (Fla. 3d DCA 2009).
[87] *Id.* at 11.
[88] *Cohn v. Grand Condominium Assoc.*, 62 So. 3d 1120 (Fla. 2011).

The bill requires a court to invalidate contractual provisions or judgments not based on laws that provide the parties with the "same" constitutional protections as the state and federal constitutions. As the "same" standard appears inflexible, the bill may result in the invalidation of contractual provisions or judgments based on foreign laws that grant the parties similar, or greater rights, privileges, and immunities as those granted by this country.

The bill declares in s. 45.022(4), F.S., that court orders based on disfavored foreign laws are void and unenforceable. However, the bill does not specifically address a situation in which a person seeks to enforce in this state a court order from a sister state which is based on a disfavored foreign law. In those situations, a court may likely rule that the Full Faith and Credit Clause of the U.S. Constitution requires enforcement of the order.

Similarly, the bill does not specifically address how a court would reconcile the bill with ch. 88, F.S., the Uniform Interstate Family Support Act (UIFSA), which was mandated by Congress. Under the bill, a support order entered in a foreign nation whose laws are inconsistent with this nation's constitutional "fundamental liberties, rights, and privileges" is unenforceable. In contrast, ch. 88, F.S., renders foreign support orders and agreements unenforceable if they are "manifestly incompatible with public policy." Although the two provisions appear to overlap (for example, manifest incompatibility includes due process and opportunity to be heard), the scope of the bill is likely broader than the restrictions on foreign law under the UIFSA.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill implicates four constitutional issues:

First Amendment

State legislatures that have restricted courts from applying foreign law have banned the use of Sharia law, banned several types of law or tradition including Sharia law, or prohibited the use of foreign law generally. Of the three initiatives, this bill comes under the third category, as it contains no mention of Sharia or another specific type of banned

law other than foreign law in general. In contrast to the law at issue in *Awad v. Ziriax*,[89] the bill appears to carry the greatest merit constitutionally, as it does not specifically single out a particular religion for disfavor or preference. If this bill is challenged on First Amendment grounds, a court will review the language for facial discrimination. As religion is not mentioned at all, the court will deem it facially neutral. A court will then apply the *Lemon* test, and likely find both a secular government purpose and that the law does not facilitate excessive governmental entanglement with religion. Because of this, a court will likely uphold the law from a First Amendment challenge.

Impairment of Contracts

The bill takes effect upon becoming a law and applies to lawsuits filed after the effective date. If a party attempts to apply the law to invalidate pre-existing contracts, the party must demonstrate that the law is a legitimate use of the state's police power and that the change operates in less than a severe, permanent, and immediate fashion, as required in *Pomponio v. Claridge of Pompano Condo, Inc*.[90] This test places a very high burden on the state. Alternatively, this bill may reach back to existing contracts, if a contractual provision expressly incorporates future changes to the law.

Dormant Federal Foreign Affairs Powers

Although not explicitly provided for in the U.S. Constitution, the Supreme Court has interpreted the U.S. Constitution to mean that the national government has exclusive power over foreign affairs. In *Zschernig v. Miller*, the Supreme Court reviewed an Oregon statute that refused to let a resident alien inherit property because the alien's home country barred U.S. residents from inheriting property. The Court held that the Oregon law as applied exceeded the limits of state power because the law interfered with the national government's exclusive power over foreign affairs. The Court also held that, to be unconstitutional, the state action must have more than "some incidental or indirect effect on foreign countries,"[91] and the action must pose a "great potential for disruption or embarrassment"[92] to the national unity of foreign policy. Such a determination would necessarily rely heavily on considerations of current political climates and foreign relations, as well as perception of the U.S. abroad. These factors could only be evaluated if and when a challenge to this bill was brought.

Separation of Powers

The first three articles of the U.S. Constitution define the powers given to the three branches of government in the United States.[93] Article I defines the legislative branch and vests with it all power to make law. Article II defines the executive branch and vests in it the power to enforce the law. Article III defines the judicial branch and vests in it all

[89] 670 F.3d 1111, 1123 (10th Cir. U.S.C.O.A. 2012).
[90] 378 So. 2d 774 (Fla. 1979).
[91] *Zschernig v. Miller*, 389 U.S. 429, 434 (1968).
[92] *Id*. at 435.
[93] Articles I, II, III, U.S. Const.

judicial power. For time immemorial, that power has been understood to mean the power to interpret and apply the law.[94]

As discussed above, to the extent that this bill directs Florida courts to consider and interpret foreign decisions and law in a certain manner, it may interfere with the federal government's ability to govern foreign policy with one voice. As such, this bill could be challenged as preempted by the federal government. Similarly, as previously stated, the judiciary's constitutional role is to act as the sole interpreter of laws; therefore, the bill could be challenged as an infringement on the essential role of the judicial branch in violation of the constitutional separation of powers. Similarly, the Florida Constitution explicitly mandates separation of powers between branches of the Florida government. Article II, section 3 of the Florida Constitution provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Because of this language, Florida's separation of powers doctrine is even stronger than the federal concept of separation of powers. Therefore, the bill may face an additional separation of powers inquiry.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The extent to which private parties will be impacted by the provisions of this bill is unknown.

C. Government Sector Impact:

The Office of the State Courts Administrator expects an impact from the bill on judicial workload in ch. 61 and ch. 88, F.S., proceedings by requiring the court to determine whether application of foreign law would grant litigants the same fundamental rights as the state and federal constitutions grant. These determinations will require the court to research liberties, right, and privileges granted under foreign law. The fiscal impact cannot be accurately determined due to the unavailability of data needed to quantifiably establish the increase in judicial workload.[95]

VI. Technical Deficiencies:

None.

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[94] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).
[95] Office of the State Courts Administrator, *2014 Judicial Impact Statement* (December 30, 2013); on file with the Senate Judiciary Committee.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 45.022 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

By Senator Hays

11-00143-14 2014386__

A bill to be entitled

An act relating to the application of foreign law in certain cases; creating s. 45.022, F.S.; providing legislative intent; defining the term "foreign law, legal code, or system"; providing for applicability; specifying the public policy of this state on the application of a foreign law, legal code, or system in proceedings brought under or relating to chapter 61 or chapter 88, F.S., which relate to dissolution of marriage, support, time-sharing, the Uniform Child Custody Jurisdiction and Enforcement Act, and the Uniform Interstate Family Support Act; providing that certain decisions rendered under such laws, codes, or systems are void; providing that certain contracts and contract provisions are void; providing for the construction of a waiver by a natural person of the person's fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution; providing that claims of forum non conveniens or related claims must be denied under certain circumstances; providing that the act may not be construed to require or authorize any court to adjudicate, or prohibit any religious organization from adjudicating, ecclesiastical matters in violation of specified constitutional provisions or to conflict with any federal treaty or other international agreement to which the United States is a party to a specified extent; providing for severability; providing a directive to the Division of Law Revision and Information; providing an effective date.

Florida Senate - 2014 **SB 386**

11-00143-14 2014386__

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 45.022, Florida Statutes, is created to read:

45.022 Application of foreign law contrary to public policy in certain cases.—

(1) While the Legislature fully recognizes the right to contract freely under the laws of this state, it also recognizes that this right may be reasonably and rationally circumscribed pursuant to the interest of the state to protect and promote liberties, rights, and privileges granted under the State Constitution or the United States Constitution.

(2) As used in this section, the term "foreign law, legal code, or system" means any law, legal code, or system of a foreign country, or a state, nation, or subdivision thereof, outside the United States or its territories, including, but not limited to, a foreign or international organization claiming the status of a country, state, or nation or asserting legal authority to act on behalf of one or more foreign countries, states, nations, or any other similar international organizations or tribunals, which is applied by that jurisdiction's courts, administrative bodies, or other formal or informal tribunals. The term does not include the common law and statute laws of England as described in s. 2.01 or any laws of the Native American tribes in this state.

(3) This section applies:

(a) Only to actual or foreseeable denials of a natural

person's fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution from the application of a foreign law, legal code, or system in actions or proceedings brought under, pursuant to, or pertaining to the subject matter of chapter 61 or chapter 88 and filed after the effective date of this act; and

(b) To a corporation, partnership, or other form of business association only as necessary to provide effective relief in actions or proceedings brought under, pursuant to, or pertaining to the subject matter of chapter 61 or chapter 88.

(4) Any court, arbitration, tribunal, or administrative agency ruling or decision violates the public policy of this state and is void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its ruling or decision in the matter at issue in whole or in part on any foreign law, legal code, or system that does not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.

(5) A contract, or contractual provision, if severable, violates the public policy of this state and is void and unenforceable if:

(a) The contract or contractual provision provides for the choice of a foreign law, legal code, or system to govern some or all of the disputes arising from the contract between the parties and the foreign law, legal code, or system chosen includes or incorporates any substantive or procedural law, as applied to the dispute at issue, which would deny the parties the same fundamental liberties, rights, and privileges

guaranteed by the State Constitution or the United States Constitution. This paragraph does not limit the right of a natural person in this state to voluntarily restrict or limit his or her fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution by contract or specific waiver consistent with constitutional principles, but the language of any such contract or waiver must be strictly construed in favor of preserving such liberties, rights, and privileges; or

(b) The contract or contractual provision provides for the choice of venue or choice of forum outside a state or territory of the United States and the enforcement of the choice of venue or choice of forum provision would result in a violation of any fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.

(6) If a natural person who is subject to personal jurisdiction in this state seeks to maintain litigation, arbitration, agency, or similarly binding proceedings in this state and the courts of this state find that granting a claim of forum non conveniens or a related claim denies or would likely lead to the denial of any fundamental liberties, rights, and privileges of the nonclaimant guaranteed by the State Constitution or the United States Constitution in the foreign forum with respect to the matter in dispute, it is the public policy of this state that the claim be denied.

(7) This section may not be construed to:

(a) Require or authorize any court to adjudicate, or prohibit any religious organization from adjudicating, ecclesiastical matters, including, but not limited to, the

election, appointment, calling, discipline, dismissal, removal, or excommunication of a member, officer, official, priest, nun, monk, pastor, rabbi, imam, or member of the clergy of the religious organization, or determination or interpretation of the doctrine of the religious organization, if such adjudication or prohibition would violate s. 3, Art. I of the State Constitution or the First Amendment to the United States Constitution; or

(b) Conflict with any federal treaty or other international agreement to which the United States is a party to the extent that such federal treaty or international agreement preempts or is superior to state law on the matter at issue.

Section 2. If any provision of this act or its application to any natural person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to that end the provisions of this act are severable.

Section 3. The Division of Law Revision and Information is directed to replace the phrase "the effective date of this act" wherever it occurs in this act with the date this act becomes a law.

Section 4. This act shall take effect upon becoming a law.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 870
INTRODUCER:	Senator Smith
SUBJECT:	Insurance
DATE:	March 24, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	**Favorable**
2.	Brown	Cibula	JU	**Pre-meeting**

I. Summary:

SB 870 provides that the absence of a countersignature by an agent of the insurer does not affect the validity of a property, casualty, or surety insurance policy or contract. This change may reduce the risk that an insured loses coverage due to events the insured cannot control.

Current law provides that property, casualty, and surety insurers do not assume direct liability unless the policy or contract of insurance is countersigned by a licensed agent for the insurer. However, the countersignature requirement may be waived by the insurer. Whether the requirement has been waived is a factual question.

II. Present Situation:

Section 624.425(1), F.S., requires all property, casualty, and surety insurance policies or contracts to be issued and countersigned by an agent. The agent must be regularly commissioned, currently licensed, and appointed as an agent for the insurer.

The purpose of the countersignature requirement is "to protect the public…by requiring such policies to be issued by resident, licensed agents over whom the state can exercise control and thus prevent abuses."[1]

The absence of a countersignature does not necessarily invalidate the insurance policy. The insurer may waive the countersignature requirement.[2] If the countersignature requirement is not waived, a policy is not enforceable against the insurer, as a court will not consider the policy properly executed.[3] In the absence of a countersignature, whether a policy is waived is a factual

[1] *Wolfe v. Aetna Insurance Company*, 436 So. 2d 997, 999 (Fla. 5th DCA 1983).
[2] *See Meltsner v. Aetna Casualty and Surety Company of Hartford, Conn.*, 233 So. 2d 849, 850 (Fla. 3rd DCA 1969) (holding under the facts of that case that the countersignature requirement was waived).
[3] 43 Am. Jur. 2d Insurance s. 225.

matter determined on a case-by-case basis.[4] In at least one case, a defendant argued that the lack of a countersignature constituted a defense in a breach of contract action.[5]

Section 624.426, F.S., excludes some policies from the countersignature requirement. These are:

- Contracts of reinsurance;
- Policies of insurance on the rolling stock of railroad companies doing a general freight and passenger business;
- United States Custom surety bonds issued by a corporate surety approved by the United States Department of Treasury;
- Policies of insurance issued by insurers whose agents represent one company or a group of companies under common ownership if a company within one group is transferring policies to another company within the same group and the agent of record remains the same; and
- Policies of property, casualty, and surety insurance issued by insurers whose agents represent one company or a group of companies under common ownership and for which the application is lawfully submitted to the insurer.[6]

III. Effect of Proposed Changes:

SB 870 provides that the absence of a countersignature does not affect the validity of the insurance policy or contract.

The bill will preclude arguments by an insurer that a policy is invalid because it lacks a countersignature.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[4] *See Meltsner*, 233 So.2d at 850 (finding a waiver of the countersignature requirement); *Wolfe*, 436 So.2d at 999 (finding a waiver of the countersignature requirement).
[5] *See FCCI Insurance Company v. Gulfwind Companies, LLC*, 2003 CC 003056 NC (Fla. Sarasota County Court).
[6] Section 624.426, F.S.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 624.425 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Latvala) recommended the following:

Senate Amendment (with title amendment)

Between lines 33 and 34
insert:

Section 2. Subsection (2) of section 627.94072, Florida Statutes, is amended to read:

627.94072 Mandatory offers.—

(2) An insurer that offers a long-term care insurance policy, certificate, or rider in this state shall ~~must~~ offer a nonforfeiture protection provision providing reduced paid-up insurance, extended term, shortened benefit period, or ~~any~~ other

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benefit ~~benefits~~ approved by the office if all or part of a premium is not paid. A nonforfeiture provision may also be offered in the form of a return of premium on the death of the insured, or on the complete surrender or cancellation of the policy or contract. Nonforfeiture benefits and any additional premium for such benefits must be computed in an actuarially sound manner~~,~~ using a methodology that has been filed with and approved by the office.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 5

and insert:

amending s. 627.94072, F.S.; providing an alternative form of a nonforfeiture provision for long-term care insurance; providing an effective date.

By Senator Smith

31-01023-14 2014870__

A bill to be entitled

An act relating to insurance; amending s. 624.425, F.S.; providing that the absence of a countersignature does not affect the validity of a policy or contract; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 624.425, Florida Statutes, is amended to read:

624.425 Agent countersignature required, property, casualty, surety insurance.—

(1) Except as stated in s. 624.426, no authorized property, casualty, or surety insurer shall assume direct liability as to a subject of insurance resident, located, or to be performed in this state unless the policy or contract of insurance is issued by or through, and is countersigned by, an agent who is regularly commissioned and licensed currently as an agent and appointed as an agent for the insurer under this code. However, the absence of a countersignature does not affect the validity of the policy or contract. If two or more authorized insurers issue a single policy of insurance against legal liability for loss or damage to person or property caused by a ~~the~~ nuclear energy hazard, or a single policy insuring against loss or damage to property by radioactive contamination, whether or not also insuring against one or more other perils that may be insured ~~proper to insure~~ against in this state, such policy if otherwise lawful may be countersigned on behalf of all of the insurers by a licensed and appointed agent of the ~~any~~ insurer

31-01023-14 2014870__

appearing thereon. The producing agent shall receive on each policy or contract the full and usual commission allowed and paid by the insurer to its agents on business written or transacted by them for the insurer.

Section 2. This act shall take effect July 1, 2014.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 1308
INTRODUCER:	Banking and Insurance Committee and Senator Simmons
SUBJECT:	Insurer Solvency
DATE:	March 24, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	**Fav/CS**
2.	Munroe	Cibula	JU	**Pre-meeting**
3.			RC	

I. Summary:

CS/SB 1308 revises provisions within the Insurance Code relating to solvency requirements and regulatory oversight of insurers by the Office of Insurance Regulation (OIR). The bill incorporates provisions of model acts of the National Association of Insurance Commissioners (NAIC) and additional recommendations of the OIR. Some of the NAIC provisions in the bill are in response to the 2008 financial crisis and the globalization of the insurance market and are intended to enhance the regulation of insurers as well as their affiliated entities and provide more solvency tools for evaluating risks within insurance groups. The bill:

- Authorizes the OIR to implement principle-based reserving for life insurers, which allows life insurers to calculate reserves that reflect current mortality rates, the life insurer's business model, and its particular risk profile.
- Requires persons that acquire controlling interests to disclose enterprise risk, and requires that ultimate controlling persons must file an annual enterprise risk report with the OIR which identifies material risk within the insurance company holding company system which could pose a risk or have a material adverse effect upon the insurer.
- Provides that a presumption of control may be rebutted by filing a disclaimer of control on a form prescribed by the OIR or by providing a copy of a Schedule 13G on file with the Securities and Exchange Commission. After a disclaimer is filed, the insurer is relieved of any further duty to register or report under s. 628.461, F.S., unless the OIR disallows the disclaimer.
- Incorporates a risk-based capital trend test for life and health as well as property and casualty insurers and requires health maintenance organizations and prepaid limited health service organizations to file risk-based capital reports.
- Requires insurers to file actuarial opinion summaries and supporting workpapers annually and creates and evidentiary privilege for memoranda supporting actuarial opinions on reserves, actuarial opinion summaries and related information and provides for confidentiality of enterprise risk reports, actuarial opinion summaries, and other information.

- Authorizes the OIR to impose sanctions for noncompliance with the reporting requirements of s. 628.461, F.S., and s. 628.801, F.S.
- Allows the OIR to participate in supervisory colleges with other regulators for the regulation of any domestic insurer that is part of an insurance holding company system having international operations.

II. Present Situation:

States primarily regulate insurance companies. The state of domicile serves as the primary regulator for insurers. Solvency regulation is designed to protect policyholders against the risk that insurers will not be able to meet their financial responsibilities. The OIR[1] is primarily responsible for monitoring the solvency of regulated insurers and examining insurers to determine compliance with applicable laws, and taking administrative action, if necessary. Solvency regulation includes the requirements for starting and operating an insurance company,[2] monitoring the financial condition of insurers through examinations and audits, and procedures for the administrative supervision,[3] rehabilitation,[4] or liquidation[5] of an insurance company if it is in unsound financial condition or insolvent.

NAIC Model Acts

The National Association of Insurance Commissioners (NAIC) is a voluntary association of insurance regulators from all 50 states. The NAIC coordinates regulation and examination of multistate insurers, provides a forum for addressing major insurance issues, and promotes uniform model laws among the states. The NAIC accreditation is a certification that legal, financial, and organizational standards are being fulfilled by the OIR. The NAIC establishes accreditation effective dates for states to adopt in substantially similar form models and acts for purposes of NAIC accreditation review. As a member of the NAIC, the OIR is required to participate in the Financial Regulation Standards and Accreditation Program. The OIR has identified model provisions or updates that need to be incorporated in the current Insurance Code for accreditation purposes. Updates to the Insurance Code relating to the Property and Casualty Trend Test of the Risk-Based Capital Model Act and the Property and Casualty Actuarial Opinion Model Law are necessary since the accreditation effective dates for these provisions were January 1, 2012, and January 1, 2010, respectively. In addition, two other NAIC model acts, Risk-Based Capital for Health Organizations and the Life Trend Test of the Risk Based Capital Model Act are necessary for accreditation effective January 1, 2015, and January 1, 2017, respectively. The accreditation effective date for amendments to the Insurance Holding Company System Regulatory Act is January 1, 2016.

[1] Section 20.121(3)(a), F.S.
[2] Sections 624.411 - 624.414, F.S.
[3] Administrative supervision allows the Department of Financial Services (DFS) to supervise the management of a consenting troubled insurance company in an attempt to cure the company's troubles rather than close it down.
[4] In rehabilitation, the DFS is authorized as receiver to conduct all business of the insurer in an attempt to place the insurance company back in sound financial condition.
[5] In liquidation, the DFS is authorized as receiver to gather the insurance company's assets, convert them to cash, distribute them to various claimants, and shut down the company.

Model Holding Company Act and Regulation

The NAIC has adopted amendments to its Insurance Holding Company System Regulatory Model Act and the Insurance Holding Company Model Regulation with Reporting Forms and Instructions. In light of the recent financial crisis, the NAIC, insurance regulators, and other stakeholders reviewed the potential impact of non-insurance operations on insurance companies in the same group to determine the best methods to evaluate the risks and activities of entities within a holding company system. The revised model act adds the concept of "enterprise risk" and requires controlled insurers to file a new annual form (Form F) detailing specified matters relating to the holding company group. The NAIC model act defines "enterprise risk" as:

> [A]ny activity, circumstance, event, or series of events involving one or more affiliates of an insurer that, if not remedied promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer of its insurance company as a whole, including, but not limited to, anything that would cause the insurer's risk-based capital as set forth in [state requirement] or would cause the insurer to be in a hazardous financial condition.[6]

Amendments to the model act also address divestitures. Prior to the amendments to the model act, a person could divest control of an insurer without prior regulatory review as long as no single acquirer obtained control of 10 percent or more of the outstanding voting shares. Amendments to the model act generally require a person divesting control over an insurer to provide 30 days' prior notice to the regulator.

The revised model act also provides insurance regulators access to information of an insurer and its affiliates to ascertain the financial condition of the insurer, including the enterprise risk to the insurer by the ultimate controlling party. The regulator may require any insurer registered as a controlled insurer to produce information not in the possession of the insurer if the insurer can obtain access to such. If the insurer fails to obtain the requested information, the insurer is required to provide an explanation of such failure. If the regulator determines that the explanation is without merit, the regulator may require the insurer to pay a penalty for each day's delay, or may suspend or revoke the insurer's certificate of authority.[7]

The amendments to the model acts also authorize a regulator to participate in a supervisory college for any domestic insurer that is part of an insurance holding company system having international operations in order to determine compliance. Insurers must pay for expenses associated with the insurance regulator's participation in a supervisory college. State, federal, and international regulators may participate in the supervision of the insurer or its affiliates.[8] According to the NAIC Center for Insurance Policy & Research, "a supervisory college is a meeting of insurance regulators or supervisors where the topic of discussion is regulatory oversight of one specific insurance group that is writing significant amounts of insurance in other jurisdictions."[9] Supervisory colleges facilitate oversight of internationally active insurance

[6] Section 1F of the NAIC Insurance Holding Company System Regulatory Act.
[7] Section 6B of the NAIC Insurance Holding Company System Regulatory Act.
[8] Section 7 of the NAIC Insurance Holding Company System Regulatory Act.
[9] "Supervisory Colleges: A Regulatory Tool for Enhancing Supervisory Cooperation and Coordination," at http://www.naic.org/cipr_newsletter_archive/vol4_supervisory_colleges.htm (last visited on March 19, 2014).

companies at the group level and promote regulatory information sharing, subject to applicable confidentiality agreements.[10]

Risk-Based Capital for Insurers and Health Organizations

Risk-based capital (RBC) is a capital adequacy standard that represents the amount of required capital that an insurer must maintain, based on the inherent risks in the insurer's operations. It is determined by a formula that considers various risks depending on the type of insurer (e.g., subsidiary insurance companies, fixed income, equity, credit, reserves, and net written premium). The RBC standard provides a safety net for insurers, is uniform among states, and provides state insurance regulators with authority for timely corrective action.[11] The NAIC's *Risk-Based Capital for Insurers Model Act* provides that states must require both life and health and property and casualty insurers to submit RBC filings with their regulators. Presently, this requirement is incorporated in the Insurance Code; however, it does not apply to health maintenance organizations (HMOs) and prepaid limited health service organizations.[12] Prepaid limited health service organizations provide limited health services (such as dental or vision care) through an exclusive panel of providers in return for a prepayment,[13] and HMOs generally provide a range of health coverage with contracted providers.[14] The NAIC Risk-Based Capital Health Organizations Model Act will be effective as an accreditation standard beginning January 1, 2015, and applies to health maintenance organizations and prepaid limited health service organization.

In March 2006, the NAIC adopted revisions to the Risk-Based Capital for Insurers Model Act. The revisions incorporate a new Property and Casualty Trend Test for property and casualty companies. The accreditation effective date for property and casualty trend test was January 1, 2012. A statutory provision relating to a life trend test was already included in the RBC for Insurers Model Act; but the changes equalize the trigger between life and health, property, and casualty companies that prompt the need for a trend test calculation. The model was amended to cite the Property and Casualty Trend Test as a means for the company action level to be triggered.

Property and Casualty Actuarial Opinion Model Law

The NAIC Property and Casualty Actuarial Opinion Model Law specifies that states must require property and casualty insurers to submit a Statement of Actuarial Opinion, which is a public document. The model act also requires the submission of an Actuarial Opinion Summary, an Actuarial Report, and workpapers to support each actuarial opinion, which must be treated as a confidential and privileged document.

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[10] NAIC on Supervisory Colleges at http://www.naic.org/cipr_topics/topic_supervisory_college.htm. (last visited on March 19, 2014). Additionally, the linked/public records bill, CS/SB 1300, provides for confidential and exempt treatment of regulatory information, including within the context of a supervisory college that is shared between insurance regulators and law enforcement, pursuant to confidentiality agreements.

[11] NAIC on Risk-Based Capital at http://www.naic.org/cipr_topics/topic_risk_based_capital.htm (last visited on March 19, 2014).

[12] Section 624.4085, F.S.

[13] Section 636.003(7), F.S.

[14] Section 641.19(12), F.S.

Current law requires insurers (except those providing life insurance and title insurance) to provide to the OIR an annual statement of its financial condition and a statement of opinion on loss and loss adjustment expense reserves prepared by an actuary or a qualified loss reserve specialist. These insurers are also required to provide supporting work papers upon the OIR's request.[15] Currently, these materials are not exempt from ch. 119, F.S., relating to public records.

Valuation of Life Insurance and Principle-Based Reserves

For insurance purposes, reserves are liabilities that are reported on insurers' balance sheets for the ultimate payment of future losses and policyholder benefits. Reserves are often set using factors and rates determined by an insurer's actuary consistent with guidelines for insurance products established in state law consistent with NAIC models or laws. Reserve levels for insurers operating in the United States and offering certain life insurance and annuity products are set according to a state law, with rules-based formula that, some insurers claim, results in excessive reserves that detract from the insurer's ability to maximize the value of its capital.

Critics of the current formula-based approach to reserving for life insurance contend that it: (1) is static and too conservative; (2) fails to capture all the particularized risks inherent in increasingly complicated life insurance benefits and guaranties; and (3) does not reflect life insurers' business practices, such as the hedging of risk through derivatives use plans. However, reserves are subject to an annual analysis to verify the adequacy of reserves through different models, with additional reserves established if necessary. Many industry participants argue that redundant reserve requirements force reliance upon reinsurance captives in order to reduce excessive reserves and allow life insurers to use capital more effectively.

While the current formula-based approach to quantifying reserves uses standardized formulas, principle based reserves (PBR) relies upon an insurer's internal risk modeling and analysis techniques, including the use of insurer-specific claims experience with specific portfolios of business, to incorporate consideration of particularized risks and thereby to more closely tailor calculations to the actual attributes of insurer portfolios.

In response to concerns about reserves, the National Association of Insurance Commissioners (NAIC) revised the NAIC Standard Valuation Law (SVL) and the Standard Nonforfeiture Law to incorporate the NAIC Valuation Manual as the authoritative source for reserves and other requirements.[16] The revised SVL, as adopted by the NAIC, preserves state authority to require insurers to change any assumption or method, as necessary, and authorize the regulator to engage a qualified actuary at the expense of an insurer to review compliance with the valuation manual requirements. The manual includes experience reporting, actuarial opinion and memorandum requirements, PBR reporting, and corporate governance requirements. Many of the requirements are dynamic in nature, and are responsive to fluctuations in the insurance marketplace and the economy. The requirements of the manual are applicable to life insurance contracts, accident and health contracts, and other specified contracts. Some products are not subject to PBR; however, some products, such as term life insurance policies and universal life insurance policies with a secondary guarantee[17] issued on or after the operative date of the manual become subject to PBR

[15] Section 624.424, F.S.
[16] The Valuation Manual was adopted by the NAIC on December 2, 2012.
[17] A universal life policy with a secondary guarantee is also known as a no-lapse guarantee. The policy will not lapse if

once the manual is operative. The PBR method will be effective only after the SVL law revisions are adopted by at least 42 states representing 75 percent of total U.S. premium and then, after a 3-year transition period. However, insurers can implement PBR anytime during the transition period.

Under current Florida law, life insurers are required to calculate reserves for life insurance policies based on a standardized formula prescribed by the NAIC Model Standard Valuation Law (SVL) and codified in s. 625.121, F.S. The SVL incorporates mortality tables. The NAIC Standard Nonforfeiture Law establishes minimum benefit values if policies are surrendered or lapsed and is codified in s. 627.476, F.S. For purposes of the implementation of PBR, the NAIC revised the Standard Nonforfeiture Law to reference the Standard Valuation Law and the Valuation Manual as the source for mortality and interest rates used in nonforfeiture calculations. However, such changes apply to policies issued on or after the operative date of the valuation manual. The PBR requirements do not apply to policies issued prior to the operative date of the valuation manual.

In 2013, seven states enacted PBR enabling legislation (Arizona, Indiana, Louisiana, Maine, New Hampshire, Rhode Island, and Tennessee). In 2013, Texas enacted the Standard Nonforfeiture Law revisions. Nine states have introduced PBR enabling legislation in 2014 (Hawaii, Illinois, Iowa, Mississippi, Nebraska, New Mexico, Ohio, Oklahoma, and Virginia). Five more states have drafted legislation for 2014 introduction (Connecticut, Florida, Georgia, Missouri, and West Virginia).[18]

III. Effect of Proposed Changes:

Examinations (Section 2)

Section 2 amends s. 624.319, F.S., relating to examinations, to provide that the production of documents during the course of an examination or investigation does not constitute waiver of the attorney-client or work-product privileges.

Captives (Section 5)

Section 5 requires insurers that reinsure through a captive insurance company to file with the OIR an annual report containing certain information specific to reinsurance assumed by each captive.

Risk-Based Capital for Insurers and Health Organizations (Sections 4, 15, 16, and 17)

Section 4 amends s. 624.4085, F.S., to revise the definition of the term, "life and health insurer," for purposes of risk-based capital (RBC) requirements to include HMOs and prepaid limited health service organizations that are authorized in Florida and one or more other states, jurisdictions, or countries effective January 1, 2015. The section also clarifies the RBC requirements for a life and health insurer that reports using the life and health annual statement

certain conditions are met.

[18] American Council of Life Insurers PBR Implementation Status, February 3, 2014, (on file with Senate Banking and Insurance staff).

instructions and changes a company action level event to total adjusted capital that is greater than or equal to its company action level RBC but less than the product of its authorized control level risk-based capital and 3.0.

Effective January 1, 2015, the section also defines the RBC requirements for a life and health, as well as property and casualty, insurer that reports using the health annual statement instructions and defines a company action level event as total adjusted capital that is greater than or equal to its company action level risk-based capital but less than the product of its authorized control level RBC and 3.0 and triggers the trend test calculation. An insurer that fails the Trend Test is subject to filing a corrective action plan with the OIR.

Sections 15 through 17 provide that prepaid limited health service organizations authorized in Florida are subject to the RBC requirements and confidentially requirements pursuant to s. 624.4085, F.S., and s. 624.40851, F.S., respectively. The bill also provides that an HMO that is authorized in one or more other states, jurisdictions, or countries is subject to the risk-based capital requirements for insurers as well as the confidentiality protections of risk-based capital information provided in s. 624.4085, F.S., and s. 624.4615, F.S., respectively. Finally, an HMO that is a member of a holding company system is subject to the acquisition and enterprise risk reporting requirements of s. 628.461, F.S., but not to the acquisition requirements for specialty insurers in s. 628.4615, F.S. These provisions are effective January 1, 2015.

Model Insurance Holding Company Act and Regulation (Sections 1, 3, 10-14)

Section 1 provides definitions of affiliate, affiliated person, control, and NAIC. The definitions of the terms, "affiliated person" and "controlling person" currently defined in s. 628.461(12), F.S., are modified and transferred. The bill revises the definition of the term, "affiliated person," to include persons affiliated through 10 percent instead of 5 percent of ownership, control, or management. The bill revises the definition of the term, "controlling person," to require a 10 percent rather than a 25 percent ownership or interest.

Section 3 amends s. 624.402, F.S., to provide a technical, conforming amendment.

Section 10 amends s. 628.461, F.S., relating to acquisition of controlling stock, and specifies that the acquiring party's statement must include an agreement to file an "annual enterprise risk report," if control exists as described in Section 11 of the bill. Effective January 1, 2015, the bill provides that the person required to file the statement pursuant to s. 628.461(1), F.S., will provide the annual report specified in s. 628.801(2), F.S., if control exists. The bill provides that a person may rebut a presumption of control by filing a disclaimer of control on a form prescribed by the OFR, as required by the model act, or by providing a copy of a Schedule 13G on file with the U.S. Securities and Exchange Commission. After a disclaimer is filed, the insurer is relieved of any further duty to register or report under s. 628.461, F.S., unless the OIR disallows the disclaimer. Any controlling person of a domestic insurer that seeks to divest its controlling interest in the domestic insurer is required to file with the OIR a confidential notice of its proposed divestiture at least 30 days prior to the relinquishment of control.

Currently, s. 628.461, F.S., provides that a person or affiliated person must file a letter of notification and a statement for the OIR's approval before concluding a tender offer to acquire

5 percent or more of a domestic stock insurer or of a controlling company. The statement must contain certain criminal, employment, and regulatory history information. Alternatively, a party acquiring less than 10 percent of the outstanding voting securities of an insurer may file a disclaimer of affiliation of control, and such disclaimer must fully disclose all material relationships and affiliation with the insurer, as well as the reason for such disclaimer (this disclaimer is mandatory for acquisitions of more than 10 percent).

During the pendency of the OIR's review of an acquisition filing, the insurer may not make a "material change" to its operation or management, unless the OIR has approved or has been notified, respectively. A "material change" consists of a disposal or obligation of 5 percent or more of the insurer's capital and surplus, or a change in management involving a person who has the authority to dispose or obligate 5 percent of the insurer's capital and surplus.

Section 11 amends s. 628.801, F.S., relating to the regulation of insurance holding companies, to amend and update the provisions of the NAIC Insurance Holding Company System Regulatory Model Act and the Insurance Holding Company System Model Regulation by incorporating reference to the 2010 version. The section requires insurers to file an annual holding company registration statement, including disclosure of material transaction between affiliates. Currently, authorized insurers are required to register with the OIR and be subject to regulation with respect to the relationship with the holding company. Pursuant to its authority under ch. 624, F.S., the OIR may examine any insurer and its affiliates registered under this section to ascertain the financial condition of the insurer, including the enterprise risk to the insurer by the ultimate controlling party.

Effective January 1, 2015, the ultimate controlling person in an insurer's holding company must identify and report material risk within the system that could pose enterprise risk to the insurer in an annual enterprise risk report filed with the OIR. The enterprise risk report will contain detailed information including the holding company's business plan, material developments concerning risk management, and rating agency information. Effective January 1, 2015, if an insurer fails to file a registration statement, a summary of the registration statement, or enterprise risk filing report within the specified time, it is a violation of this section. The section also provides criteria under which an insurer may apply for waiver of the requirements contained in s. 628.801, F.S.

Information contained in the enterprise risk report filed with OIR is confidential and exempt as provided in s. 624.4212, F.S. The bill also adds a provision that prohibits the waiver of any applicable privilege or claim of confidentiality in the enterprise risk report because of disclosures to the OIR. The bill provides that the Department of Financial Services or the OIR may use confidential and exempt information in the furtherance of any regulatory or legal action brought against an insurer as part of the official duties of the department or office.

Section 12 amends s. 628.803, F.S., relating to sanctions against an insurance holding company, to provide that a violation of s. 628.461, F.S., (i.e., the filing requirements for acquisition of controlling stock) or s. 628.801, F.S., (i.e., filing requirements for insurance holding companies) may serve as an independent basis for the OIR to disapprove dividends and distributions and place the insurer under an order of supervision pursuant to part VI of ch. 624, F.S. This provision is effective January 1, 2015.

Currently, the Insurance Code states that noncompliant insurance holding companies (and their directors, officers, employees, and agents) can be subject to a number of sanctions that include:

- A penalty, not to exceed $10,000, for failing to file registration statements or certificate of exemption;
- Civil forfeitures, not to exceed $5,000 per violation, for knowingly engaging in transactions that have not been properly filed, approved, or in accordance with commission rule; or
- A cease and desist order for engaging in transactions or entering into contracts that violate commission rules, and rescission orders if in the best interests of the policyholders, creditors, or public.

Additionally, an officer, director, or employee of an insurance holding company who willfully and knowingly submits a false statement, false report, or false filing with the intent to deceive the OIR, is guilty of a felony of the third degree.

Sections 13 and 14 create ss. 628.804 and 628.805, F.S., which authorize the creation and participation by the OIR in a supervisory college with other state, federal, and international regulators charged with supervising an insurer or its affiliates, effective January 1, 2015. The bill provides the terms and conditions of participation. With respect to participation in a supervisory college, the OIR may clarify the membership and participation of other supervisors and clarify the role of other regulators, including the establishment of a groupwide supervisor.

The bill defines, the term, "groupwide supervisor," as the chief insurance regulator for the jurisdiction who is determined by the OIR to have significant contacts with the international insurance group sufficient to conduct and coordinate groupwide supervision activities. The OIR is authorized to adopt rules to implement criteria for determining the appropriate groupwide supervisor. This language, which was requested by the OIR, is supplemental to the NAIC model provision. It is consistent with a law recently enacted in Pennsylvania. In accordance with s. 624.4212, F.S., regarding confidential information sharing, the OIR is authorized to enter into cooperative agreements with other regulators. Insurers are liable for the payment of reasonable expenses for the OIR's participation in a supervisory college.

Property and Casualty Actuarial Opinion Model Law (Section 5)

The bill requires property and casualty insurers to file an annual Statement of Actuarial Opinion and Actuarial Opinion Summary in accordance with the NAIC annual statement instructions. The section also updates the Financial Services Commission's (commission's) rulemaking authority under this section to specify that rules must be in substantial conformity with the 2006 Annual Financial Reporting Model Regulation adopted by the NAIC. Life and health insurers are exempt from the specified reporting requirements of this section since they are governed by ss. 625.121 and 625.1212, F.S.

Proprietary business information contained in the summary is confidential and exempt under s. 624.4212, F.S., which is created in a linked public records bill CS/SB 1300. This section also protects the summary and related information from subpoena, discovery, or admissibility in any private civil action. The bill provides that the Department of Financial Services or the OIR may

use confidential and exempt information in the furtherance of any regulatory or legal action brought against an insurer as part of the official duties of the department or office.

Valuation of Life Insurance and Principle Based Reserves (Sections 6, 7, 8, and 9)

Standard Valuation Law for Life Insurers

Section 6 amends s. 625.121, F.S., relating to the Standard Valuation Law for life insurance, to provide that any memorandum or other material in support of the actuarial opinion that is currently confidential and exempt from s. 119.07(1), F.S., is not subject to subpoena or discovery, or admissible in evidence in any private civil action. Currently, authorized life insurance companies are required to submit an annual actuarial opinion of reserves, reflecting the valuation of reserve liabilities. This section also provides that neither the OIR nor any person who receives information while acting under the authority of the OIR or with whom such information is shared may testify in any private civil action concerning confidential information. These changes incorporate a provision of the NAIC Standard Valuation Law that provides that this information is not subject to subpoena or discovery, and should not be admissible in any civil action in either documentary or testimonial form. The bill provides that the Department of Financial Services or the OIR may use confidential and exempt information in the furtherance of any regulatory or legal action brought against an insurer as part of the official duties of the department or office.

The bill requires the implementation of the valuation manual and PBR for policies issued on or after the operative date of the valuation manual. Section 625.121, F.S., applies to policies and contracts issued prior to the operative date of the valuation manual.

Section 7 creates s. 625.1212, F.S., which is applicable to the valuation of policies and contracts issued on or after the operative date of the valuation manual with some exceptions. This include life insurance contracts, accident and health contracts, and deposit-type policies.[19] The operative date of the valuation manual is defined to mean the later of January 1, 2017, or the January 1 immediately following the July 1 that the Commissioner of the OIR certifies to the Financial Services Commission that the following conditions occurred on or before July 1:

- The valuation manual is adopted by the NAIC by an affirmative vote of at least 42 members, or three-fourths of the members voting, whichever is greater;
- The Standard Valuation Law, as amended by the NAIC in 2009, or substantially similar legislation, is enacted by states representing greater than 75 percent of the direct premiums written as reported in the following annual statements submitted for 2008: life, accident and health annual statements; health annual statements; or fraternal annual statements; and
- The Standard Valuation Law, as amended by the NAIC in 2009, or substantially similar legislation, has been enacted by at least 42 of the 55 jurisdictions.

The bill requires the OIR to value insurer reserves annually. The OIR may accept a valuation made by another insurance state supervisory official. Insurers are required to submit an actuarial opinion of reserves and memorandum to support each actuarial opinion on an annual basis. The bill provides minimum standard of valuation with exceptions. The OIR may require an insurer to

[19] According to the NAIC 2010 Standard Valuation Law, the term "deposit-type contract" means contracts that do not incorporate mortality or morbidity risks and as may be specified in the valuation manual.

change any assumption or method. The OIR may exempt specific product forms or product lines of a domestic company that is licensed and doing business in Florida from the minimum standards of valuation and the principal-based valuation requirements if certain conditions are met. The Financial Services Commission is authorized to adopt rules to implement s. 625.1212, F.S. Such rules are not subject to s. 120.541(3), F.S., which requires legislative ratification of agency rules having a private sector impact of more than $1 million over 5 years.

Section 8 provides that documents and other information created, produced, or obtained pursuant to ss. 625.121 and 625.1212, F.S., are privileged, confidential, and exempt as provided in s. 624.4212, F.S. CS/SB 1300, which creates s. 624.4212, F.S., is linked to this bill. These documents and other information are not subject to subpoena or discovery, or admissible in evidence in any private civil action. The bill provides that the Department of Financial Services or the OIR may use confidential and exempt information in the furtherance of any regulatory or legal action brought against an insurer as part of the official duties of the department or office.

This section also provides that neither the OIR nor any person who receives information while acting under the authority of the OIR or with whom such information is shared may be permitted or required to testify in any private civil action concerning such confidential and exempt information. These changes incorporate a provision of the NAIC Standard Valuation Law which provides that the information is not subject to subpoena or discovery, and is not admissible in any civil action in either documentary or testimonial form.

Standard Nonforfeiture Law for Life Insurers

Section 9 provides for the application of the valuation manual for policies issued on or after the operative date of the manual. The bill provides technical conforming changes. The bill also addresses a potential federal income tax issue relating to life insurance contracts by establishing a 4 percent minimum interest rate. Currently, the interest rate per annum for any policy issued in a calendar year is equal to 125 percent of the calendar year statutory valuation interest for such policy as defined in the Standard Valuation Law. The 4 percent floor created by the bill is the annual effective rate used to determine the net single premium for purposes of cash-value accumulation test under Section 7702(b) of the IRC.[20] This provision codifies an amendment to Standard Nonforfeiture Law for Life Insurance, which was adopted by the NAIC.[21] According to the NAIC, the establishment of this floor addresses a concern that the interest rate could decline below 4 percent, resulting in traditional life insurance being noncompliant with the maximum cash value requirements of the IRC Section 7702, and not qualify as a life insurance contract for federal income tax purposes.

[20] 26 U.S.C. s. 7702(a) provides that, for a contract to qualify as a life insurance contract for Federal income tax purposes, the contract must be a life insurance contract under the applicable law and must either (1) satisfy the cash value accumulation test of s. 7702(b), or (2) both meet the guideline premium requirements of § 7702(c) and fall within the cash value corridor of s. 7702(d).

[21] The NAIC Executive Committee adopted this change at the 2013 Fall NAIC Meeting.

Effective Date (Section 18)

Section 18 provides that except as otherwise expressly provided in the bill, the act will take effect October 1, 2014, if CS/SB 1300 or similar legislation is adopted in the same legislative session or an extension thereof, and becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Insurers may incur an indeterminate amount of administrative costs associated with complying with the additional reporting requirements and implementing principle based reserves (PBR), and the OIR's participation in the supervisory colleges. The PBR requirements apply to policies issued on or after the operative date of the valuation manual.

Advocates of principle based reserves state that the method will reduce redundant reserves that are required pursuant to the current formulaic approach, thereby leading to lower prices for life insurance products, increasing consumer choices of products, and freeing up capital for insurers. Insurers will have the option to phase in the PBR requirements over 3 years after the valuation manual is effective, which would be no earlier than January 1, 2017, as provided in the bill.

C. Government Sector Impact:

The bill provides greater solvency tools and regulatory authority for the OIR. The supervisory college will provide greater coordination of efforts in the examination of multistate insurers and will reduce regulatory redundancies and expenses among the state regulators.

The OIR states there is no anticipated impact for fiscal year 2014-2015.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 624.10, 624.319, 624.402, 624.4085, 624.424, 625.121, 627.476, 628.461, 628.801, 628.803, 636.045, 641.225, and 641.255.

This bill creates the following sections of the Florida Statutes: 625.1212, 625.1214, 628.804, and 628.805.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on March 11, 2014:
The CS clarifies the process for rebutting a presumption of control and clarifies the definition of the term, "operative date." The CS also provides technical, conforming changes.

B. Amendments:

None.

774566

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Richter) recommended the following:

Senate Amendment

Delete line 311
and insert:
discovery directly from the office.

Delete lines 466 - 467
and insert:
119.07(1) and is not subject to subpoena or discovery directly from the office; however, the

774566

Delete lines 1088 - 1089
and insert:
s. 624.4212, and are not subject to subpoena or discovery directly from the office. However, the

Delete lines 1498 - 1499
and insert:
624.4212 and are not subject to subpoena or discovery directly from the office. A waiver of

381568

LEGISLATIVE ACTION

Senate . House

. . . . .

The Committee on Judiciary (Richter) recommended the following:

Senate Amendment

Delete lines 1365 - 1371
and insert:
(12)(a) A person may rebut a presumption of control by filing a disclaimer of control with the office on a form prescribed by the office. The disclaimer must fully disclose all material relationships and bases for affiliation between the person and the insurer as well as the basis for disclaiming the affiliation. In lieu of such form a person or acquiring party may file with

By the Committee on Banking and Insurance; and Senator Simmons

597-02475-14 20141308c1

A bill to be entitled

An act relating to insurer solvency; amending s. 624.10, F.S.; providing additional definitions applicable to the Florida Insurance Code; amending s. 624.319, F.S.; clarifying that production of documents does not waive the attorney-client or work-product privileges; amending s. 624.402, F.S.; conforming a cross-reference; amending s. 624.4085, F.S.; revising a definition; providing additional calculations for determining whether an insurer has a company action level event; revising provisions relating to mandatory control level events; amending s. 624.424, F.S.; requiring an insurer's annual statement to include an actuarial opinion summary; providing criteria for such summary; providing an exception for life and health insurers; updating provisions; requiring insurers reinsuring through a captive insurance company to file a report containing certain information; amending s. 625.121, F.S.; revising the Standard Valuation Law; distinguishing the provisions from valuations done pursuant to the National Association of Insurance Commissioner's (NAIC) valuation manual and incorporating certain provisions included in the manual; exempting certain documents from civil proceedings; revising the methods for evaluating the valuation of industrial life insurance policies; revising provisions relating to calculating additional premium; updating provisions relating to reserve calculations for indeterminate premium plans; creating

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s. 625.1212, F.S.; providing for the valuation of policies and contracts after the adoption of the NAIC's valuation manual; providing applicability; defining terms; requiring the office to value insurer reserves; requiring actuarial opinions of the reserves and a supporting memorandum to the opinions; requiring the insurer to apply the standard prescribed in the valuation manual; providing exceptions; providing requirements for a principle-based valuation of reserves; requiring an insurer to submit certain data to the office; directing the Financial Services Commission to adopt rules; creating s. 625.1214, F.S.; providing for the use of confidential information; prohibiting the use of such information in private civil actions; amending s. 627.476, F.S.; revising the Standard Nonforfeiture Law; distinguishing provisions subject to the valuation manual and providing for the application of tables found in the manual; amending s. 628.461, F.S.; revising the amount of outstanding voting securities of a domestic stock insurer or a controlling company which a person is prohibited from acquiring unless certain requirements have been met; deleting a provision authorizing an insurer to file a disclaimer of affiliation and control in lieu of a letter notifying the Office of Insurance Regulation of the Financial Services Commission of the acquisition of the voting securities of a domestic stock company under certain circumstances; requiring the statement notifying the office to include additional

information; conforming a provision to changes made by the act; providing that control is presumed to exist under certain conditions; specifying how control may be rebutted and how a controlling interest may be divested; deleting definitions; amending s. 628.801, F.S.; requiring an insurer to annually file a registration statement by a specified date; revising the requirements and standards for the rules establishing the information and statement form for the registration; requiring an insurer to file an annual enterprise risk report; authorizing the office to conduct examinations to determine the financial condition of registrants; providing that failure to file a registration or report is a violation of the section; providing additional grounds, requirements, and conditions with respect to a waiver from the registration requirements; amending s. 628.803, F.S.; providing sanctions for persons who violate certain provisions relating to the acquisition of controlling stock; creating s. 628.804, F.S.; providing for the groupwide supervision of international insurance groups; defining terms; providing for the selection of a groupwide supervisor; authorizing the commission to adopt rules; creating s. 628.805, F.S.; authorizing the office to participate in supervisory colleges; authorizing the office to assess fees on insurers for participation; amending ss. 636.045 and 641.225, F.S.; applying certain statutes related to solvency to prepaid limited health service organizations and

health maintenance organizations; amending s. 641.255, F.S.; providing for applicability of specified provisions to a health maintenance organization that is a member of a holding company; providing effective dates and a contingent effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 624.10, Florida Statutes, is amended to read:

624.10 Other definitions ~~Transacting insurance~~.—As used in the Florida Insurance Code, the term:

(1) "Affiliate" means an entity that exercises control over or is directly or indirectly controlled by the insurer through:

(a) Equity ownership of voting securities;

(b) Common managerial control; or

(c) Collusive participation by the management of the insurer and affiliate in the management of the insurer or the affiliate.

(2) "Affiliated person" of another person means:

(a) The spouse of the other person;

(b) The parents of the other person and their lineal descendants, or the parents of the other person's spouse and their lineal descendants;

(c) A person who directly or indirectly owns or controls, or holds with the power to vote, 10 percent or more of the outstanding voting securities of the other person;

(d) A person, 10 percent or more of whose outstanding voting securities are directly or indirectly owned or

controlled, or held with power to vote, by the other person;

(e) A person or group of persons who directly or indirectly control, are controlled by, or are under common control with the other person;

(f) An officer, director, partner, copartner, or employee of the other person;

(g) If the other person is an investment company, an investment adviser of such company, or a member of an advisory board of such company;

(h) If the other person is an unincorporated investment company not having a board of directors, the depositor of such company; or

(i) A person who has entered into a written or unwritten agreement to act in concert with the other person in acquiring or limiting the disposition of securities of a domestic stock insurer or controlling company.

(3) "Control," including the terms "controlling," "controlled by," and "under common control with," means the direct or indirect possession of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise. Control is presumed to exist if a person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing 10 percent or more of the voting securities of another person.

(4) "NAIC" means the National Association of Insurance Commissioners.

(5) "Transact" with respect to insurance includes any of

the following, in addition to other applicable provisions of this code:

(a) ~~(1)~~ Solicitation or inducement.

(b) ~~(2)~~ Preliminary negotiations.

(c) ~~(3)~~ Effectuation of a contract of insurance.

(d) ~~(4)~~ Transaction of matters subsequent to effectuation of a contract of insurance and arising out of it.

Section 2. Subsection (2) of section 624.319, Florida Statutes, is amended to read:

624.319 Examination and investigation reports.—

(2) The examination report ~~when~~ so filed is ~~shall be~~ admissible in evidence in any action or proceeding brought by the department or office against the person examined, or against its officers, employees, or agents. In all other proceedings, the admissibility of the examination report is governed by the evidence code. The department or office or its examiners may ~~at any time~~ testify and offer other proper evidence as to information secured or matters discovered during the course of an examination, regardless of whether ~~or not~~ a written report of the examination has been ~~either~~ made, furnished, or filed in the department or office. The production of documents during the course of an examination or investigation does not constitute a waiver of the attorney-client or work-product privileges.

Section 3. Paragraph (c) of subsection (8) of section 624.402, Florida Statutes, is amended to read:

624.402 Exceptions, certificate of authority required.—A certificate of authority shall not be required of an insurer with respect to:

(8)

(c) Subject to the limitations provided in this subsection, services, including those listed in the definition of the term "transact" in s. 624.10, may be provided by the insurer or an affiliated person as defined in s. 624.04 under common ownership or control with the insurer.

Section 4. Paragraph (g) of subsection (1), paragraph (a) of subsection (3), and paragraph (b) of subsection (6) of section 624.4085, Florida Statutes, are amended to read:

624.4085 Risk-based capital requirements for insurers.—

(1) As used in this section, the term:

(g) "Life and health insurer" means an ~~any~~ insurer authorized or eligible under the Florida Insurance Code to underwrite life or health insurance. The term includes a property and casualty insurer that writes accident and health insurance only. Effective January 1, 2015, the term also includes a health maintenance organization that is authorized in this state and one or more other states, jurisdictions, or countries and a prepaid limited health service organization that is authorized in this state and one or more other states, jurisdictions, or countries.

(3)(a) A company action level event includes:

1. The filing of a risk-based capital report by an insurer which indicates that:

a. The insurer's total adjusted capital is greater than or equal to its regulatory action level risk-based capital but less than its company action level risk-based capital; ~~or~~

b. If a life and health insurer reports using the life and health annual statement instructions, the insurer has total adjusted capital that is greater than or equal to its company

action level risk-based capital, but is less than the product of its authorized control level risk-based capital and 3.0 ~~2.5~~, and has a negative trend;

c. Effective January 1, 2015, if a life and health or property and casualty insurer reports using the health annual statement instructions, the insurer or organization has total adjusted capital that is greater than or equal to its company action level risk-based capital, but is less than the product of its authorized control level risk-based capital and 3.0, and triggers the trend test determined in accordance with the trend test calculation included in the Risk-Based Capital Forecasting and Instructions, Health, updated annually by the NAIC; or

d. If a property and casualty insurer reports using the property and casualty annual statement instructions, the insurer has total adjusted capital that is greater than or equal to its company action level risk-based capital, but less than the product of its authorized control level risk-based capital and 3.0, and triggers the trend test determined in accordance with the trend test calculation included in the Risk-Based Capital Forecasting and Instructions, Property/Casualty, updated annually by the NAIC;

2. The notification by the office to the insurer of an adjusted risk-based capital report that indicates an event in subparagraph 1., unless the insurer challenges the adjusted risk-based capital report under subsection (7); or

3. If, under subsection (7), an insurer challenges an adjusted risk-based capital report that indicates an event in subparagraph 1., the notification by the office to the insurer that the office has, after a hearing, rejected the insurer's

challenge.

(6)

(b) If a mandatory control level event occurs:

1. With respect to a life and health insurer, the office shall, after due consideration of s. 624.408, and effective January 1, 2015, ss. 636.045 and 641.225, take any action necessary to place the insurer under regulatory control, including any remedy available under chapter 631. A mandatory control level event is sufficient ground for the department to be appointed as receiver as provided in chapter 631. The office may forego taking action for up to 90 days after the mandatory control level event if the office finds there is a reasonable expectation that the ~~mandatory control level~~ event may be eliminated within the 90-day period.

2. With respect to a property and casualty insurer, the office shall, after due consideration of s. 624.408, take any action necessary to place the insurer under regulatory control, including any remedy available under chapter 631, or, in the case of an insurer that is not writing new business, may allow the insurer to continue to operate under the supervision of the office. In either case, the mandatory control level event is sufficient ground for the department to be appointed as receiver as provided in chapter 631. The office may forego taking action for up to 90 days after the mandatory control level event if the office finds there is a reasonable expectation that the ~~mandatory control level~~ event may ~~will~~ be eliminated within the 90-day period.

Section 5. Subsection (1) and paragraph (e) of subsection (8) of section 624.424, Florida Statutes, are amended, and

subsection (11) is added to that section, to read:

624.424 Annual statement and other information.—

(1)(a) Each authorized insurer shall file with the office full and true statements of its financial condition, transactions, and affairs. An annual statement covering the preceding calendar year shall be filed on or before March 1, and quarterly statements covering the periods ending on March 31, June 30, and September 30 shall be filed within 45 days after each such date. The office may, for good cause, grant an extension of time for filing ~~of~~ an annual or quarterly statement. The statements must ~~shall~~ contain information generally included in insurers' financial statements prepared in accordance with generally accepted insurance accounting principles and practices and in a form generally used ~~utilized~~ by insurers for financial statements, sworn to by at least two executive officers of the insurer or, if a reciprocal insurer, by ~~the~~ oath of the attorney in fact or its like officer if a corporation. To facilitate uniformity in financial statements and to facilitate office analysis, the commission may by rule adopt the form and instructions for financial statements approved by the NAIC in 2014 ~~National Association of Insurance Commissioners in 2002~~, and ~~may adopt~~ subsequent amendments thereto if the methodology remains substantially consistent, and may by rule require each insurer to submit to the office, or such organization as the office may designate, all or part of the information contained in the financial statement in a computer-readable form compatible with the electronic data processing system specified by the office.

(b) Each insurer's annual statement must contain:

1. A statement of opinion on loss and loss adjustment expense reserves made by a member of the American Academy of Actuaries or by a qualified loss reserve specialist, pursuant to ~~under~~ criteria established by rule of the commission. In adopting the rule, the commission shall ~~must~~ consider any criteria established by the NAIC ~~National Association of Insurance Commissioners~~. The office may require semiannual updates of the annual statement of opinion for ~~as to~~ a particular insurer if the office has reasonable cause to believe that such reserves are understated to the extent of materially misstating the financial position of the insurer. Workpapers in support of the statement of opinion must be provided to the office upon request. This paragraph does not apply to life insurance, health insurance, or title insurance.

2. An actuarial opinion summary written by the insurer's appointed actuary. The summary must be filed in accordance with the appropriate NAIC property and casualty annual statement instructions. Proprietary business information contained in the summary is confidential and exempt under s. 624.4212, and the summary and related information are not subject to subpoena or discovery or admissible in evidence in a private civil action. Neither the office nor any person who received documents, materials, or other information while acting under the authority of the office, or with whom such information is shared pursuant to s. 624.4212, may testify in a private civil action concerning such confidential information. However, the department or office may use the confidential and exempt information in the furtherance of any regulatory or legal action brought against an insurer as a part of the official duties of the department or

office. No waiver of any other applicable claim of confidentiality or privilege may occur as a result of a disclosure to the office under this section or any other section of the insurance code. This paragraph does not apply to life and health insurers subject to s. 625.121(3) before the operative date of the valuation manual as defined in s. 625.1212(2), and does not apply to life and health insurers subject to s. 625.1212(4) on or after such operative date.

(c) The commission may by rule require reports or filings required under the insurance code to be submitted by electronic means in a computer-readable form compatible with the electronic data processing equipment specified by the commission.

(8)

(e) The commission shall adopt rules to administer ~~implement~~ this subsection~~,~~ which ~~rules~~ must be in substantial conformity with the 2006 Annual Financial Reporting Model Regulation ~~1998 Model Rule requiring annual audited financial reports~~ adopted by the NAIC ~~National Association of Insurance Commissioners~~ or subsequent amendments, except where inconsistent with the requirements of this subsection. Any exception to, waiver of, or interpretation of accounting requirements of the commission must be in writing and signed by an authorized representative of the office. An ~~No~~ insurer may not raise an ~~as a defense in any action, any~~ exception to, waiver of, or interpretation of accounting requirements as a defense in an action, unless previously issued in writing by an authorized representative of the office.

(11) Each insurer doing business in this state which reinsures through a captive insurance company as defined in s.

628.901, but without regard to domiciliary status, shall, in conjunction with the annual financial statement required under paragraph (1)(a), file a report with the office containing financial information specific to reinsurance assumed by each captive.

(a) The report shall be filed as a separate schedule designed to avoid duplication of disclosures required by the NAIC's annual statement and instructions.

(b) Insurers must:

1. Identify the products ceded to the captive and whether the products are subject to rule 69O-164.020, Florida Administrative Code, the NAIC Valuation of Life Insurance Policies Regulation (Model #830), or the NAIC Actuarial Guideline XXXVIII (AG 38).

2. Disclose the assets of the captive in the format prescribed in the NAIC annual statement schedules.

3. Include a stand-alone actuarial opinion or certification identifying the differences between the assets the ceding company would be required to hold and the assets held by the captive.

Section 6. Subsection (2), paragraphs (a) and (b) of subsection (3), subsection (5), paragraph (e) of subsection (6), and subsections (10), (11), and (12) of section 625.121, Florida Statutes, are amended to read:

625.121 Standard Valuation Law; life insurance.—

(2) ANNUAL VALUATION.—The office shall annually value, or cause to be valued, the reserves ~~reserve liabilities, hereinafter called "reserves,"~~ for all outstanding life insurance policies and annuity and pure endowment contracts of

each ~~every~~ life insurer doing business in this state~~, and may certify the amount of any such reserves, specifying the mortality table or tables, rate or rates of interest, and methods, net-level premium method or others, used in the calculation of such reserves~~. In the case of an alien insurer, such valuation is ~~shall be~~ limited to its insurance transactions in the United States. In calculating ~~such~~ reserves, the office may use group methods and approximate averages for fractions of a year or otherwise, and~~. It~~ may accept ~~in its discretion~~ the insurer's calculation of such reserves. In lieu of the valuation of the reserves ~~herein~~ required of a ~~any~~ foreign or alien insurer, the office ~~it~~ may accept any valuation made or caused to be made by the insurance supervisory official of any state or other jurisdiction if the ~~when such~~ valuation complies with the minimum standard ~~herein~~ provided under this section ~~and if the official of such state or jurisdiction accepts as sufficient and valid for all legal purposes the certificate of valuation of the office when such certificate states the valuation to have been made in a specified manner according to which the aggregate reserves would be at least as large as if they had been computed in the manner prescribed by the law of that state or jurisdiction~~. If a ~~When any such~~ valuation is made by the office, the office ~~it~~ may use its ~~the~~ actuary ~~of the office~~ or employ an actuary for that ~~the~~ purpose; and the reasonable compensation of the actuary, at a rate approved by the office, plus ~~and~~ reimbursement of travel expenses pursuant to s. 624.320 ~~upon demand by the office~~, supported by an itemized statement of such compensation and expenses, shall be paid by the insurer upon demand of the office. If ~~When~~ a domestic insurer furnishes

the office with a valuation of its outstanding policies as computed by its own actuary or by an actuary deemed satisfactory for that ~~the~~ purpose by the office, the valuation shall be verified by the actuary of the office without cost to the insurer. This section applies to the calculation of reserves for policies and contracts not subject to s. 625.1212.

(3) ACTUARIAL OPINION OF RESERVES.—

(a)~~1.~~ Each life insurer ~~insurance company~~ doing business in this state shall annually submit the opinion of a qualified actuary as to whether the reserves and related actuarial items held in support of the policies and contracts specified by the commission by rule are computed appropriately, are based on assumptions that ~~which~~ satisfy contractual provisions, are consistent with prior reported amounts, and comply with applicable laws of this state. The commission by rule shall define the specifics of this opinion and add any other items determined ~~to be~~ necessary to its scope.

1.~~2.~~ The opinion shall be submitted with the annual statement and must reflect ~~reflecting~~ the valuation of such reserve liabilities for each year ending on or before ~~after~~ December 31 of the year before the operative date of the valuation manual as defined in s. 625.1212(2), and in accordance with s. 625.1212(4) for each year thereafter~~, 1992~~.

2.~~3.~~ The opinion applies ~~shall apply~~ to all business in force, including individual and group health insurance plans, in the form and substance acceptable to the office as specified by rule of the commission.

3.~~4.~~ The commission may adopt rules providing the standards of the actuarial opinion consistent with standards adopted by

the Actuarial Standards Board on December 31, 2013 ~~2002~~, and subsequent revisions thereto if~~, provided that~~ the standards remain substantially consistent.

4.~~5. In the case of an opinion required to be submitted by a foreign or alien company,~~ The office may accept an ~~the~~ opinion filed by a foreign or alien insurer ~~that company~~ with the insurance supervisory official of another state if the office determines that the opinion reasonably meets the requirements applicable to an insurer ~~a company~~ domiciled in this state.

5.~~6.~~ As used in ~~For the purposes of~~ this subsection, the term "qualified actuary" means a member in good standing of the American Academy of Actuaries who also meets the requirements specified by rule of the commission.

6.~~7.~~ Disciplinary action by the office against the insurer ~~company~~ or the qualified actuary shall be in accordance with the insurance code and related rules adopted by the commission.

7.~~8.~~ A memorandum in the form and substance specified by rule shall be prepared to support each actuarial opinion.

8.~~9.~~ If the insurer ~~insurance company~~ fails to provide a supporting memorandum at the request of the office within a period specified by rule of the commission, or if the office determines that the supporting memorandum provided by the insurer ~~insurance company~~ fails to meet the standards prescribed by rule of the commission, the office may engage a qualified actuary at the expense of the insurer ~~company~~ to review the opinion and the basis for the opinion and prepare such supporting memorandum as ~~is~~ required by the office.

9.~~10.~~ Except as otherwise provided in this subparagraph ~~paragraph~~, any memorandum or other material in support of the

opinion is confidential and exempt from ~~the provisions of~~ s. 119.07(1) and is not subject to subpoena or discovery or admissible in evidence in any private civil action; however, the memorandum or other material may be released by the office with the written consent of the insurer ~~company~~, or to the American Academy of Actuaries upon request stating that the memorandum or other material is required for the purpose of professional disciplinary proceedings and setting forth procedures satisfactory to the office for preserving the confidentiality of the memorandum or other material. If any portion of the confidential memorandum is cited by the insurer ~~company~~ in its marketing, ~~or~~ is cited before any governmental agency other than a state insurance department, or is released by the insurer ~~company~~ to the news media, no portion of the memorandum is confidential. Neither the office nor any person who receives documents, materials, or other information while acting under the authority of the office or with whom such information is shared pursuant to this paragraph may testify in a private civil action concerning the confidential documents, materials, or information. However, the department or office may use the confidential and exempt information in the furtherance of any regulatory or legal action brought against an insurer as a part of the official duties of the department or office. A waiver of an applicable privilege or claim of confidentiality in the documents, materials, or information may not occur as a result of disclosure to the office under this section or any other section of the insurance code, or as a result of sharing as authorized under s. 624.4212.

(b) In addition to the opinion required by paragraph (a)

~~subparagraph (a)1.~~, the office may, pursuant to commission rule, require an opinion of the same qualified actuary as to whether the reserves and related actuarial items held in support of the policies and contracts specified by the commission by rule, when considered in light of the assets held by the insurer ~~company~~ with respect to the reserves and related actuarial items, including, but not limited to, the investment earnings on the assets and considerations anticipated to be received and retained under the policies and contracts, make adequate provision for the insurer's ~~company's~~ obligations under the policies and contracts, including, but not limited to, the benefits under, and expenses associated with, the policies and contracts.

(5) MINIMUM STANDARD FOR VALUATION OF POLICIES AND CONTRACTS ISSUED ON OR AFTER OPERATIVE DATE OF THE STANDARD NONFORFEITURE LAW.—Except as otherwise provided in paragraph (h) and subsections (6), (13) ~~(11)~~, and (14), the minimum standard for the valuation of all such policies and contracts issued on or after the operative date of s. 627.476 ~~(Standard Nonforfeiture Law for Life Insurance)~~ shall be the commissioners' reserve valuation method defined in subsections (7), (11), and (14); 5 percent interest for group annuity and pure endowment contracts and 3.5 percent interest for all other such policies and contracts, or in the case of life insurance policies and contracts, other than annuity and pure endowment contracts, issued on or after July 1, 1973, 4 percent interest for such policies issued prior to October 1, 1979, and 4.5 percent interest for such policies issued on or after October 1, 1979; and the following tables:

(a) For all ordinary policies of life insurance issued on the standard basis, excluding any disability and accidental death benefits in such policies:

1. For policies issued before ~~prior to~~ the operative date of s. 627.476(9), the ~~commissioners'~~ 1958 Commissioners Standard Ordinary (CSO) Mortality Table; except that, for any category of such policies issued on female risks, modified net premiums and present values, referred to in subsection (7), may be calculated according to an age up to ~~not more than~~ 6 years younger than the actual age of the insured.

2. For policies issued on or after the operative date of s. 627.476(9), the ~~commissioners'~~ 1980 Commissioners Standard Ordinary Mortality Table or, at the election of the insurer for any one or more specified plans of life insurance, the ~~commissioners'~~ 1980 Commissioners Standard Ordinary Mortality Table with Ten-Year Select Mortality Factors.

3. For policies issued on or after July 1, 2004, ordinary mortality tables, adopted after 1980 by the NAIC ~~National Association of Insurance Commissioners~~, adopted by rule by the commission for use in determining the minimum standard of valuation for such policies.

(b) For all industrial life insurance policies issued on the standard basis, excluding any disability and accidental death benefits in such policies:

1. For policies issued before ~~prior to~~ the first date ~~to which~~ the ~~commissioners'~~ 1961 Commissioners Standard Industrial Mortality Table is applicable according to s. 627.476, the 1941 Standard Industrial Mortality Table; ~~and~~

2. For ~~such~~ policies issued on or after that date, the

~~commissioners'~~ 1961 Commissioners Standard Industrial Mortality Table; and

3. For policies issued on or after October 1, 2014, a Commissioners Standard Industrial Mortality Table adopted by the NAIC after 1980 which is adopted by rule of the commission for use in determining the minimum standard of valuation for such policies.

(c) For individual annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies, the 1937 Standard Annuity Mortality Table or, at the option of the insurer, the Annuity Mortality Table for 1949, Ultimate, or any modification of ~~either of~~ these tables approved by the office.

(d) For group annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies, the Group Annuity Mortality Table for 1951; any modification of such table approved by the office; or, at the option of the insurer, any of the tables or modifications of tables specified for individual annuity and pure endowment contracts.

(e) For total and permanent disability benefits in or supplementary to ordinary policies or contracts:

1. For policies or contracts issued on or after January 1, 1966, the tables of period 2 disablement rates and the 1930 to 1950 termination rates of the 1952 disability study of the Society of Actuaries, with due regard to the type of benefit;

2. For policies or contracts issued on or after January 1, 1961, and before ~~prior to~~ January 1, 1966, either of the tables specified in subparagraph 1. ~~those tables~~ or, at the option of

the insurer, the class three disability table (1926);

3. For policies issued before ~~prior to~~ January 1, 1961, the class three disability table (1926); and

4. For policies or contracts issued on or after July 1, 2004, tables of disablement rates and termination rates adopted after 1980 by the NAIC ~~National Association of Insurance Commissioners~~, adopted by rule by the commission for use in determining the minimum standard of valuation for those policies or contracts.

Any such table for active lives shall be combined with a mortality table permitted for calculating the reserves for life insurance policies.

(f) For accidental death benefits in or supplementary to policies:

1. For policies issued on or after January 1, 1966, the 1959 Accidental Death Benefits Table;

2. For policies issued on or after January 1, 1961, and before ~~prior to~~ January 1, 1966, the 1959 Accidental Death Benefits ~~either that~~ Table or, at the option of the insurer, the Intercompany Double Indemnity Mortality Table;

3. For policies issued before ~~prior to~~ January 1, 1961, the Intercompany Double Indemnity Mortality Table; and

4. For policies issued on or after July 1, 2004, tables of accidental death benefits adopted after 1980 by the NAIC ~~National Association of Insurance Commissioners~~, adopted by rule by the commission for use in determining the minimum standard of valuation for those policies.

Either table shall be combined with a mortality table permitted for calculating the reserves for life insurance policies.

(g) For group life insurance, life insurance issued on the substandard basis, and other special benefits, such tables as may be approved by the office as being sufficient with relation to the benefits provided by such policies.

(h) Except as provided in subsection (6), the minimum standard for the valuation of all individual annuity and pure endowment contracts issued on or after the operative date of this paragraph and for all annuities and pure endowments purchased on or after such operative date under group annuity and pure endowment contracts shall be the commissioners' reserve valuation method defined in subsection (7) and the following tables and interest rates:

1. For individual annuity and pure endowment contracts issued before ~~prior to~~ October 1, 1979, excluding any disability and accidental death benefits in such contracts, the 1971 Individual Annuity Mortality Table, or any modification of this table approved by the office, and 6 percent interest for single-premium immediate annuity contracts and 4 percent interest for all other individual annuity and pure endowment contracts.

2. For individual single-premium immediate annuity contracts issued on or after October 1, 1979, and before ~~prior to~~ October 1, 1986, excluding any disability and accidental death benefits in such contracts, the 1971 Individual Annuity Mortality Table, or any modification of this table approved by the office, and 7.5 percent interest. For such contracts issued on or after October 1, 1986, the 1983 Individual Annual Mortality Table, or any modification of such table approved by

the office, and the applicable calendar year statutory valuation interest rate as described in subsection (6).

3. For individual annuity and pure endowment contracts issued on or after October 1, 1979, and before ~~prior to~~ October 1, 1986, other than single-premium immediate annuity contracts, excluding any disability and accidental death benefits in such contracts, the 1971 Individual Annuity Mortality Table, or any modification of this table approved by the office, and 5.5 percent interest for single-premium deferred annuity and pure endowment contracts and 4.5 percent interest for all other such individual annuity and pure endowment contracts. For such contracts issued on or after October 1, 1986, the 1983 Individual Annual Mortality Table, or any modification of such table approved by the office, and the applicable calendar year statutory valuation interest rate as described in subsection (6).

4. For all annuities and pure endowments purchased before ~~prior to~~ October 1, 1979, under group annuity and pure endowment contracts, excluding any disability and accidental death benefits purchased under such contracts, the 1971 Group Annuity Mortality Table, or any modification of this table approved by the office, and 6 percent interest.

5. For all annuities and pure endowments purchased on or after October 1, 1979, and before ~~prior to~~ October 1, 1986, under group annuity and pure endowment contracts, excluding ~~any~~ disability and accidental death benefits purchased under such contracts, the 1971 Group Annuity Mortality Table, or any modification of this table approved by the office, and 7.5 percent interest. For such contracts purchased on or after

October 1, 1986, the 1983 Group Annuity Mortality Table, or any modification of such table approved by the office, and the applicable calendar year statutory valuation interest rate as described in subsection (6).

After July 1, 1973, an ~~any~~ insurer may have filed with the former Department of Insurance a written notice of its election to comply with ~~the provisions of~~ this paragraph after a specified date before January 1, 1979, which shall be the operative date of this paragraph for such insurer. However, an insurer may elect a different operative date for individual annuity and pure endowment contracts from that elected for group annuity and pure endowment contracts. If an insurer does not make ~~makes no~~ such election, the operative date of this paragraph for such insurer is ~~shall be~~ January 1, 1979.

(i) In lieu of the mortality tables specified in this subsection, and subject to rules previously adopted by the former Department of Insurance, the insurance company may, at its option:

1. Substitute the applicable 1958 CSO or CET Smoker and Nonsmoker Mortality Tables, in lieu of the 1980 CSO or CET mortality table standard, for policies issued on or after the operative date of s. 627.476(9) and before January 1, 1989.

2. Substitute the applicable 1980 CSO or CET Smoker and Nonsmoker Mortality Tables in lieu of the 1980 CSO or CET mortality table standard.~~,~~

3. Use the Annuity 2000 Mortality Table for determining the minimum standard of valuation for individual annuity and pure endowment contracts issued on or after January 1, 1998, and

before July 1, 1998.

4. Use the 1994 GAR Table for determining the minimum standard of valuation for annuities and pure endowments purchased on or after January 1, 1998, and before July 1, 1998, under group annuity and pure endowment contracts.

(j) The commission may adopt by rule the model regulation for valuation of life insurance policies as approved by the NAIC ~~National Association of Insurance Commissioners~~ in March 1999, including tables of select mortality factors, and may make the regulation effective for policies issued on or after January 1, 2000.

(k) For individual annuity and pure endowment contracts issued on or after July 1, 2004, excluding ~~any~~ disability and accidental death benefits purchased under those contracts, individual annuity mortality tables adopted after 1980 by the NAIC ~~National Association of Insurance Commissioners~~, adopted by rule by the commission for use in determining the minimum standard of valuation for those contracts.

(l) For all annuities and pure endowments purchased on or after July 1, 2004, under group annuity and pure endowment contracts, excluding ~~any~~ disability and accidental death benefits purchased under those contracts, group annuity mortality tables adopted after 1980 by the NAIC ~~National Association of Insurance Commissioners~~, adopted by rule by the commission for use in determining the minimum standard of valuation for those contracts.

(6) MINIMUM STANDARD OF VALUATION.—

(e) The interest rate index shall be the Moody's Corporate Bond Yield Average-Monthly Average Corporates as published by

Moody's Investors Service, Inc., if the ~~as long as this~~ index is calculated by using substantially the same methodology ~~as~~ used by Moody's ~~it~~ on January 1, 1981. If Moody's corporate bond yield average ceases to be calculated in substantially the same ~~this~~ manner, the interest rate index shall be the index specified in the valuation manual, as applicable, as provided under s. 625.1212, or an index adopted by the NAIC and approved by rule adopted ~~promulgated~~ by the commission. The methodology used in determining the index approved by rule must ~~shall~~ be substantially the same as the methodology employed on January 1, 1981, for determining Moody's Corporate Bond Yield Average-Monthly Average Corporates as published by Moody's Investors Service, Inc.

(10) LOWER VALUATIONS.—An insurer that ~~which at any time had~~ adopted a ~~any~~ standard of valuation producing greater aggregate reserves than those calculated according to the minimum standard ~~herein~~ provided under this section shall ~~may~~, with the approval of the office, adopt a ~~any~~ lower standard of valuation, but not lower than the minimum herein provided; however, for the purposes of this subsection, the holding of additional reserves previously determined by an appointed ~~a qualified~~ actuary, as defined in s. 625.1212(2), to be necessary to render the opinion required by subsection (3) may ~~shall~~ not be deemed to be the adoption of a higher standard of valuation.

(11) ADDITIONAL PREMIUM ~~DEFICIENCY RESERVE~~.—If in any contract year the gross premium charged by a ~~any~~ life insurer on a ~~any~~ policy or contract is less than the valuation net premium for the policy or contract calculated by the method used in calculating the reserve thereon but using the minimum valuation

standards of mortality and rate of interest, the minimum premium reserve required for the policy or contract shall be the greater of the reserve calculated according to the actual mortality table, rate of interest, and method used for the policy or contract, or the actual method used for the policy or contract but using the minimum valuation standards of mortality and rate of interest and replacing the valuation net premium by the actual gross premium in each contract year for which the valuation net premium exceeds the actual gross premium. The minimum valuation standards of mortality and rate of interest are those standards ~~there shall be maintained on such policy or contract a deficiency reserve in addition to the reserve~~ defined by subsections (4), (5), and (6) ~~(7) and (12)~~. ~~For each such policy or contract, the deficiency reserve shall be the present value, according to the minimum valuation standards of mortality and rate of interest, of the differences between all such valuation net premiums and the corresponding premiums charged for such policy or contract during the remainder of the premium-paying period. For any category of policies, contracts, or benefits specified in subsections (5) and (6), issued on or after the operative date of s. 627.476 (the Standard Nonforfeiture Law for Life Insurance), the aggregate deficiency reserves may be reduced by the amount, if any, by which the aggregate reserves actually calculated in accordance with subsection (9) exceed the minimum aggregate reserves prescribed by subsection (8). The minimum valuation standards of mortality and rate of interest referred to in this subsection are those standards stated in subsections (5) and (6). However,~~ For any life insurance policy that ~~which~~ is issued on or after January

1, 1985, for which the gross premium in the first policy year exceeds that of the second year and for which no comparable additional benefit is provided in the first year for such excess, and which provides an endowment benefit, a cash surrender value, or a combination thereof in an amount greater than such excess premium, the foregoing provisions of this subsection shall be applied as if the method actually used in calculating the reserve for such policy were the method described in subsection (7), the provisions of subparagraph (7)(a)2. being ignored. The minimum premium reserve amount ~~of the deficiency reserve~~, if any, at each policy anniversary of such a policy is ~~shall be~~ the excess, if any, of the amount determined by the foregoing provisions of this subsection plus the reserve calculated by the method described in subsection (7), the provisions of subparagraph (7)(a)2. being ignored, over the reserve actually calculated by the method described in subsection (7), the provisions of subparagraph (7)(a)2. being taken into account.

(12) RESERVE CALCULATION FOR INDETERMINATE PREMIUM PLANS ~~ALTERNATE METHOD FOR DETERMINING RESERVES IN CERTAIN CASES~~.—In the case of a ~~any~~ plan of life insurance which provides for future premium determination, the amounts of which are to be determined by the insurer based on then estimates of future experience, or in the case of a ~~any~~ plan of life insurance or annuity for which ~~is of such a nature that~~ the minimum reserves cannot be determined by the methods described in subsections (7) and (11) ~~subsection (7)~~, the reserves that ~~which~~ are held under ~~any~~ such plan must ~~shall~~:

(a) Be appropriate in relation to the benefits and the

pattern of premiums for that plan; and

(b) Be computed by a method that ~~which~~ is consistent with the principles of this section, as determined by rules adopted ~~promulgated~~ by the commission.

Section 7. Section 625.1212, Florida Statutes, is created to read:

625.1212 Valuation of policies and contracts issued on or after the operative date of the valuation manual.—

(1) APPLICABILITY.—This section applies to life insurance contracts, accident and health insurance contracts, and deposit-type contracts issued on or after the operative date of the valuation manual unless the manual requires or permits an insurer to determine reserves according to the standards in effect before the operative date of the manual and rules adopted by the commission as provided under s. 625.121. Subsections (5) and (6) do not apply to policies and contracts subject to s. 625.121.

(2) DEFINITIONS.—As used in this section, the term:

(a) "Accident and health insurance" means contracts that incorporate morbidity risk and provide protection against economic loss resulting from accident, sickness, or medical conditions and as may be specified in the valuation manual.

(b) "Appointed actuary" means a qualified actuary who is appointed in accordance with the valuation manual to prepare the actuarial opinion required in subsection (4).

(c) "Deposit-type contract" means contracts that do not incorporate mortality or morbidity risks and as may be specified in the valuation manual.

(d) "Insurer" means a person engaged as an indemnitor,

surety, or contractor in the business of entering into contracts of insurance or reinsurance.

(e) "Life insurance" means policies or contracts that incorporate mortality risk, including annuity and pure endowment contracts, and as may be specified in the valuation manual.

(f) "Operative date of the valuation manual" means the later of January 1, 2017, or the January 1 immediately following the July 1 that the Commissioner of the Office of Insurance Regulation certifies to the Financial Services Commission in writing that the following conditions occurred on or before July 1:

1. The valuation manual is adopted by the NAIC by an affirmative vote of at least 42 members of the NAIC or 75 percent of members voting, whichever is greater;

2. The Standard Valuation Law, as amended by the NAIC in 2009, or substantially similar legislation, is enacted in states representing more than 75 percent of the direct premiums written as reported in the 2008 annual statements for life, accident and health, health, or fraternal society insurance; and

3. The Standard Valuation Law as amended by the NAIC in 2009, or substantially similar legislation, is enacted in at least 42 of the following 55 jurisdictions: the 50 states of the United States, the District of Columbia, American Samoa, the American Virgin Islands, Guam, and Puerto Rico.

(g) "Policyholder behavior" means an action a policyholder, contract holder, or other person who has the right to elect options, such as a certificateholder, may take under a policy or contract subject to this section including, but not limited to, lapse, withdrawal, transfer, deposit, premium payment, loan,

annuitization, or benefit elections prescribed by the policy or contract but excluding events of mortality or morbidity that result in benefits prescribed in their essential aspects by the terms of the policy or contract.

(h) "Principle-based valuation" means a reserve valuation that uses one or more methods or assumptions determined by the insurer and must comply with subsection (6) as specified in the valuation manual.

(i) "Qualified actuary" means an individual who is qualified to sign the applicable statement of actuarial opinion in accordance with the American Academy of Actuaries qualification standards for actuaries signing such statements and who meets the requirements specified in the valuation manual.

(j) "Tail risk" means a risk that occurs when the frequency of low probability events is higher than expected under a normal probability distribution or when there are observed events of very significant size or magnitude.

(k) "Valuation manual" means the manual of valuation instructions adopted by the NAIC, or as subsequently amended.

(3) RESERVE VALUATION.—The office shall annually value, or cause to be valued, insurer reserves for all outstanding life insurance contracts, accident and health contracts, and deposit-type contracts in this state. Insurers are subject to subsections (5) and (6) when calculating the reserves. In lieu of the reserve valuation for a foreign or alien insurer, the office may accept a valuation made, or caused to be made, by the insurance supervisory official of any state or other jurisdiction if the valuation complies with the minimum standard

required in this section.

(4) ACTUARIAL OPINION OF RESERVES.—

(a) Each insurer that has outstanding life insurance contracts, accident and health insurance contracts, or deposit-type contracts in this state which are subject to regulation by the office must annually submit the opinion of a qualified actuary as to whether the reserves and related actuarial items held in support of the policies and contracts are computed appropriately, are based on assumptions that satisfy contractual provisions, are consistent with prior reported amounts, and comply with applicable state law. The specifics of the opinion, including any items deemed necessary to its scope, must be as prescribed by the valuation manual.

(b) Except as exempted in the valuation manual, each insurer that has outstanding life insurance contracts, accident and health insurance contracts, or deposit-type contracts in this state shall also annually include an opinion by the same appointed actuary as to whether the reserves and related actuarial items held in support of the policies and contracts specified in the valuation manual, when considered in light of the assets held by the insurer with respect to the reserves and related actuarial items, including, but not limited to, the investment earnings on the assets and the considerations anticipated to be received and retained under the policies and contracts, make adequate provision for the insurer's obligations under the policies and contracts, including, but not limited to, the benefits under and expenses associated with the policies and contracts.

(c) The insurer shall prepare a memorandum to support each

actuarial opinion in such form and substance as specified in the valuation manual and acceptable to the office. If the insurer fails to provide a supporting memorandum within the period specified in the valuation manual, or if the office determines that the supporting memorandum fails to meet the standards required by the manual or is otherwise unacceptable to the office, the office may engage a qualified actuary at the expense of the insurer to review the opinion and the basis for the opinion and to prepare the supporting memorandum.

(d) Each opinion subject to this subsection must be submitted with the annual statement in such form and substance as specified in the valuation manual and acceptable to the office, must reflect the valuation of the reserve liabilities for each year ending on or after the operative date of the valuation manual, and must apply to all policies and contracts subject to paragraph (b), plus other actuarial liabilities as may be specified in the valuation manual. The opinion must be based on standards adopted by the Actuarial Standards Board or its successor, and on such additional standards as may be prescribed in the valuation manual. For a foreign or alien insurer, the office may accept an opinion filed by the insurer with the insurance supervisory official of another state if the office determines that the opinion reasonably meets the requirements applicable to an insurer domiciled in this state.

(e) Disciplinary action by the office against the insurer or the appointed actuary shall be in accordance with the laws of this state and related rules adopted by the commission.

(5) MINIMUM STANDARD OF VALUATION.—

(a) In accordance with this subsection and subsection (6),

an insurer must apply the standard prescribed in the valuation manual as the minimum standard of valuation for contracts issued on or after the operative date of the valuation manual, except:

1. For specific product forms or product lines exempted pursuant to paragraph (f); or

2. That an insurer domiciled in a state that does not require the insurer to apply the standards prescribed in the valuation manual as the minimum standard of valuation, including the principle-based valuation of reserves, may not apply such standards in this state.

(b) If, in the opinion of the office, there is no specific valuation requirement or a specific valuation requirement in the valuation manual is not in compliance with this section, the insurer shall comply with the minimum valuation standards prescribed by the commission by rule.

(c) The office may engage a qualified actuary, at the insurer's expense, to perform an actuarial examination of the insurer and to render an opinion as to the appropriateness of any reserve assumption or method, or computer model or modeling software used by the insurer, or to review and provide an opinion on the insurer's compliance with the requirements of this section. In calculating and establishing reserves under this section, the insurer may rely on the modeling software and tools of a third-party vendor only if the vendor contractually agrees to allow the insurer to provide the office with access to the software or tools as necessary to replicate the results of the software or tools for the purpose of evaluating and validating reserve valuations. The office may rely upon the opinion of a qualified actuary employed by or under contract

with the commissioner of another state, district, or territory of the United States with respect to this section.

(d) The office may require an insurer to change any assumption or method that, in the opinion of the office, is necessary to comply with the valuation manual or this section. The insurer shall adjust the reserves as required by the office. The office may take other disciplinary action pursuant to applicable state law and rules.

(e) The commission may adopt subsequent amendments to the valuation manual by rule if the methodology and standards remain substantially consistent with the valuation manual then in effect.

(f) A domestic insurer licensed and doing business only in this state may exempt specific product forms or product lines from the requirements of this subsection and subsection (6) if the insurer computes reserves for the specific product forms or product lines using assumptions and methods used before the operative date of the valuation manual, and the amount of insurance subject to the stochastic or deterministic reserve requirement is immaterial. The requirements of s. 625.121 apply to specific product forms and product lines exempted under this paragraph.

(g) An insurer that adopted a standard of valuation producing greater aggregate reserves than those calculated according to the minimum standard provided under this section may, with the approval of the office, adopt a lower standard of valuation, but such standard may not be lower than the minimum provided in this subsection. For purposes of this subsection, holding additional reserves previously determined by an

appointed actuary to be necessary to render the opinion required by subsection (3) may not be deemed to be the adoption of a higher standard of valuation.

(6) REQUIREMENTS OF A PRINCIPLE-BASED VALUATION OF RESERVES.—

(a) Insurers required to use a principle-based valuation of reserves for specified product forms and product lines and associated policies and contracts, pursuant to subparagraph (5)(a)2., must:

1. Quantify the benefits and guarantees, and the funding associated with the policies or contracts and their risks at a level of conservatism that reflects conditions that:

a. Include unfavorable events that have a reasonable probability of occurring during the lifetime of the policies or contracts; and

b. Are appropriately adverse to quantifying the tail risk.

2. Incorporate assumptions, risk analysis methods, and financial models and management techniques that are consistent with, but not necessarily identical to, those used within the insurer's overall risk assessment process while recognizing potential differences in financial reporting structures and any prescribed assumptions or methods.

3. Incorporate assumptions that are derived in one of the following manners:

a. The assumption is prescribed in the valuation manual.

b. For assumptions that are not prescribed, the assumptions must:

(I) Be established using the insurer's available experience, to the extent that it is relevant and statistically

credible; or

(II) To the extent that insurer data is not available, relevant, or statistically credible, be established using other relevant, statistically credible experience.

4. Provide margins for uncertainty including adverse deviation and estimation error, such that the greater the uncertainty the larger the margin and resulting reserve.

(b) An insurer using a principle-based valuation for one or more policies or contracts subject to this section as specified in the valuation manual shall:

1. Establish procedures for corporate governance and oversight of the actuarial valuation function consistent with those prescribed in the valuation manual.

2. Submit an annual certification to the office and the insurer's board of directors of the effectiveness of internal controls on the principle-based valuation. The internal controls must be designed to assure that all material risks inherent in the liabilities and associated assets subject to the valuation are included in the valuation, and that valuations are made in accordance with the valuation manual. The certification must be based on controls in place as of the end of the preceding calendar year.

3. Upon request, develop and file with the office a principle-based valuation report that complies with standards prescribed in the valuation manual.

(c) A principle-based valuation may include a prescribed formulaic reserve component.

(7) EXPERIENCE REPORTING.—An insurer subject to the requirements of paragraph (5)(d) shall submit mortality,

morbidity, policyholder behavior, or expense experience and other data as prescribed in the valuation manual to the office.

(8) RULE ADOPTION.—The commission may adopt rules as necessary to administer this section, including rules requiring the use of the NAIC 2009 Standard Valuation Law and the NAIC 2012 Valuation Manual. The adoption of such rules is not subject to s. 120.541(3), and the rules do not take effect until the operative date of the valuation manual.

Section 8. Section 625.1214, Florida Statutes, is created to read:

625.1214 Use of confidential information.—

(1) Documents, reports, materials, and other information created, produced, or obtained pursuant to ss. 625.121 and 625.1212 are privileged, confidential, and exempt as provided in s. 624.4212, and are not subject to subpoena or discovery, or admissible in evidence in any private civil action. However, the department or office may use the confidential and exempt information in the furtherance of any regulatory or legal action brought against an insurer as a part of the official duties of the department or office. A waiver of any other applicable claim of confidentiality or privilege may not occur as a result of a disclosure to the office under this section, any other section of the insurance code, or as a result of sharing under s. 624.4212.

(2) Neither the office nor any person who received confidential and exempt information while acting under the authority of the office or with whom such information is shared pursuant to s. 624.4212 may be permitted or required to testify in a private civil action concerning any confidential and exempt

information subject to s. 624.4212. If any portion of the confidential memorandum is cited by the insurer in its marketing, is cited before a governmental agency other than a state insurance department, or is released by the insurer to the news media, no portion of the memorandum is confidential.

(3) A privilege established under the law of any state or jurisdiction that is substantially similar to the privilege established under subsection (1) shall be available and enforced in any proceeding in and in any court of this state.

Section 9. Paragraphs (h) and (i) of subsection (9) and subsection (14) of section 627.476, Florida Statutes, are amended to read:

627.476 Standard Nonforfeiture Law for Life Insurance.—

(9) CALCULATION OF ADJUSTED PREMIUMS AND PRESENT VALUES FOR POLICIES ISSUED AFTER OPERATIVE DATE OF THIS SUBSECTION.—

(h) All adjusted premiums and present values referred to in this section shall, for all policies of ordinary insurance be calculated on the basis of the ~~Commissioners'~~ 1980 Standard Ordinary Mortality Table adopted by the NAIC or, at the election of the insurer for any one or more specified plans of life insurance, the ~~Commissioners'~~ 1980 Standard Ordinary Mortality Table with Ten-Year Select Mortality Factors adopted by the NAIC; ~~shall~~ for all policies of industrial insurance be calculated on the basis of the ~~Commissioners'~~ 1961 Standard Industrial Mortality Table adopted by the NAIC; and ~~shall~~ for all policies issued in a particular calendar year be calculated on the basis of a rate of interest not exceeding the nonforfeiture interest rate as defined in this subsection for policies issued in that calendar year. However:

1. At the option of the insurer, calculations for all policies issued in a particular calendar year may be made on the basis of a rate of interest not exceeding the nonforfeiture interest rate, as defined in this subsection, for policies issued in the immediately preceding calendar year.

2. Under any paid-up nonforfeiture benefit, including any paid-up dividend additions, any cash surrender value available, whether ~~or not~~ required by subsection (2), shall be calculated on the basis of the mortality table and rate of interest used in determining the amount of such paid-up nonforfeiture benefit and paid-up dividend additions, if any.

3. An insurer may calculate the amount of any guaranteed paid-up nonforfeiture benefit, including any paid-up additions under the policy, on the basis of an interest rate no lower than that specified in the policy for calculating cash surrender values.

4. In calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may be not more than those shown in the ~~Commissioners'~~ 1980 Extended Term Insurance Table adopted by the NAIC for policies of ordinary insurance and not more than the ~~Commissioners'~~ 1961 Industrial Extended Term Insurance Table adopted by the NAIC for policies of industrial insurance.

5. In lieu of the mortality tables specified in this section, at the option of the insurance company and subject to rules adopted by the commission, the insurance company may substitute:

a. The 1958 CSO or CET Smoker and Nonsmoker Mortality

Tables, whichever is applicable, for policies issued on or after the operative date of this subsection and before January 1, 1989;

b. The 1980 CSO or CET Smoker and Nonsmoker Mortality Tables, whichever is applicable, for policies issued on or after the operative date of this subsection;

c. A mortality table that is a blend of the sex-distinct 1980 CSO or CET mortality table standard, whichever is applicable, or a mortality table that is a blend of the sex-distinct 1980 CSO or CET smoker and nonsmoker mortality table standards, whichever is applicable, for policies that are subject to the United States Supreme Court decision in *Arizona Governing Committee v. Norris* to prevent unfair discrimination in employment situations.

6. For policies issued:

a. Before the operative date of the valuation manual, ordinary mortality tables, adopted after 1980 by the NAIC ~~National Association of Insurance Commissioners~~, adopted by rule by the commission for use in determining the minimum nonforfeiture standard may be substituted for the ~~Commissioners'~~ 1980 Standard Ordinary Mortality Table with or without Ten-Year Select Mortality Factors or ~~for~~ the ~~Commissioners'~~ 1980 Extended Term Insurance Table adopted by the NAIC.

b. On or after the operative date of the valuation manual, the valuation manual shall provide the Standard Mortality Table for use in determining the minimum nonforfeiture standard that may be substituted for:

(I) The 1980 Standard Ordinary Mortality Table with or without 10-Year Select Mortality Factors or the 1980 Extended

Term Insurance Table adopted by the NAIC. If the commission approves by rule a Standard Ordinary Mortality Table adopted by the NAIC for use in determining the minimum nonforfeiture standard for policies issued on or after the operative date of the valuation manual, the minimum nonforfeiture standard supersedes the minimum nonforfeiture standard provided by the valuation manual.

(II) The 1961 Standard Industrial Mortality Table or 1961 Industrial Extended Term Insurance Table adopted by the NAIC. If the commission approves by rule any Standard Industrial Mortality Table adopted by the NAIC for use in determining the minimum nonforfeiture standard for policies issued on or after the operative date of the valuation manual, the minimum nonforfeiture standard supersedes the minimum nonforfeiture standard provided by the valuation manual.

7. For insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on appropriate modifications of the aforementioned tables.

(i) The nonforfeiture interest rate per year for a ~~any~~ policy issued in a particular calendar year for policies issued:

1. Before the operative date of the valuation manual, shall be equal to 125 percent of the calendar year statutory valuation interest rate for such policy as defined in the Standard Valuation Law, rounded to the nearest one-fourth of 1 percent; however, the nonforfeiture interest rate may not be less than 4 percent.

2. On or after the operative date of the valuation manual, shall be as provided by the valuation manual.

(14) OPERATIVE DATE.—

(a) After the effective date of this code, an ~~any~~ insurer may file with the office a written notice or notices of its election to comply with ~~the provisions of~~ this section on and after a specified date or dates before January 1, 1966, as to either or both of its policies of ordinary and industrial insurance, in which case such specified date or dates shall be the operative date of this section with respect to such policies. The operative date of this section for policies of both ordinary and industrial insurance shall be the earlier of January 1, 1966, and any prior operative date or dates resulting from such previously filed written notices. With respect to policies of industrial insurance issued on and after the operative date of this section for such policies but before January 1, 1968, any insurer may file with the office written notice of its election to have the ~~Commissioners'~~ 1961 Standard Industrial Mortality Table and ~~the Commissioners'~~ 1961 Industrial Extended Term Insurance Table adopted by the NAIC applicable with respect to subsection (8) for policies issued on and after the date specified in such election.

(b) As used in subsection (9), the term "operative date of the valuation manual" has the same meaning as provided in s. 625.1212(2).

Section 10. Subsections (1), (3), (10), (12), and (13) of section 628.461, Florida Statutes, are amended to read:

628.461 Acquisition of controlling stock.—

(1) A person may not, individually or in conjunction with any affiliated person of such person, acquire directly or indirectly, conclude a tender offer or exchange offer for, enter

into any agreement to exchange securities for, or otherwise finally acquire 10 ~~5~~ percent or more of the outstanding voting securities of a domestic stock insurer or of a controlling company, unless:

(a) The person or affiliated person has filed with the office and sent to the insurer and controlling company a letter of notification regarding the transaction or proposed transaction within ~~no later than~~ 5 days after any form of tender offer or exchange offer is proposed, or within ~~no later than~~ 5 days after the acquisition of the securities if no tender offer or exchange offer is involved. The notification must be provided on forms prescribed by the commission containing information determined necessary to understand the transaction and identify all purchasers and owners involved;

(b) The person or affiliated person has filed with the office the ~~a~~ statement as specified in subsection (3). The statement must be completed and filed within 30 days after:

1. Any definitive acquisition agreement is entered;

2. Any form of tender offer or exchange offer is proposed; or

3. The acquisition of the securities, if no definitive acquisition agreement, tender offer, or exchange offer is involved; and

(c) The office has approved the tender or exchange offer, or acquisition if no tender offer or exchange offer is involved, and approval is in effect.

~~In lieu of a filing as required under this subsection, a party acquiring less than 10 percent of the outstanding voting~~

~~securities of an insurer may file a disclaimer of affiliation and control. The disclaimer shall fully disclose all material relationships and basis for affiliation between the person and the insurer as well as the basis for disclaiming the affiliation and control. After a disclaimer has been filed, the insurer shall be relieved of any duty to register or report under this section which may arise out of the insurer's relationship with the person unless and until the office disallows the disclaimer. The office shall disallow a disclaimer only after furnishing all parties in interest with notice and opportunity to be heard and after making specific findings of fact to support the disallowance.~~ A filing ~~as~~ required under this subsection must be made for ~~as to~~ any acquisition that equals or exceeds 10 percent of the outstanding voting securities.

(3) The statement to be filed with the office under subsection (1) and furnished to the insurer and controlling company must ~~shall~~ contain all the following information and any additional information that ~~as~~ the office deems necessary to determine the character, experience, ability, and other qualifications of the person or affiliated person of such person for the protection of the policyholders and shareholders of the insurer and the public:

(a) The identity of, and the background information specified in subsection (4) on, each natural person by whom, or on whose behalf, the acquisition is to be made; and, if the acquisition is to be made by, or on behalf of, a corporation, association, or trust, as to the corporation, association, or trust and as to any person who controls, ~~either~~ directly or indirectly, the corporation, association, or trust, the identity

of, and the background information specified in subsection (4) on, each director, officer, trustee, or other natural person performing duties similar to those of a director, officer, or trustee for the corporation, association, or trust.~~;~~

(b) The source and amount of the funds or other consideration used, or to be used, in making the acquisition.~~;~~

(c) Any plans or proposals that ~~which~~ such persons may have made to liquidate such insurer, to sell any of its assets or merge or consolidate it with any person, or to make any other major change in its business or corporate structure or management; and any plans or proposals that ~~which~~ such persons may have made to liquidate any controlling company of such insurer, to sell any of its assets or merge or consolidate it with any person, or to make any other major change in its business or corporate structure or management.~~;~~

(d) The number of shares or other securities that ~~which~~ the person or affiliated person of such person proposes to acquire, the terms of the proposed acquisition, and the manner in which the securities are to be acquired.~~; and~~

(e) Information as to any contract, arrangement, or understanding with any party with respect to any of the securities of the insurer or controlling company, including, but not limited to, information relating to the transfer of any of the securities, option arrangements, puts or calls, or the giving or withholding of proxies, which information names the party with whom the contract, arrangement, or understanding has been entered into and gives the details thereof.

(f) Effective January 1, 2015, an agreement by the person required to file the statement that the person will provide the

annual report specified in s. 628.801(2) if control exists.

(g) Effective January 1, 2015, an acknowledgement by the person required to file the statement that the person and all subsidiaries within the person's control in the insurance holding company system will provide, as necessary, information to the office upon request to evaluate enterprise risk to the insurer.

(10) Upon notification to the office by the domestic stock insurer or a controlling company that any person or any affiliated person of such person has acquired 10 ~~5~~ percent or more of the outstanding voting securities of the domestic stock insurer or controlling company without complying with the provisions of this section, the office shall order that the person and any affiliated person of such person cease acquisition of any further securities of the domestic stock insurer or controlling company; however, the person or any affiliated person of such person may request a proceeding, which proceeding shall be convened within 7 days after the rendering of the order for the sole purpose of determining whether the person, individually or in connection with any affiliated person of such person, has acquired 10 ~~5~~ percent or more of the outstanding voting securities of a domestic stock insurer or controlling company. Upon the failure of the person or affiliated person to request a hearing within 7 days, or upon a determination at a hearing convened pursuant to this subsection that the person or affiliated person has acquired voting securities of a domestic stock insurer or controlling company in violation of this section, the office may order the person and affiliated person to divest themselves of any voting securities

so acquired.

(12)(a) A person may rebut a presumption of control by filing a disclaimer of control with the office. The disclaimer must fully disclose all material relationships and bases for affiliation between the person and the insurer as well as the basis for disclaiming the affiliation. The disclaimer of control shall be filed on a form prescribed by the office. A person or acquiring party may file a disclaimer of control by filing with the office a copy of a Schedule 13G filed with the Securities and Exchange Commission pursuant to rules 13d-1(b) or 13d-1(c) under the Securities Exchange Act of 1934, as amended. After a disclaimer has been filed, the insurer is relieved of any duty to register or report under this section which may arise out of the insurer's relationship with the person unless the office disallows the disclaimer.

(b) A controlling person of a domestic insurer who seeks to divest the person's controlling interest in the domestic insurer in any manner shall file with the office, with a copy provided to the insurer, confidential notice, not subject to public inspection as provided under s. 624.4212, of the person's proposed divestiture at least 30 days before the cessation of control. The office shall determine those instances in which the party seeking to divest or to acquire a controlling interest in an insurer must file for and obtain approval of the transaction. The information remains confidential until the conclusion of the transaction unless the office, in its discretion, determines that confidential treatment interferes with enforcement of this section. If the statement referred to in subsection (1) is otherwise filed, this paragraph does not apply ~~For the purpose~~

~~of this section, the term "affiliated person" of another person means:~~

~~1. The spouse of such other person;~~

~~2. The parents of such other person and their lineal descendants and the parents of such other person's spouse and their lineal descendants;~~

~~3. Any person who directly or indirectly owns or controls, or holds with power to vote, 5 percent or more of the outstanding voting securities of such other person;~~

~~4. Any person 5 percent or more of the outstanding voting securities of which are directly or indirectly owned or controlled, or held with power to vote, by such other person;~~

~~5. Any person or group of persons who directly or indirectly control, are controlled by, or are under common control with such other person;~~

~~6. Any officer, director, partner, copartner, or employee of such other person;~~

~~7. If such other person is an investment company, any investment adviser of such company or any member of an advisory board of such company;~~

~~8. If such other person is an unincorporated investment company not having a board of directors, the depositor of such company; or~~

~~9. Any person who has entered into an agreement, written or unwritten, to act in concert with such other person in acquiring or limiting the disposition of securities of a domestic stock insurer or controlling company~~.

~~(b) For the purposes of this section, the term "controlling company" means any corporation, trust, or association owning,~~

~~directly or indirectly, 25 percent or more of the voting securities of one or more domestic stock insurance companies.~~

(13) The commission may adopt~~, amend, or repeal~~ rules that are necessary to administer ~~implement the provisions of~~ this section~~, pursuant to chapter 120~~.

Section 11. Section 628.801, Florida Statutes, is amended to read:

628.801 Insurance holding companies; registration; regulation.—

(1) An ~~Every~~ insurer that is authorized to do business in this state and that is a member of an insurance holding company shall, on or before April 1 of each year, register with the office and file a registration statement and be subject to regulation with respect to its relationship to the holding company as provided by law or rule ~~or statute~~. The commission shall adopt rules establishing the information and statement form required for registration and the manner in which registered insurers and their affiliates are regulated. The rules apply to domestic insurers, foreign insurers, and commercially domiciled insurers, except for ~~a~~ foreign insurers ~~insurer~~ domiciled in states that are currently accredited by the NAIC ~~National Association of Insurance Commissioners by December 31, 1995~~. Except to the extent of any conflict with this code, the rules must include all requirements and standards of ss. 4 and 5 of the Insurance Holding Company System Regulatory Act and the Insurance Holding Company System Model Regulation of the NAIC ~~National Association of Insurance Commissioners~~, as adopted in December 2010. The commission may adopt subsequent amendments thereto if the methodology remains substantially consistent. The

rules ~~Regulatory Act and the Model Regulation existed on November 30, 2001, and~~ may include a prohibition on oral contracts between affiliated entities. Material transactions between an insurer and its affiliates shall be filed with the office as provided by rule ~~Upon request, the office may waive filing requirements under this section for a domestic insurer that is the subsidiary of an insurer that is in full compliance with the insurance holding company registration laws of its state of domicile, which state is accredited by the National Association of Insurance Commissioners~~.

(2) Effective January 1, 2015, the ultimate controlling person of every insurer subject to registration shall also file an annual enterprise risk report on or before April 1. As used in this subsection, the term "ultimate controlling person" means a person who is not controlled by any other person. The report, to the best of the ultimate controlling person's knowledge and belief, must identify the material risks within the insurance holding company system that could pose enterprise risk to the insurer. The report shall be filed with the lead state office of the insurance holding company system as determined by the procedures within the Financial Analysis Handbook adopted by the NAIC and is confidential and exempt from public disclosure as provided in s. 624.4212.

(a) An insurer may satisfy this requirement by providing the office with the most recently filed parent corporation reports that have been filed with the Securities and Exchange Commission which provide the appropriate enterprise risk information.

(b) The term "enterprise risk" means an activity,

circumstance, event, or series of events involving one or more affiliates of an insurer which, if not remedied promptly, are likely to have a materially adverse effect upon the financial condition or liquidity of the insurer or its insurance holding company system as a whole, including anything that would cause the insurer's risk-based capital to fall into company action level as set forth in s. 624.4085 or would cause the insurer to be in a hazardous financial condition.

(3) Effective January 1, 2015, pursuant to chapter 624 relating to the examination of insurers, the office may examine any insurer registered under this section and its affiliates to ascertain the financial condition of the insurer, including the enterprise risk to the insurer by the ultimate controlling party, or by any entity or combination of entities within the insurance holding company system, or by the insurance holding company system on a consolidated basis.

(4) The filings and related documents filed pursuant to this section are confidential and exempt as provided in s. 624.4212 and are not subject to subpoena or discovery or admissible in evidence in any private civil action. A waiver of any applicable privilege or claim of confidentiality in the filings and related documents may not occur as a result of any disclosure to the office under this section or any other section of the insurance code as authorized under s. 624.4212. Neither the office nor any person who received the filings and related documents while acting under the authority of the office or with whom such information is shared pursuant to s. 624.4212 is permitted or required to testify in any private civil action concerning any confidential documents, materials, or information

subject to s. 624.4212. However, the department or office may use the confidential and exempt information in the furtherance of any regulatory or legal action brought against an insurer as a part of the official duties of the department or office.

(5) Effective January 1, 2015, the failure to file a registration statement, or a summary of the registration statement, or the enterprise risk filing report required by this section within the time specified for filing is a violation of this section.

(6) Upon request, the office may waive the filing requirements of this section:

(a) If the insurer is a domestic insurer that is the subsidiary of an insurer that is in full compliance with the insurance holding company registration laws of its state of domicile, which state is accredited by the NAIC; or

(b) If the insurer is a domestic insurer that writes only in this state and has annual direct written and assumed premium of less than $300 million, excluding premiums reinsured with the Federal Crop Insurance Corporation and Federal Flood Program, and demonstrates that compliance with this section would not provide substantial regulatory or consumer benefit. In evaluating a waiver request made under this paragraph, the office may consider various factors including, but not limited to, the type of business entity, the volume of business written, the ownership or organizational structure of the entity, or whether the company is in run-off.

A waiver granted pursuant to this subsection is valid for 2 years unless sooner withdrawn due to a change in the

circumstances under which the waiver was granted.

Section 12. Effective January 1, 2015, present subsection (4) of section 628.803, Florida Statutes, is renumbered as subsection (5), and a new subsection (4) is added to that section, to read:

628.803 Sanctions.—

(4) If the office determines that any person violated s. 628.461 or s. 628.801, the violation may serve as an independent basis for disapproving dividends or distributions and for placing the insurer under an order of supervision in accordance with part VI of chapter 624.

Section 13. Effective January 1, 2015, section 628.804, Florida Statutes, is created to read:

628.804 Groupwide supervision for international insurance groups.—

(1) As used in this section:

(a) "Groupwide supervisor" means the chief insurance regulatory official for the jurisdiction who is determined by the office to have significant contacts with the international insurance group sufficient to conduct and coordinate groupwide supervision activities.

(b) "International insurance group" means an insurance group operating internationally which includes an insurer.

(2) The office may act as the groupwide supervisor for an international insurance group in which the ultimate controlling person of the group is domiciled in this state.

(3)(a) If the ultimate controlling person is domiciled outside this state, the office, in cooperation with other groupwide supervisors, may:

1. Determine that the office is the appropriate groupwide supervisor for an international insurance group with substantial operations concentrated in this state or in insurance operations conducted by subsidiary insurance companies domiciled in this state; or

2. Acknowledge that another chief insurance regulatory official is the appropriate groupwide supervisor for the international insurance group.

(b) Before issuing a determination, the office must notify the insurer and the ultimate controlling person within the international insurance group and provide the international insurance group with at least 30 days to submit information pertinent to the pending determination.

(4) The commission may adopt rules to administer this section, including rules establishing the criteria for making a determination under paragraph (3)(a), such as the extent of insurance operations in this state and nation; the location of the executive offices, assets and liabilities, and business operations of the international insurance group; the domicile of the ultimate controlling person of the international insurance group; and the similarity of the regulatory systems of other jurisdictions acting or seeking to act as lead groupwide supervisor.

Section 14. Effective January 1, 2015, section 628.805, Florida Statutes, is created to read:

628.805 Supervisory colleges.—In order to assess the business strategy, financial position, legal and regulatory position, risk exposure, risk management, and governance processes, and as part of the examination of individual insurers

in accordance with ss. 624.316 and 628.801, the office may participate in a supervisory college with other regulators charged with supervision of the insurer or its affiliates, including other state, federal, and international regulatory agencies. In accordance with s. 624.4212 regarding confidential information sharing, the office may enter into agreements that provide the basis for cooperation between the office and the other regulatory agencies and the activities of the supervisory college. This section does not delegate to the supervisory college the office's authority to regulate or supervise the insurer or its affiliates under its jurisdiction.

(1) With respect to participation in a supervisory college, the office may:

(a) Initiate the establishment of a supervisory college.

(b) Clarify the membership and participation of other supervisors in the supervisory college.

(c) Clarify the functions of the supervisory college and the role of other regulators, including the establishment of a groupwide supervisor.

(d) Coordinate the ongoing activities of the supervisory college, including planning meetings, supervisory activities, and processes for information sharing.

(e) Establish a crisis management plan.

(2) With respect to an insurer registered under s. 628.801, and in accordance with this section, the office may participate in a supervisory college for any domestic insurer that is part of an insurance holding company system that has international operations in order to determine the insurer's compliance with this chapter.

(3) Each registered insurer subject to this section is liable for and shall pay reasonable expenses for the office's participation in a supervisory college, including reasonable travel expenses. A supervisory college may be convened as a temporary or permanent forum for communication and cooperation between the regulators charged with the supervision of the insurer or its affiliates, and the office may impose a regular assessment on the insurer for the payment of these expenses.

Section 15. Effective January 1, 2015, subsection (3) is added to section 636.045, Florida Statutes, to read:

636.045 Minimum surplus requirements.—

(3) A prepaid limited health service organization that is authorized in this state and one or more other states, jurisdictions, or countries is subject to ss. 624.4085 and 624.40851.

Section 16. Effective January 1, 2015, subsection (7) is added to section 641.225, Florida Statutes, to read:

641.225 Surplus requirements.—

(7) A health maintenance organization that is authorized in this state and one or more other states, jurisdictions, or countries is subject to ss. 624.4085 and 624.40851.

Section 17. Effective January 1, 2015, subsection (3) is added to section 641.255, Florida Statutes, to read:

641.255 Acquisition, merger, or consolidation.—

(3) A health maintenance organization that is a member of a holding company system is subject to s. 628.461 but not s. 628.4615.

Section 18. Except as otherwise expressly provided in this act, this act shall take effect October 1, 2014, if SB 1300 or

similar legislation is adopted in the same legislative session or an extension thereof and becomes a law.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1496
INTRODUCER:	Senator Evers
SUBJECT:	Unlicensed Practice of Law
DATE:	March 24, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	**Pre-meeting**
2.			GO	
3.			RC	

I. Summary:

SB 1496 lists seven activities that are not considered a violation of the statute prohibiting the unlicensed practice of law. Those activities are:

- Pro se representation by an individual;
- Serving as a mediator or arbitrator;
- Providing services under the supervision of an attorney in compliance with the Rules of Professional Conduct, which are promulgated by the Florida Supreme Court;
- Providing services authorized by court rule;
- Acting within the lawful scope of practice of a business or profession regulated by the state;
- Giving legal notice in the form and manner required by law; or
- Representation of another person before a legislative body, committee, commission, or board.

Under existing s. 454.23, F.S., it is a third degree felony to engage in the unlicensed or unauthorized practice of law. A definition of the unlicensed practice of law is not contained in statue but has been developed over the years through case law and advisory opinions. This list of seven activities provides some clarity as to what is not criminal conduct when performed by a lay person.

II. Present Situation:

The Florida Supreme Court has stated that the primary goal of regulating the unlicensed practice of law is the protection of the public. The Court's regulation is not performed to "aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop."[1] Accordingly, there are two methods to enforce that prohibition: civil actions and criminal penalties.

[1] *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1189 (Fla. 1978).

Civil Actions

Civil actions are authorized and governed by court rules. Article V, section 15, of the Florida Constitution provides that the Supreme Court has exclusive jurisdiction to regulate the admission of people to the practice of law as well as the discipline of those admitted. The Florida Bar, then, "as an official arm of the court,"[2] has been delegated the duty and responsibility of investigating and prosecuting alleged offenders.[3]

According to The Florida Bar, the unauthorized practice of law, or UPL, is a significant problem in this state. The Bar reports opening 655 cases in 2011, 714 cases in 2012, and 550 cases in 2013. In this fiscal year, which runs from July 1-June 30, 361 cases have been opened. As of March 3, 2014, nine cases are pending at the Supreme Court of Florida and nine cases are pending with a state attorney. The Bar also reports closing 390 cases in this fiscal year, but points out that those cases were opened over several years.[4] If the Supreme Court finds a violator guilty of indirect criminal contempt under the rules, the penalty is a fine that may not exceed $2,500 and imprisonment of up to 5 months, or both.[5]

Criminal Penalties

The Legislature enacted a statute in 1925 which prohibited the unlicensed practice of law. The statute stated that any person who was not entitled to practice law or who held himself out to the public as being qualified to practice law without having first obtained a certificate from the State Board of Law Examiners, as required by law, would be guilty of a penal offence punishable by not more than $1,000 or imprisonment in a "county jail with or without hard labor for not more than twelve months" or by both the fine and imprisonment.[6] In 1971, the $1,000 fine and hard labor provisions were replaced and the offense became a first degree misdemeanor.[7] The statute was amended in 1997 to clarify that it applied also to women[8] and again in 2004 to establish a third degree felony penalty for the unlicensed practice of law or for any person who unlawfully holds himself or herself out to the public as qualified to practice law.

Section 454.23, F.S., states that it is a felony of the third degree for an unlicensed or unauthorized person to practice law in this state or hold himself or herself out to the public as qualified to practice law in the state or willfully pretend or imply that he or she is qualified or recognized by law as qualified to practice law in this state. A third degree felony is punishable by a term of imprisonment that does not exceed 5 years and a fine that does not exceed $5,000.[9]

The Florida Department of Law Enforcement (FDLE) reports that between 2004 and 2013, 104 arrests were made for a violation of this statute. Of those arrests, 50 cases resulted in a judicial

[2] R. Regulating Fla. Bar 10-1.2.
[3] *Id.*
[4] E-mail from Lori Holcomb, Director, Client Protection, The Florida Bar (March 21, 2014) (on file with the Senate Committee on Judiciary).
[5] R. Regulating Fla. Bar 10-7.2.
[6] Chapter 10175, s. 21, Laws of Fla. (1925).
[7] Chapter 71-136, s. 384, Laws of Fla.
[8] Chapter 97-103, s. 184, Laws of Fla.
[9] See ss. 775.082(3)(d) and 775.083(1)(c), F.S.

disposition of guilty and seven cases were categorized as adjudication withheld. In 2014, six arrests have been reported and one count has been recorded as adjudication withheld.[10]

Definition

The "unlicensed practice of law" is not defined in statute or in court rules. When the allegation was made that an earlier version of the statute was unconstitutionally vague, the First District Court of Appeal concluded that the statute was not void for vagueness.[11] The court further noted that the definition of the practice of law "is not confined to the language in section 454.23, but rather, is shaped by the decisional law and court rules as well as common understanding and practices."[12]

The definition of the unlicensed practice of law is derived from case law and formal advisory opinions developed by The Florida Bar Standing Committee on Unlicensed Practice of Law. In demonstrating the difficulty in defining the practice of law to establish what constitutes the unlicensed practice of law, the Florida Supreme Court has stated:

> This definition is broad and is given content by this court only as it applies to specific circumstances of each case. We agree that "any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure 'for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order.'"[13]

Throughout the years courts have decided, on a case by case basis, what constitutes the unauthorized practice of law. Some unauthorized activities involve a nonlawyer examining witnesses,[14] taking a deposition,[15] and representing an investor for compensation in a securities arbitration against a broker.[16]

In contrast, the courts have found that the practice of law does not include:

- A real estate licensee preparing residential lease forms approved by the Court,[17]
- A nonlawyer property manager preparing complaints for eviction and handling uncontested residential evictions on behalf of a landlord,[18]
- Title insurance companies and their agents preparing abstracts of title to real property and issuing policies of title insurance,[19] and

[10] E-mail from Rachel Truxell, Office of Legislative Affairs, Florida Department of Law Enforcement (March 21, 2014) (on file with the Senate Committee on Judiciary).
[11] *State v. Foster*, 674 So. 2d 747 (Fla. 1st DCA 1996).
[12] *Id.*, at 751.
[13] *Brumbaugh* at 1191, 1192 (quoting *State Bar of Michigan v. Cramer*, 399 Mich. 116, 249 N.W. 2d 1 at 7 (1976).
[14] *Millen v. Millen*, 122 So. 3d 496 (Fla. 3d DCA 2013)
[15] *Foster*, supra note 10.
[16] *The Florida Bar Re Advisory Opinion on Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997).
[17] *The Florida Bar Re: Advisory Opinion-Nonlawyer Preparation of Residential Leases Up To One Year In Duration*, 602 So. 2d 914 (Fla. 1992).
[18] *The Florida Bar Re Advisory Opinion-Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions*, 627 So. 2d 485 (Fla. 1993).
[19] *Cooperman et al., v. West Coast Title Company*, 75 So. 2d 818 (Fla. 1954).

- Lobbying.[20]

Under the Bar's process, a person may submit a written request asking whether certain activities constitute the unlicensed practice of law. If the committee agrees to accept the request for a formal advisory opinion, notice is published and a public hearing is held in which the committee takes testimony from interested individuals. After the public hearing, the committee decides whether it will issue a proposed formal advisory opinion and what it will contain. If the committee determines that the conduct in question constitutes the unlicensed practice of law, a proposed, or draft, formal advisory opinion is filed with the Florida Supreme Court. The court may then adopt, reject, or modify the opinion.[21] Between 1988 and 1997, nine advisory opinions have been released determining whether certain activities by business groups constitute the unlicensed practice of law. Two additional formal advisory opinions are pending.[22]

III. Effect of Proposed Changes:

This bill, in an effort to further define what constitutes the unlicensed practice of law, lists seven activities that do not constitute the unlicensed practice of law. Those activities include:

- Pro se representation by an individual;
- Serving as a mediator or arbitrator;
- Providing services under the supervision of an attorney in compliance with the Rules of Professional Conduct;
- Providing services authorized by court rules;
- Acting within the lawful scope of practice of a business or profession regulated by the state;
- Giving legal notice in the form and manner required by law; or
- Representation of another person before a legislative body, committee, commission, or board.

This list provides some measure of clarity as to what activities may be performed by a lay person.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

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[20] *Florida Association of Professional Lobbyists, Inc., etc., v. Division of Legislative Information Services*, 7 So. 3d 511 (Fla 2009).
[21] Florida Bar Rule 10-9.1
[22] See http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/34fac28eda9ca382852579ac006aff21!OpenDocument#FAORequestReMedicaidPlan.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator does not expect the bill to have a significant fiscal impact.[23]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends s. 454.23, F.S.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[23] Office of the State Courts Administrator, *2014 Judicial Impact Statement for SB 1496*, March 23, 2014.

877792

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Latvala) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 454.23, Florida Statutes, is amended to read:

454.23 Unlicensed practice of law; prohibition; penalties; exceptions.—

(1) A ~~Any~~ person not licensed or otherwise authorized to practice law in this state who ~~practices law in this state or~~ holds himself or herself out to the public as qualified to

877792

practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to practice law in this state, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) A person not licensed or otherwise authorized to practice law in this state who practices law in this state commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, a person engaging in any of the following activities is exempt from prosecution under this subsection:

(a) Pro se representation of one's self in one's individual capacity and not in any representative capacity for any other person, business entity, or trust;

(b) Serving as a mediator or arbitrator;

(c) Providing services under the supervision of an attorney in compliance with The Florida Bar's Rules of Professional Conduct;

(d) Providing services authorized by court rule;

(e) Acting within the lawful scope of practice of a business or profession licensed by the state;

(f) The giving of a legal notice in the form and manner required by law; however, this paragraph does not apply to notice required as part of a court proceeding or as required by court rule; or

(g) Representation before a legislative body, committee, commission, or board.

Section 2. This act shall take effect July 1, 2014.

877792

41
42 ========== T I T L E A M E N D M E N T ==========
43 And the title is amended as follows:
44 Delete everything before the enacting clause
45 and insert:
46 A bill to be entitled
47 An act relating to the unlicensed practice of law;
48 amending s. 454.23, F.S.; exempting persons engaging
49 in certain activities from criminal prosecution for
50 the unlicensed practice of law; providing an effective
51 date.

434964

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Soto) recommended the following:

Senate Amendment to Amendment (877792) (with title amendment)

Before line 5
insert:
Section 1. Subsection (3) is added to section 454.021, Florida Statutes, to read:
454.021 Attorneys; admission to practice law; Supreme Court to govern and regulate.—
(3) A person may not be disqualified from admission to practice law in this state solely because he or she is not a

434964

United States citizen.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 47

and insert:

An act relating to the practice of law; amending s. 454.021, F.S.; providing that a person may not be disqualified from admission to practice law based solely on lack of United States citizenship;

952212

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Soto) recommended the following:

Senate Amendment to Amendment (877792) (with title amendment)

Before line 5
insert:
Section 1. Subsection (3) is added to section 454.021, Florida Statutes, to read:
454.021 Attorneys; admission to practice law; Supreme Court to govern and regulate.—
(3) Upon certification by the Florida Board of Bar Examiners that an applicant who is not lawfully present in the

952212

United States has fulfilled all requirements for admission to practice law in this state, the Supreme Court of Florida may admit that applicant as an attorney at law authorized to practice in this state and may direct an order be entered upon its records to that effect.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 47

and insert:

An act relating to the practice of law; amending s. 454.021, F.S.; authorizing the Supreme Court of Florida to admit a bar applicant who is not lawfully present in the United States;

405152

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Soto) recommended the following:

Senate Amendment (with title amendment)

Before line 9
insert:

Section 1. Subsection (3) is added to section 454.021, Florida Statutes, to read:

454.021 Attorneys; admission to practice law; Supreme Court to govern and regulate.—

(3) A person may not be disqualified from admission to practice law in this state solely because he or she is not a United States citizen.

405152

12
13 ========== T I T L E A M E N D M E N T ==========
14 And the title is amended as follows:
15 Delete line 2
16 and insert:
17 An act relating to the practice of law; amending s.
18 454.021, F.S.; providing that a person may not be
19 disqualified from admission to practice law based
20 solely on lack of United States citizenship;

379872

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Soto) recommended the following:

Senate Amendment (with title amendment)

Before line 9
insert:
Section 1. Subsection (3) is added to section 454.021, Florida Statutes, to read:
454.021 Attorneys; admission to practice law; Supreme Court to govern and regulate.—
(3) A person may not be disqualified from admission to practice law in this state solely because he or she is not a United States citizen if he or she has deferred action status

379872

approved by the United States Department of Homeland Security.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 2

and insert:

An act relating to the practice of law; amending s. 454.021, F.S.; providing that a person may not be disqualified from admission to practice law based solely on lack of United States citizenship if he or she has approved deferred action status;

By Senator Evers

2-01145A-14 20141496__

A bill to be entitled

An act relating to the unlicensed practice of law; amending s. 454.23, F.S.; creating exceptions to the prohibition of unlicensed practice of law; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 454.23, Florida Statutes, is amended to read:

454.23 Unlicensed practice of law; prohibition; penalties; exceptions.—

(1) A ~~Any~~ person not licensed or otherwise authorized to practice law in this state who practices law in this state or holds himself or herself out to the public as qualified to practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to practice law in this state, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Notwithstanding subsection (1), the following activities are not prohibited by this section:

(a) Pro se representation by an individual;

(b) Serving as a mediator or arbitrator;

(c) Providing services under the supervision of an attorney in compliance with the Rules of Professional Conduct;

(d) Providing services authorized by court rule;

(e) Acting within the lawful scope of practice of a

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2-01145A-14 20141496__

business or profession regulated by the state;

(f) Giving legal notice in the form and manner required by law; or

(g) Representation of another person before a legislative body, committee, commission, or board.

Section 2. This act shall take effect July 1, 2014.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1626
INTRODUCER:	Senator Lee
SUBJECT:	Administrative Procedures
DATE:	March 24, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	**Pre-meeting**
2.			GO	
3.			AP	

I. Summary:

SB 1626 makes a number of changes to the Administrative Procedure Act, which relate to a state agency's reliance on unadopted or invalid rules, a state agency's liability for attorney fees and costs, and the provision of notices and information to the public.

The bill strengthens a party's ability to assert an agency's reliance on an unadopted or invalid rule as a defense to an agency action. When the defense is asserted, a DOAH judge (an administrative law judge with the Division of Administrative Hearings) must determine the validity of a rule or unadopted rule. This determination may not be rejected by the agency as is currently authorized.

The Administrative Procedure Act makes agencies liable for attorney fees and costs of others in some circumstances as a result of challenges to proposed rules, existing rules, and unadopted rules. When attorney fees and costs are available, they are limited to $50,000.

Under the bill, a state agency may be liable for attorney fees and costs in additional circumstances. These circumstances may result, for example, from the agency improperly denying a petition for a declaratory statement, acting contrary to a declaratory statement, or relying on an unadopted or invalid rule in an enforcement action or licensing decision. The existing limit on attorney fees and costs will not apply to attorney fees and costs for litigating the amount and entitlement to these fees and costs.

Lastly, the bill requires the Department of Management Services and state agencies to provide additional notices and information to the public relating to rulemaking activities. For example, the bill requires state agencies using rulemaking workshops to establish a time certain for the workshops and requires the department to publish information on its website describing the status of rulemaking activities.

II. Present Situation:

Rulemaking and the Administrative Procedure Act

The Administrative Procedure Act (APA) in ch. 120, F.S., sets forth a uniform set of procedures that agencies must follow when exercising delegated rulemaking authority. A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency.[1] Rulemaking authority is delegated by the Legislature[2] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[3] a rule. Agencies do not have discretion whether or not to engage in rulemaking.[4] To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.[5] The grant of rulemaking authority itself need not be detailed.[6] The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[7]

Declaratory Statements

The Administrative Procedure Act provides for the opportunity to request, for notice and opportunity for public input, and for the issuance of a "declaratory statement" of an agency's opinion on the applicability of a law or rule over which the agency has authority to a particular set of facts set forth in the petition.[8] When issued, a declaratory statement is the agency's legal opinion that binds the agency under principles of estoppel. An agency has the option to deny the petition and typically will do so if a live enforcement action is pending with respect to similar facts.

Attorney Fees

For purposes of the Equal Access to Justice Act in awarding attorney fees to a small business, an agency action is reasonably justified if it has a reasonable basis in law and fact at the time the agency acted. In such cases, no fees are allowable.

In addition to the special attorney fee provisions in the Equal Access to Justice Act, the APA provides for the recovery of attorney fees when a non-prevailing party has participated for an improper purpose; when an agency's actions are not substantially justified; when an agency relies upon an unadopted rule and is successfully challenged after 30 days' notice of the need to adopt rules; and when an agency loses an appeal in a proceeding challenging an unadopted rule.[9]

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[1] Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[2] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).
[3] Section 120.52(17), F.S.
[4] Section 120.54(1)(a), F.S.
[5] Sections 120.52(8) and 120.536(1), F.S.
[6] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 at 599.
[7] *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008) (internal citations omitted); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc.*, 794 So. 2d 696, 704(Fla. 1st DCA 2001).
[8] Section 120.565, F.S.
[9] Section 120.595, F.S.

An agency defense to attorney fees available in actions challenging agency statements defined as rules is that the agency did not know and should not have known that the agency statement was an unadopted rule. Additionally, attorney fees in such actions may be awarded only upon a finding that the agency received notice that the agency statement may constitute an unadopted rule at least 30 days before a petition challenging the agency statement is filed, and the agency fails to publish a notice of rulemaking within that 30 day period.[10]

These attorney fee provisions supplement the attorney fee provisions provided by other laws.[11]

Notice of Rules

Presently, the only notice of adopted rules is the filing with the Department of State. The Department of State publishes such rules in the Florida Administrative Code. However, as a courtesy, the Department of State, once each week, lists newly adopted rules in the Florida Administrative Register, and includes a cumulative list of rules filed for adoption pending legislative ratification.

Burden of Proof

In general, laws carry a presumption of validity, and those challenging the validity of a law carry the burden of proving invalidity. The APA retains this presumption of validity by requiring those challenging adopted rules to carry the burden of proving a rule's invalidity.[12] However, in the case of proposed rules, the APA places the burden on the agency to demonstrate the validity of the rule as proposed, once the challenger has raised specific objections to the rule's validity.[13] In addition, a rule may not be filed for adoption until any pending challenge is resolved.[14]

In the case of a statement or policy in force that was not adopted as a rule, a challenger must prove that the statement or policy meets the definition of a rule under the APA. If so, and if the statement or policy has not been validly adopted, the agency must prove that rulemaking is not feasible or practicable.[15]

Proceedings Involving Rule Challenges

The APA presently applies different procedures when proposed rules, existing rules and unadopted rules are challenged by petition, compared to a challenge to the validity of an existing rule, or an unadopted rule defensively in a proceeding initiated by agency action. In addition to the attorney fees awardable to small businesses under the Equal Access to Justice Act, the APA provides attorney fee awards when a party petitions for invalidation of a rule or unadopted rule, but not when the same successful legal case is made in defense of an enforcement action or grant or denial of a permit or license.

The APA does provide that a (DOAH) judge may determine that an agency has attempted to rely on an unadopted rule in proceedings initiated by agency action. However, this is qualified by a

[10] Section 120.595(4)(b), F.S.
[11] See, for example, ss. 57.105, 57.111, F.S. These sections are specifically preserved in s. 120.595(6), F.S.
[12] Section 120.56(3), F.S.
[13] Section 120.56(2), F.S.
[14] Section 120.54(3)(e)2., F.S.
[15] Section 120.56(4), F.S.

provision that an agency may overrule the DOAH determination if clearly erroneous. If the agency rejects the DOAH determination and is later reversed on appeal, the challenger is awarded attorney fees for the entire proceeding.[16] Additionally, in proceedings initiated by agency action, when a DOAH judge determines that a rule constitutes an invalid exercise of delegated legislative authority the agency has full de novo authority to reject or modify such conclusions of law, provided the final order states with particularity the reasons for rejection or modifying such determination.[17]

In proceedings initiated by a party challenging a rule or unadopted rule, the DOAH judge enters a final order that cannot be overturned by the agency. The only appeal is to the District Court of Appeals.

Final Orders

An agency has 90 days to render a final order in any proceeding, after the hearing if the agency conducts the hearing, or after the recommended order is submitted to the agency if DOAH conducts the hearing (excepting the rule challenge proceedings described above in which the DOAH judge enters the final order).

Judicial Review

A notice of appeal of an appealable order under the APA must be filed within 30 days after the rendering of the order.[18] An order, however, is rendered when filed with the agency clerk. On occasion, a party may not receive notice of the order in time to meet the 30 day appeal deadline. Under the current statute a party may not seek judicial review of the validity of a rule by appealing its adoption but the statute authorizes an appeal from a final order in a rule challenge.[19]

III. Effect of Proposed Changes:

This makes a number of changes to the Administrative Procedure Act, which relate to a state agency's reliance on unadopted or invalid rules, a state agency's liability for attorney fees and costs, and the provision of notices and information to the public.

Rule Challenges

Reliance on Unadopted Rules During Rulemaking (Section 2)

Existing law, ss. 120.56(4)(e) and 120.595(4)(a), F.S., allow a person to challenge an agency statement as an unadopted rule. If the challenger prevails, the agency must "immediately discontinue reliance on the statement and any substantially similar statement until rules addressing the subject are adopted." Similarly, the bill requires an agency to stop using an unadopted rule when it receives a petition to initiate rulemaking relating to an unadopted rule and then proceeds with the rulemaking process.

[16] Section 120.57(1)(e)3., F.S.
[17] Section 120.57(1)(k-*l*), F.S.
[18] Section 120.68(2)(a), F.S.
[19] Section 120.68(9), F.S.

Rule Challenges; Burdens of Challenger and Agency (Section 4)

Under case law, in a rule challenge, a person challenging a rule or proposed rule generally has the burden of going forward with evidence and the ultimate burden of establishing the basis for the claim.[20] Once the challenger satisfies his or her burden, the agency must demonstrate by the greater weight of the evidence that the rule or proposed rule is not an invalid exercise of delegated legislative authority. The bill appears to codify case law defining the respective burdens of the challenger and agency in rule challenge proceedings.

Rule Challenges as a Defense to Agency Action

The bill specifies various ways that a party can assert the invalidity of a rule or unadopted rule as a defense to an agency action. A party may do so by filing a petition for a rule challenge alleging that a rule is an invalid exercise of delegated legislative authority. A party alleging status as a substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time the existing rule at any time during the existence of the rule.

In those circumstances, a DOAH judge must determine the validity of the rule or unadopted rule.

Rule Challenge as a Defense (Section 7)

Under current law, when an agency proposes to take action and there are no disputed factual issues, a person may have a dispute heard by an agency hearing officer. If disputed factual issues exist the dispute generally must be resolved by a DOAH judge, but an agency may reject the judge's conclusions of law in some circumstances.

Under the bill, when no factual disputes exist, a challenge to agency action will be heard by a DOAH judge if the challenger asserts the invalidity of a rule or unadopted rule as a defense to the agency action. The decision of the DOAH judge on the validity of the rule cannot be rejected by the agency. Thus, an agency may not adjudicate the validity of its own rules.

In cases in which an agency's rule or statement is being challenged as a defense and factual disputes exist, the agency must notify the challenger whether it will continue to rely on the rule or unadopted rule in the agency's action. If the agency fails to timely provide the notice, it may not rely on the rule or unadopted rule in the proceeding.

Bifurcation of Challenges to Agency Action Prohibited (Section 4)

The bill prohibits DOAH judge from bifurcating a petition challenging agency action based on an unadopted rule into separate cases—one case for a challenge to the action and one for a challenge to an alleged unadopted rule.

[20] *Keen v. Dept. of Bus. and Professional Regulation*, 920 So. 2d 805, 808 (Fla. 5th DCA 2006). *See also, Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*, 808 So. 2d 243, 251 (Fla. 1st DCA 2002).

Attorney Fees and Costs

The bill specifies additional circumstances in which a state agency may be liable for the attorney fees and costs and limits the circumstances in which private parties may be liable to a state agency for the same.

Challenges to Unadopted or Invalid Rules as a Defense (Section 9)

Under the bill, if a party successfully defends itself against an agency action by showing that the rule or unadopted rule on which the action was based was not valid, the party is entitled to reasonable attorney fees and costs which may not exceed $50,000.

Challenges to Proposed Rules (Section 9)

Under existing law, an agency is not liable for attorney fees in a challenge to a proposed rule, if it demonstrates that its actions were substantially justified based on a reasonable basis in law and fact or if special circumstances exist which would make an award unjust. Under the bill, if the agency loses a challenge to a proposed rule, the agency will be able to avoid liability for attorney fees and costs only if special circumstances exist that would make the award unjust.

Prerequisite to Attorney Fees in Rule Challenge Proceedings (Section 9)

Under existing law, if an agency is notified that it may be relying upon an unadopted rule, the agency can avoid liability for pre-notice attorney fees by initiating rulemaking within 30 days after receiving the notice.

As a prerequisite to the entitlement to attorney fees under the bill, a person challenging a proposed rule, unadopted rule, or existing rule must file a "notice of invalidity" with the agency. The notice must be received by the agency head at least 5 days before the challenge is filed against a proposed rule and 30 before a challenge is filed against an unadopted rule or existing rule.

Attorney Fees; Agency Action Not Substantially Justified (Section 1)

The Florida Equal Access to Justice Act, s. 57.111, F.S., requires a DOAH judge to award attorney fees to a prevailing small business party in any action under the Administrative Procedure Act, if a state agency initiated the action and the agency's action was not substantially justified.

The bill provides specific examples of agency action that is not substantially justified. As a result, a state agency is liable for the attorney fees and costs of a small business if the agency declines to issue a declaratory statement to a business and then takes action against the business based on facts and circumstances similar to those raised in the petition for a declaratory statement. Similarly, the agency is liable if the agency issues a declaratory statement to the business and then acts in contradiction to the declaratory statement.

Attorney Fees; Denial of a Declaratory Statement (Section 5)

The bill provides that a DOAH judge must award reasonable attorney fees to a person whose petition for a declaratory statement is improperly denied by a state agency.

Agency Liability for Fees for Fees (Section 9)

Under the Administrative Procedure Act, attorney fees and costs awarded against an agency are generally limited to $50,000. Under the bill, attorney fees and costs are available for litigating the entitlement to or an amount of fees and costs. These are not subject to the cap on attorney fees and costs.

Attorney Fee Awards against a Nonprevailing Adverse Party (Section 9)

Under existing law, a DOAH judge may award attorney fees against a nonprevailing adverse party who participated in a proceeding for an improper purpose. An improper purpose could exist if the party lost two or more similar cases against the agency. Under the bill, the party must have lost at least three similar cases against the agency.

Declaratory Statements (Section 5)

Under existing law, a person may petition a state agency for a declaratory statement, which is an explanation of how an agency's statutes, rules, or orders apply to the petitioner's particular circumstances. An agency must issue a declaratory statement or deny the petition within 90 days.

The bill provides that if the petitioner includes in the petition a statement that describes or asserts the petitioner's understanding of how and agency rule, policy, or procedure applies, the agency's response is due within 60 days. Thus, by including a statement describing how a petitioner believes an agency rule, policy, or procedure applies to his or her circumstances, the petitioner may accelerate the agency's response.

Notices and Information to the Public and Interested Persons

Workshops (Section 2)

Existing law allows agencies to use public workshops for the purpose of developing rules. During a workshop, agency personnel must be available to explain the agency's proposed rule and to respond to questions or comments on the proposed rule.

The bill requires an agency to establish a "time certain" for rulemaking workshops, if a state agency begins rulemaking based on a petition to initiate rulemaking from a person regulated by the agency or a person having a substantial interest. However, existing law requires that notice of a workshop be published in the Florida Administrative Register at least 14 days before the workshop.[21]

Florida Administrative Register (Section 3)

The Department of State is currently required to publish the Florida Administrative Register on the Internet. The register must contain a variety of variety of notices relating to agency rulemaking and declaratory statements.

[21] Section 120.54(3)(a)2. and 3., F.S.

The bill adds to the required contents of the Florida Administrative Register:
- Notices of rule development;
- Rules filed for adoption during the previous 7 days; and
- Rules filed for adoption pending ratification by the Legislature.

Notice of the Proposed Adoption, Amendment, or Repeal of Rules (Section 3)

Existing law requires an agency to provide notice of its intent to adopt, amend, or repeal a rule. The notice must be published in the Florida Administrative Register and mailed to persons named in the proposed rule or who have requested advance notice of agency proceedings.

The bill requires an agency that provides an e-mail alert service to inform licensees of important information to use its alert system to provide notice of:
- Rule development activities;
- Proposed rules; and
- Filing rules for adoption.

The e-email alerts relating to the rulemaking activities must include links to the proposed or final rules.

Notice to Administrative Procedures Committee (Section 10)

Existing law requires agencies to notify the Administrative Procedures Committee if the decision in a rule challenge proceeding is being appealed.[22] The bill requires the committee to be notified in an additional circumstance—an appeal of a decision in an agency action in which the respondent challenged the validity of a rule or unadopted rule as a defense.

Designation of Minor Violations (Section 11)

Existing law contains a requirement that agencies review their rules to identify rules that if violated would be a minor violation.[23] The review was to have been completed by December 1, 1995. If one of these violations occur, agencies are required issue a notice of noncompliance, which may not include a fine or penalty, as a first response to the violation.

The bill requires agencies to again review their rules to identify those that if violated would be a minor violation. Additionally, rules filed for adoption must be accompanied by a certification by the agency head as to whether any part of a rule that if violated would be a minor violation. These rules must be identified on agency websites or disciplinary guidelines adopted as a rule. These procedures do not apply to the Department of Corrections and educational units.

[22] Section 120.68(2)(a), F.S.
[23] Section 120.695, F.S.

Mediation (Section 8)

Existing law allows a person to seek to mediate the resolution of an agency-initiated action.[24] The bill allows a party that initiates a rule challenge or files a petition for a declaratory statement to seek mediation of the petition as well.

Effective Date (Section 12)

The bill takes effect on July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may make additional attorney fees and costs available to persons who challenge agency actions that are based on invalid or unadopted rules.

C. Government Sector Impact:

The bill may make agencies cautious about pursuing enforcement actions by increasing the circumstances in which agencies may be liable for attorney fees.

Agencies may receive reduced amounts of fines from minor rule violations.

[24] Section 120.573, F.S.

VI. Technical Deficiencies:

In s. 57.111(3)(e)2, F.S., the Legislature may wish to clarify that an agency is liable for attorney fees under the Equal Access to Justice Act only if the agency *improperly* denies a petition for a declaratory statement.

In s. 120.565(5), F.S., the bill provides that a DOAH judge must award attorney fees to a person whose petition for a declaratory statement is improperly denied by a state agency. Elsewhere in the bill and ch. 120, F.S., a person is entitled to costs in addition to attorney fees. As such, the Legislature may wish to make costs available in this instance as well.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 57.111, 120.54, 120.55, 120.56, 120.565, 120.569, 120.57, 120.573, 120.595, 120.68, and 120.695.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

By Senator Lee

24-01138-14 20141626__

A bill to be entitled

An act relating to administrative procedures; amending s. 57.111, F.S.; providing conditions under which a proceeding is not substantially justified for purposes of an award under the Florida Equal Access to Justice Act; amending s. 120.54, F.S.; requiring agencies to set a time for workshops if initiating rulemaking at the request of the petitioner; amending s. 120.55, F.S.; providing for publication of notices of rule development and of rules filed for adoption; providing additional notice of rule development, proposals, and adoptions; amending s. 120.56, F.S.; clarifying that petitions for administrative determinations apply to rules or proposed rules; providing that a petitioner challenging a rule, proposed rule, or agency statement has the burden of going forward after which the agency has the burden of proving that the rule, proposed rule, or agency statement is not invalid; prohibiting an administrative law judge from bifurcating certain petitions challenging agency action into separate cases; amending s. 120.565, F.S.; authorizing certain parties to provide to an agency their understanding of how certain rules apply to specific facts; requiring the agency to provide a declaratory statement within 60 days; authorizing the administrative law judge to award attorney fees under certain circumstances; amending s. 120.569, F.S.; granting agencies additional time to render final orders in certain circumstances; amending s. 120.57, F.S.; conforming

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proceedings that oppose agency action based on an invalid or unadopted rule to proceedings used for challenging rules; requiring the agency to issue a notice stating whether the agency will rely on the challenged rule or alleged unadopted rule; authorizing the administrative law judge to make certain findings on the validity of certain alleged unadopted rules; authorizing the administrative law judge to issue a separate final order on certain rules and alleged unadopted rules; prohibiting agencies from rejecting specific conclusions of law; providing for stay of proceedings not involving disputed issues of fact upon timely filing of a rule challenge; providing that the final order terminates the stay; amending s. 120.573, F.S.; authorizing a party to request mediation of a rule challenge and declaratory statement proceedings; amending s. 120.595, F.S.; providing for an award of attorney fees and costs in specified challenges to agency action; providing criteria that, if met, establish that a nonprevailing party participated in an administrative proceeding for an improper purpose; revising provisions providing for the award of attorney fees and costs by the appellate court or administrative law judge against the agency or party in specified administrative challenges; providing exceptions for the award of attorney fees and costs; capping the amount of attorney fees that may be awarded; requiring notice of a proposed challenge by the petitioner as a condition precedent to filing a

challenge and being eligible for the reimbursement of attorney fees and costs; authorizing the recovery of attorney fees and costs incurred in litigating entitlement to attorney fees and costs in administrative actions; providing such attorney fees and costs are not limited in amount; amending s. 120.68, F.S.; requiring specified agencies in appeals of certain final orders to provide a copy of the notice of appeal to the Administrative Procedures Committee; amending s. 120.695, F.S.; removing obsolete provisions with respect to required agency review and designation of minor violations; requiring agency review and certification of minor violation rules by a specified date; requiring the reporting of agency failure to complete the review and file certification of such rules; requiring minor violation certification for all rules adopted after a specified date; requiring public notice; providing for nonapplicability; conforming provisions to changes made by the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (e) of subsection (3) of section 57.111, Florida Statutes, is amended to read:

57.111 Civil actions and administrative proceedings initiated by state agencies; attorney ~~attorneys'~~ fees and costs.—

(3) As used in this section:

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency. A proceeding is not substantially justified if the specified law, rule, or order at issue in the current agency action is the subject upon which the substantially affected party previously petitioned the agency for a declaratory statement under s. 120.565; the current agency action involves identical or substantially similar facts and circumstances as those raised in the previous petition and:

1. The agency action contradicts the declaratory statement issued by the agency upon the previous petition; or

2. The agency denied the previous petition under s. 120.565 before initiating the current agency action against the substantially affected party.

Section 2. Paragraph (c) of subsection (7) of section 120.54, Florida Statutes, is amended to read:

120.54 Rulemaking.—

(7) PETITION TO INITIATE RULEMAKING.—

(c) Within 30 days after ~~following~~ the public hearing provided for in ~~by~~ paragraph (b), if the petition's requested action requires rulemaking and the agency initiates rulemaking, the agency shall establish a time certain for the rulemaking workshops and shall discontinue reliance upon the agency statement or unadopted rule until it adopts appropriate rules pursuant to subsection (3). If the agency does not initiate rulemaking or otherwise comply with the requested action, the agency shall publish in the Florida Administrative Register a statement of its reasons for not initiating rulemaking or otherwise complying with the requested action, and of any

changes it will make in the scope or application of the unadopted rule. The agency shall file the statement with the committee. The committee shall forward a copy of the statement to the substantive committee with primary oversight jurisdiction of the agency in each house of the Legislature. The committee or the committee with primary oversight jurisdiction may hold a hearing directed to the statement of the agency. The committee holding the hearing may recommend to the Legislature the introduction of legislation making the rule a statutory standard or limiting or otherwise modifying the authority of the agency.

Section 3. Section 120.55, Florida Statutes, is amended to read:

120.55 Publication.—

(1) The Department of State shall:

(a)1. Through a continuous revision and publication system, compile and publish electronically, on an Internet website managed by the department, the "Florida Administrative Code." The Florida Administrative Code shall contain all rules adopted by each agency, citing the grant of rulemaking authority and the specific law implemented pursuant to which each rule was adopted, all history notes as authorized in s. 120.545(7), complete indexes to all rules contained in the code, and any other material required or authorized by law or deemed useful by the department. The electronic code shall display each rule chapter currently in effect in browse mode and allow full text search of the code and each rule chapter. The department may contract with a publishing firm for a printed publication; however, the department shall retain responsibility for the code as provided in this section. The electronic publication shall be

the official compilation of the administrative rules of this state. The Department of State shall retain the copyright over the Florida Administrative Code.

2. Rules general in form but applicable to only one school district, community college district, or county, or a part thereof, or state university rules relating to internal personnel or business and finance shall not be published in the Florida Administrative Code. Exclusion from publication in the Florida Administrative Code shall not affect the validity or effectiveness of such rules.

3. At the beginning of the section of the code dealing with an agency that files copies of its rules with the department, the department shall publish the address and telephone number of the executive offices of each agency, the manner by which the agency indexes its rules, a listing of all rules of that agency excluded from publication in the code, and a statement as to where those rules may be inspected.

4. Forms shall not be published in the Florida Administrative Code; but any form which an agency uses in its dealings with the public, along with any accompanying instructions, shall be filed with the committee before it is used. Any form or instruction which meets the definition of "rule" provided in s. 120.52 shall be incorporated by reference into the appropriate rule. The reference shall specifically state that the form is being incorporated by reference and shall include the number, title, and effective date of the form and an explanation of how the form may be obtained. Each form created by an agency which is incorporated by reference in a rule notice of which is given under s. 120.54(3)(a) after December 31, 2007,

must clearly display the number, title, and effective date of the form and the number of the rule in which the form is incorporated.

5. The department shall allow adopted rules and material incorporated by reference to be filed in electronic form as prescribed by department rule. When a rule is filed for adoption with incorporated material in electronic form, the department's publication of the Florida Administrative Code on its Internet website must contain a hyperlink from the incorporating reference in the rule directly to that material. The department may not allow hyperlinks from rules in the Florida Administrative Code to any material other than that filed with and maintained by the department, but may allow hyperlinks to incorporated material maintained by the department from the adopting agency's website or other sites.

(b) Electronically publish on an Internet website managed by the department a continuous revision and publication entitled the "Florida Administrative Register," which shall serve as the official publication and must contain:

1. All notices required by s. 120.54(2) and (3)(a) ~~s. 120.54(3)(a)~~, showing the text of all rules proposed for consideration.

2. All notices of public meetings, hearings, and workshops conducted in accordance with s. 120.525, including a statement of the manner in which a copy of the agenda may be obtained.

3. A notice of each request for authorization to amend or repeal an existing uniform rule or for the adoption of new uniform rules.

4. Notice of petitions for declaratory statements or

administrative determinations.

5. A summary of each objection to any rule filed by the Administrative Procedures Committee.

6. A listing of rules filed for adoption in the previous 7 days.

7. A listing of all rules filed for adoption pending legislative ratification under s. 120.541(3) until notice of ratification or withdrawal of such rule is received.

8.~~6.~~ Any other material required or authorized by law or deemed useful by the department.

The department may contract with a publishing firm for a printed publication of the Florida Administrative Register and make copies available on an annual subscription basis.

(c) Prescribe by rule the style and form required for rules, notices, and other materials submitted for filing.

(d) Charge each agency using the Florida Administrative Register a space rate to cover the costs related to the Florida Administrative Register and the Florida Administrative Code.

(e) Maintain a permanent record of all notices published in the Florida Administrative Register.

(2) The Florida Administrative Register Internet website must allow users to:

(a) Search for notices by type, publication date, rule number, word, subject, and agency.

(b) Search a database that makes available all notices published on the website for a period of at least 5 years.

(c) Subscribe to an automated e-mail notification of selected notices to be sent out before or concurrently with

publication of the electronic Florida Administrative Register. Such notification must include in the text of the e-mail a summary of the content of each notice.

(d) View agency forms and other materials submitted to the department in electronic form and incorporated by reference in proposed rules.

(e) Comment on proposed rules.

(3) Publication of material required by paragraph (1)(b) on the Florida Administrative Register Internet website does not preclude publication of such material on an agency's website or by other means.

(4) Each agency shall provide copies of its rules upon request, with citations to the grant of rulemaking authority and the specific law implemented for each rule.

(5) Each agency that provides an e-mail alert service to inform licensees or other registered recipients of important notices shall use such service to notify recipients of each notice required under s. 120.54(2) and (3)(a), including a notice of rule development, notice of proposed rules, and notice of filing rules for adoption, and provide Internet links to the appropriate rule page on the Department of State's website or Internet links to an agency website that contains the proposed rule or final rule.

(6)~~(5)~~ Any publication of a proposed rule promulgated by an agency, whether published in the Florida Administrative Register or elsewhere, shall include, along with the rule, the name of the person or persons originating such rule, the name of the agency head who approved the rule, and the date upon which the rule was approved.

(7)~~(6)~~ Access to the Florida Administrative Register Internet website and its contents, including the e-mail notification service, shall be free for the public.

(8)~~(7)~~(a) All fees and moneys collected by the Department of State under this chapter shall be deposited in the Records Management Trust Fund for the purpose of paying for costs incurred by the department in carrying out this chapter.

(b) The unencumbered balance in the Records Management Trust Fund for fees collected pursuant to this chapter may not exceed $300,000 at the beginning of each fiscal year, and any excess shall be transferred to the General Revenue Fund.

Section 4. Subsections (1), (3), and (4) of section 120.56, Florida Statutes, are amended to read:

120.56 Challenges to rules.—

(1) GENERAL PROCEDURES ~~FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE~~.—

(a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

(b) The petition seeking an administrative determination of the rule or proposed rule must state the facts and ~~with particularity~~ the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the petitioner ~~person~~ challenging the ~~a~~ rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by the proposed rule ~~it~~.

(c) The petition shall be filed by electronic means with

the division which shall, immediately upon filing, forward by electronic means copies to the agency whose rule is challenged, the Department of State, and the committee. Within 10 days after receiving the petition, the division director shall, if the petition complies with the requirements of paragraph (b), assign an administrative law judge who shall conduct a hearing within 30 days thereafter, unless the petition is withdrawn or a continuance is granted by agreement of the parties or for good cause shown. Evidence of good cause includes, but is not limited to, written notice of an agency's decision to modify or withdraw the proposed rule or a written notice from the chair of the committee stating that the committee will consider an objection to the rule at its next scheduled meeting. The failure of an agency to follow the applicable rulemaking procedures or requirements set forth in this chapter shall be presumed to be material; however, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired.

(d) Within 30 days after the hearing, the administrative law judge shall render a decision and state the reasons therefor in writing. The division shall forthwith transmit by electronic means copies of the administrative law judge's decision to the agency, the Department of State, and the committee.

(e) Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. The petitioner has the burden of going forward with the evidence. The agency has the burden of proving by a preponderance of the evidence that the rule, proposed rule, or agency statement is not an invalid exercise of delegated

legislative authority. Hearings shall be conducted in the same manner as provided by ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action. The petitioner and the agency whose rule is challenged shall be adverse parties. Other substantially affected persons may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings. Failure to proceed under this section shall not constitute failure to exhaust administrative remedies.

(3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.—

(a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. The petitioner has the ~~a~~ burden of going forward with the evidence as set forth in paragraph (1)(b), and the agency has the burden of proving by a preponderance of the evidence that the existing rule is not an invalid exercise of delegated legislative authority as to the objections raised.

(b) The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Register in the first available issue after the rule has become void.

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.—

(a) Any person substantially affected by an agency statement may seek an administrative determination that the

statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state ~~with particularity~~ facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3), such notice shall automatically operate as a stay of proceedings pending adoption of the statement as a rule. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings pending rulemaking shall remain in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible or not practicable under s. 120.54(1)(a).

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Register.

(d) If an administrative law judge enters a final order that all or part of an agency statement violates s.

120.54(1)(a), the agency must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

(e) If proposed rules addressing the challenged statement are determined to be an invalid exercise of delegated legislative authority as defined in s. 120.52(8)(b)-(f), the agency must immediately discontinue reliance upon ~~on~~ the statement and any substantially similar statement until rules addressing the subject are properly adopted, and the administrative law judge shall enter a final order to that effect.

(f) If a petitioner files a petition challenging agency action and a part of that petition alleges the presence of or reliance upon agency statements or unadopted rules, the administrative law judge may not bifurcate the petition into separate cases, but shall consider the challenge to the proposed agency action and the allegation that such agency action was based upon the presence of or reliance upon agency statements or unadopted rules.

(g)~~(f)~~ All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under subsection (3) or under any other section of this chapter. This paragraph does not prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

Section 5. Subsection (2) of section 120.565, Florida Statutes, is amended, and subsections (4) and (5) are added to that section, to read:

120.565 Declaratory statement by agencies.—

(2) The petition seeking a declaratory statement shall state ~~with particularity~~ the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

(4) The petitioner or substantially affected person may submit to the agency clerk a statement that describes or asserts the petitioner's understanding of how the agency rule, policy, or procedure applies to a set of facts and circumstances. The agency has 60 days to review the petitioner's statement and to either accept the statement or offer changes and other clarifications so as to establish the plain meaning of how the agency rule, policy, or procedure applies to the set of facts and circumstances described in the petitioner's statement.

(5) If the agency denies a request for a declaratory statement and the petitioner appeals the denial, and if the administrative law judge finds that the agency improperly denied the request, the administrative law judge shall award to the petitioner reasonable attorney fees.

Section 6. Paragraph (l) of subsection (2) of section 120.569, Florida Statutes, is amended to read:

120.569 Decisions which affect substantial interests.—

(2)

(l) Unless the time period is waived or extended with the consent of all parties, the final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated, and it must be rendered within 90 days:

1. After the hearing is concluded, if conducted by the

agency;

2. After a recommended order is submitted to the agency and mailed to all parties, if the hearing is conducted by an administrative law judge, except that, at the election of the agency, the time for rendering the final order may be extended up to 10 days after entry of a mandate on any appeal from a final order under s. 120.57(1)(e)4.; or

3. After the agency has received the written and oral material it has authorized to be submitted, if there has been no hearing.

Section 7. Paragraphs (e) and (h) of subsection (1) and subsection (2) of section 120.57, Florida Statutes, are amended to read:

120.57 Additional procedures for particular cases.—

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—

(e)1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. ~~The administrative law judge shall determine whether an agency statement constitutes an unadopted rule.~~ This subparagraph does not preclude application of valid adopted rules and applicable provisions of law to the facts.

2. In a matter initiated as a result of agency action proposing to determine the substantial interests of a party, the party's timely petition for hearing may challenge the proposed agency action based on a rule that is an invalid exercise of delegated legislative authority or based on an alleged unadopted

rule. For challenges brought under this subparagraph:

a. The challenge shall be pled as a defense using the procedures set forth in s. 120.56(1)(b).

b. Section 120.56(3)(a) applies to a challenge alleging that a rule is an invalid exercise of delegated legislative authority.

c. Section 120.56(4)(c) applies to a challenge alleging an unadopted rule.

d. The agency has 15 days from the date of receipt of a challenge under this subparagraph to serve the challenging party with a notice whether the agency will continue to rely upon the rule or the alleged unadopted rule as a basis for the action determining the party's substantive interests. Failure to timely serve the notice constitutes a binding stipulation that the agency may not rely upon the rule or unadopted rule further in the proceeding. The agency shall include a copy of this notice with the referral of the matter to the division under s. 120.569(2)(a).

e. This subparagraph does not preclude the consolidation of any proceeding under s. 120.56 with any proceeding under this paragraph.

3.~~2.~~ Notwithstanding subparagraph 1., if an agency demonstrates that the statute being implemented directs it to adopt rules, that the agency has not had time to adopt those rules because the requirement was so recently enacted, and that the agency has initiated rulemaking and is proceeding expeditiously and in good faith to adopt the required rules, then the agency's action may be based upon those unadopted rules if~~, subject to de novo review by~~ the administrative law judge

determines that rulemaking is neither feasible nor practicable and the unadopted rules would not constitute an invalid exercise of delegated legislative authority if adopted as rules. An unadopted rule ~~The agency action~~ shall not be presumed valid ~~or invalid~~. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority vested in the agency by ~~derived from~~ the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;

e. Is not being applied to the substantially affected party without due notice; and

f. Does not impose excessive regulatory costs on the regulated person, county, or city.

4. If the agency timely serves notice of continued reliance upon a challenged rule or an alleged unadopted rule under sub-subparagraph 2.d., the administrative law judge shall determine whether the challenged rule is an invalid exercise of delegated legislative authority or whether the challenged agency statement constitutes an unadopted rule and if that unadopted rule meets the requirements of subparagraph 3. The determination shall be rendered as a separate final order no earlier than the date on

which the administrative law judge serves the recommended order.

5.~~3.~~ The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (k) and (l), except that the administrative law judge's determination ~~regarding an unadopted rule~~ under subparagraph 4. ~~1. or subparagraph 2.~~ shall be included as a conclusion of law that the agency may not reject ~~not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review.~~

(h) Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if

applicable, and any other information required by law to be contained in the final order. This paragraph does not apply to proceedings authorized by paragraph (e).

(2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—In any case to which subsection (1) does not apply:

(a) The agency shall:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.

2. Give parties or their counsel the option, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the parties are overruled, provide a written explanation within 7 days.

(b) An agency may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. No later than the date provided by the agency under subparagraph (a)2. for presenting material in opposition to the agency's proposed action or refusal to act, the party may file a petition under s. 120.56 challenging the rule, portion of rule, or unadopted rule upon which the agency bases its proposed action or refusal to act. The filing of a challenge under s. 120.56 pursuant to this paragraph shall stay all proceedings on

the agency's proposed action or refusal to act until entry of the final order by the administrative law judge, which shall provide additional notice that the stay of the pending agency action is terminated and any further stay pending appeal of the final order must be sought from the appellate court.

(c) ~~(b)~~ The record shall only consist of:

1. The notice and summary of grounds.

2. Evidence received.

3. All written statements submitted.

4. Any decision overruling objections.

5. All matters placed on the record after an ex parte communication.

6. The official transcript.

7. Any decision, opinion, order, or report by the presiding officer.

Section 8. Section 120.573, Florida Statutes, is amended to read:

120.573 Mediation of disputes.—

(1) Each announcement of an agency action that affects substantial interests shall advise whether mediation of the administrative dispute for the type of agency action announced is available and that choosing mediation does not affect the right to an administrative hearing. If the agency and all parties to the administrative action agree to mediation, in writing, within 10 days after the time period stated in the announcement for election of an administrative remedy under ss. 120.569 and 120.57, the time limitations imposed by ss. 120.569 and 120.57 shall be tolled to allow the agency and parties to mediate the administrative dispute. The mediation shall be

concluded within 60 days after ~~of~~ such agreement unless otherwise agreed by the parties. The mediation agreement shall include provisions for mediator selection, the allocation of costs and fees associated with mediation, and the mediating parties' understanding regarding the confidentiality of discussions and documents introduced during mediation. If mediation results in settlement of the administrative dispute, the agency shall enter a final order incorporating the agreement of the parties. If mediation terminates without settlement of the dispute, the agency shall notify the parties in writing that the administrative hearing processes under ss. 120.569 and 120.57 are resumed.

(2) Any party to a proceeding conducted pursuant to a petition seeking an administrative determination of the invalidity of an existing rule, proposed rule, or unadopted agency statement under s. 120.56 or a proceeding conducted pursuant to a petition seeking a declaratory statement under s. 120.565 may request mediation of the dispute under this section.

Section 9. Section 120.595, Florida Statutes, is amended to read:

120.595 Attorney ~~Attorney's~~ fees.—

(1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—

(a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and ~~a~~ reasonable attorney fees ~~attorney's fee~~ to the prevailing party if the

administrative law judge determines ~~only where~~ the nonprevailing adverse party ~~has been determined by the administrative law judge to have~~ participated in the proceeding for an improper purpose.

1.~~(c)~~ Other than as provided in paragraph (d), in proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. ~~In making such determination, the administrative law judge shall consider whether~~ The nonprevailing adverse party shall be presumed to have participated in the pending proceeding for an improper purpose if:

a. Such party was an adverse party ~~has participated~~ in three ~~two~~ or more other such proceedings involving the same prevailing party and the same subject; ~~project as an adverse party and in~~

b. In those ~~which such two or more~~ proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position;~~, and shall consider~~

c. ~~Whether~~ The factual or legal position asserted in the pending ~~instant~~ proceeding would have been cognizable in the previous proceedings; and~~. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose~~

d. The nonprevailing adverse party has not rebutted the presumption of participating in the pending proceeding for an improper purpose.

2.~~(d)~~ If ~~In any proceeding in which the administrative law judge determines that~~ a party is determined to have participated in the proceeding for an improper purpose, the recommended order shall include such findings of fact and conclusions of law to establish the conclusion ~~so designate~~ and shall determine the award of costs and attorney ~~attorney's~~ fees.

(c)~~(c)~~ For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

(d) For challenges brought under s. 120.57(1)(e), when the agency relies on a challenged rule or an alleged unadopted rule pursuant to s. 120.57(1)(e)2.d., if the appellate court or the administrative law judge declares the rule or portion of the

rule to be invalid or that the agency statement is an unadopted rule which does not meet the requirements of s. 120.57(1)(e)4., a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney fees. An award of attorney fees as provided by this paragraph may not exceed $50,000.

(2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO SECTION 120.56(2).—If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney ~~attorney's~~ fees, unless the agency demonstrates that ~~its actions were substantially justified or~~ special circumstances exist which would make the award unjust. ~~An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.~~ If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney ~~attorney's~~ fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(c) ~~(1)(c)~~. An ~~No~~ award of attorney ~~attorney's~~ fees as provided by this subsection may not ~~shall~~ exceed $50,000.

(3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO SECTION 120.56(3) AND (5).—If the appellate court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3) or (5), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney

~~attorney's~~ fees, unless the agency demonstrates that ~~its actions were substantially justified or~~ special circumstances exist which would make the award unjust. ~~An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.~~ If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney ~~attorney's~~ fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(c) ~~(1)(c)~~. An ~~No~~ award of attorney ~~attorney's~~ fees as provided by this subsection may not ~~shall~~ exceed $50,000.

(4) CHALLENGES TO UNADOPTED RULES ~~AGENCY ACTION~~ PURSUANT TO SECTION 120.56(4).—

(a) If the appellate court or administrative law judge determines that all or part of an unadopted rule ~~agency statement~~ violates s. 120.54(1)(a), or that the agency must immediately discontinue reliance upon ~~on~~ the unadopted rule ~~statement~~ and any substantially similar statement pursuant to s. 120.56(4)(e), a judgment or order shall be entered against the agency for reasonable costs and reasonable attorney ~~attorney's~~ fees, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

(b) Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3)(a), such notice shall

automatically operate as a stay of proceedings pending rulemaking. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings under this paragraph remains in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. The administrative law judge shall award reasonable costs and reasonable attorney ~~attorney's~~ fees incurred ~~accrued~~ by the petitioner before ~~prior to~~ the date the notice was published~~,~~ ~~unless the agency proves to the administrative law judge that it did not know and should not have known that the statement was an unadopted rule. Attorneys' fees and costs under this paragraph and paragraph (a) shall be awarded only upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before a petition under s. 120.56(4) was filed and that the agency failed to publish the required notice of rulemaking pursuant to s. 120.54(3) that addresses the statement within that 30-day period. Notice to the agency may be satisfied by its receipt of a copy of the s. 120.56(4) petition, a notice or other paper containing substantially the same information, or a petition filed pursuant to s. 120.54(7)~~. An award of attorney ~~attorney's~~ fees as provided by this paragraph may not exceed $50,000.

(c) Notwithstanding the provisions of chapter 284, an award shall be paid from the budget entity of the secretary, executive director, or equivalent administrative officer of the agency, and the agency is ~~shall~~ not ~~be~~ entitled to payment of an award or reimbursement for payment of an award under any provision of law.

(d) If the agency prevails in the proceedings, the

appellate court or administrative law judge shall award reasonable costs and attorney ~~attorney's~~ fees against a party if the appellate court or administrative law judge determines that the party participated in the proceedings for an improper purpose as defined in paragraph (1)(c) ~~(1)(c)~~ or that the party or the party's attorney knew or should have known that a claim was not supported by the material facts necessary to establish the claim or would not be supported by the application of then-existing law to those material facts.

(5) APPEALS.—When there is an appeal, the court in its discretion may award reasonable attorney ~~attorney's~~ fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney ~~attorney's~~ fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

(6) NOTICE OF INVALIDITY.—A party failing to serve a notice of proposed challenge under this subsection is not entitled to an award of reasonable costs and reasonable attorney fees under this section.

(a) Before filing a petition challenging the validity of a proposed rule under s. 120.56(2), an adopted rule under s. 120.56(3), or an agency statement defined as an unadopted rule under s. 120.56(4), a substantially affected person shall serve

the agency head with notice of the proposed challenge. The notice shall identify the proposed or adopted rule or the unadopted rule that the person proposes to challenge and a brief explanation of the basis for that challenge. The notice must be received by the agency head at least 5 days before the filing of a petition under s. 120.56(2), and at least 30 days before the filing of a petition under s. 120.56(3) or s. 120.56(4).

(b) This subsection does not apply to defenses raised and challenges authorized by s. 120.57(1)(e) or s. 120.57(2)(b).

(7) DETERMINATION OF RECOVERABLE FEES AND COSTS.—For purposes of this chapter, s. 57.105(5), and s. 57.111, in addition to an award of reasonable attorney fees and reasonable costs, the prevailing party shall also recover reasonable attorney fees and reasonable costs incurred in litigating entitlement to, and the determination or quantification of, reasonable attorney fees and reasonable costs for the underlying matter. Reasonable attorney fees and reasonable costs awarded for litigating entitlement to, and the determination or quantification of, reasonable attorney fees and reasonable costs for the underlying matter are not subject to the limitations on amounts provided in this chapter or s. 57.111.

(8)~~(6)~~ OTHER SECTIONS NOT AFFECTED.—Other provisions, including ss. 57.105 and 57.111, authorize the award of attorney ~~attorney's~~ fees and costs in administrative proceedings. Nothing in this section shall affect the availability of attorney ~~attorney's~~ fees and costs as provided in those sections.

Section 10. Paragraph (a) of subsection (2) and subsection (9) of section 120.68, Florida Statutes, are amended to read:

120.68 Judicial review.—

(2)(a) Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law. All proceedings shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed. If the appeal is of an order rendered in a proceeding initiated under s. 120.56, or a final order under s. 120.57(1)(e)4., the agency whose rule is being challenged shall transmit a copy of the notice of appeal to the committee.

(9) No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.56, under s. 120.57(1)(e)5., or under s. 120.57(2)(b), or an agency's findings of immediate danger, necessity, and procedural fairness prerequisite to the adoption of an emergency rule pursuant to s. 120.54(4), unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.

Section 11. Section 120.695, Florida Statutes, is amended to read:

120.695 Notice of noncompliance; designation of minor violation rules.—

(1) It is the policy of the state that the purpose of regulation is to protect the public by attaining compliance with the policies established by the Legislature. Fines and other penalties may be provided in order to assure compliance; however, the collection of fines and the imposition of penalties

are intended to be secondary to the primary goal of attaining compliance with an agency's rules. It is the intent of the Legislature that an agency charged with enforcing rules shall issue a notice of noncompliance as its first response to a minor violation of a rule in any instance in which it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it.

(2)(a) Each agency shall issue a notice of noncompliance as a first response to a minor violation of a rule. A "notice of noncompliance" is a notification by the agency charged with enforcing the rule issued to the person or business subject to the rule. A notice of noncompliance may not be accompanied with a fine or other disciplinary penalty. It must identify the specific rule that is being violated, provide information on how to comply with the rule, and specify a reasonable time for the violator to comply with the rule. A rule is agency action that regulates a business, occupation, or profession, or regulates a person operating a business, occupation, or profession, and that, if not complied with, may result in a disciplinary penalty.

(b) Each agency shall review all of its rules and designate those for which a violation would be a minor violation and for which a notice of noncompliance must be the first enforcement action taken against a person or business subject to regulation. A violation of a rule is a minor violation if it does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm. ~~If an agency under the direction of a cabinet officer mails to each licensee a notice of the designated rules~~

~~at the time of licensure and at least annually thereafter, the provisions of paragraph (a) may be exercised at the discretion of the agency. Such notice shall include a subject-matter index of the rules and information on how the rules may be obtained.~~

(c) ~~The agency's review and designation must be completed by December 1, 1995;~~

1. No later than June 30, 2015, and after such date within 3 months after any request of the rules ombudsman in the Executive Office of the Governor, each agency shall review ~~under the direction of the Governor shall make a report to the Governor, and each agency under the joint direction of the Governor and Cabinet shall report to the Governor and Cabinet by January 1, 1996, on which of~~ its rules and certify to the President of the Senate, the Speaker of the House of Representatives, the Administrative Procedures Committee, and the rules ombudsman those rules that have been designated as rules the violation of which would be a minor violation under paragraph (b), consistent with the legislative intent stated in subsection (1). For each agency failing to timely complete the review and file the certification as required by this section, the rules ombudsman shall promptly report such failure to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Administrative Procedures Committee.

2. Beginning on July 1, 2015, each agency shall:

a. Publish all rules that the agency has designated as rules the violation of which would be a minor violation, either as a complete list on the agency's website or by incorporation of the designations in the agency's disciplinary guidelines adopted as a rule.

b. Ensure that all investigative and enforcement personnel are knowledgeable of the agency's designations under this section.

3. For each rule filed for adoption, the agency head shall certify whether any part of the rule is designated as a rule the violation of which would be a minor violation and shall update the listing required by sub-subparagraph 2.a.

(d) The Governor or the Governor and Cabinet, as appropriate ~~pursuant to paragraph (c)~~, may evaluate the review and designation effects of each agency subject to the direction and supervision of such authority and may direct ~~apply~~ a different designation than that applied by such ~~the~~ agency.

(e) Notwithstanding s. 120.52(1)(a), this section does not apply to:

1. The Department of Corrections;

2. Educational units;

3. The regulation of law enforcement personnel; or

4. The regulation of teachers.

(f) Designation pursuant to this section is not subject to challenge under this chapter.

Section 12. This act shall take effect July 1, 2014.