

STORAGE NAME: h1449a.ccc.doc
DATE: April 18, 2001

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE
COUNCIL FOR COMPETITIVE COMMERCE
ANALYSIS**

BILL #: HB 1449
RELATING TO: Consumer Protection
SPONSOR(S): Committee on Agriculture & Consumer Affairs, Representatives Spratt & others
TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) AGRICULTURE & CONSUMER AFFAIRS YEAS 8 NAYS 0
 - (2) JUDICIAL OVERSIGHT YEAS 10 NAYS 0
 - (3) COUNCIL FOR COMPETITIVE COMMERCE YEAS 12 NAYS 0
 - (4)
 - (5)
-

I. SUMMARY:

This bill revises several consumer-protection programs under the regulatory authority of the Division of Consumer Services within the Department of Agriculture and Consumer Services:

- **Solicitation of Funds by Charitable Organizations:** This bill requires charitable solicitations to include the solicitor's state registration number, the percentage of contributions kept by the solicitor, and the percentage of funds received by the charity.
- **Health Studios:** This bill requires health studios to pay required refunds within 30 days and clarifies that any person who knowingly makes false representations to obtain an exemption is subject to criminal penalties.
- **Pawnbrokers:** This bill provides that a licensed pawnbroker is subject to administrative and criminal penalties for knowingly accepting or receiving stolen property.
- **Sellers of Business Opportunities:** This bill provides that an oral representation by a seller of a business opportunity is actionable, adds additional disclosure requirements, requires delivery of promised goods and services, and limits the "trademark" exception. This bill further provides that collection on a surety bond posted by a seller is heard in an administrative forum.
- **Motor Vehicle Repair Shops:** This bill removes the distinction between minor and major repair shops. This bill further requires motor vehicle repair shops to annually file estimate and invoice forms; and modifies how "shop supplies" are treated in estimates and statements. Additionally, this bill provides that motor vehicle repair shops in public schools and charter technical career centers are exempt from registration.

This bill appears to have a minimal positive fiscal impact on state government. This bill does not appear to have a fiscal impact on local government.

On April 18, 2001, the Council for Competitive Commerce adopted 4 amendments to HB 1449. The amendments are explained in Section VI. Amendments or Committee Substitute Changes.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

This bill increases requirements for charitable solicitations.

This bill expands the regulation of sellers of business opportunities.

This bill eliminates the distinction between motor vehicle repair shops conducting only minor repairs, and other repair shops. The approximately 1,000 shops currently licensed for only minor work would have to re-register as a regular motor vehicle repair shop. The annual registration fee for shops currently classified as minor repair shops is \$25; the fee for regular motor vehicle repair shops ranges from \$50 to \$300.

This bill requires that every motor vehicle repair shop annually file a copy of the shop's standard estimate and invoice form.

B. PRESENT SITUATION:

Background

The Division of Consumer Services, of the Florida Department of Agriculture and Consumer Services (DACCS), is:

Florida's clearinghouse for consumer information, protection and complaints. We function as the U.S. Consumer Product Safety Commission's agent in Florida regarding product recalls, inspections and investigations. . . . The Division also has responsibility for a number of regulatory laws as well. These program areas include: assistive technology devices, business opportunities, charitable organizations, dance studios, health studios, motor vehicle repair shops, no sales solicitation, pawnbrokers, sellers of travel and telemarketing. Some of these programs require businesses to post a security in order to protect consumers. In addition, the Division conducts investigations of violations involving unfair and deceptive trade practices and any laws that fall under the Division's jurisdiction.¹

This bill contains proposals recommended by the division addressing several statutory provisions that need to clarification or updating in order to enhance the division's ongoing consumer protection function.

¹ <http://www.800helpfla.com/>

Solicitation of Contributions

Chapter 496, F.S., is entitled the "Solicitation of Contributions Act." Section 496.405, F.S, provides that a charitable organization or a sponsor must register with the DACS.² Section 496.403, F.S., provides that the registration requirement does not apply to "bona fide religious institutions, educational institutions, and state agencies or other government entities or persons or organizations who solicit or act as professional fundraising consultants solely on their behalf [, nor does it] apply to political contributions solicited in accordance with the election laws of this state." Registration includes a requirement that the organization provide certain financial information regarding the organization, which information must be updated annually. That financial information is open for public inspection, and is available on the Internet. Section 496.404(1), F.S., defines "charitable organization" to mean

[A]ny person who is or holds herself or himself out to be established for any benevolent, educational, philanthropic, humane, scientific, artistic, patriotic, social welfare or advocacy, public health, environmental conservation, civic, or other eleemosynary purpose, or any person who in any manner employs a charitable appeal as the basis for any solicitation or an appeal that suggests that there is a charitable purpose to any solicitation. It includes a chapter, branch, area office, or similar affiliate soliciting contributions within the state for a charitable organization which has its principal place of business outside the state.

Section 496.404(21), F.S., defines "sponsor" to mean

[A] group or person which is or holds itself out to be soliciting contributions by the use of any name which implies that the group or person is in any way affiliated with or organized for the benefit of emergency service employees or law enforcement officers and which is not a charitable organization. The term includes a chapter, branch, or affiliate which has its principal place of business outside the state, if such chapter, branch, or affiliate solicits or holds itself out to be soliciting contributions in this state.

Section 496.411(2), F.S., provides that a charitable solicitation by a registered charitable organization or sponsor must disclose certain information. The solicitation must also conspicuously display in capital letters the following statement on every printed solicitation, written confirmation, receipt or reminder of a contribution:

**A COPY OF THE OFFICIAL REGISTRATION AND FINANCIAL INFORMATION
MAY BE OBTAINED FROM THE DIVISION OF CONSUMER SERVICES BY
CALLING TOLL-FREE WITHIN THE STATE. REGISTRATION DOES NOT IMPLY
ENDORSEMENT, APPROVAL, OR RECOMMENDATION BY THE STATE.**

This statement must include a toll-free number for the Division of Consumer Services that can be used to obtain the registration information. When a solicitation consists of more than one piece, this statement must be displayed prominently in the solicitation materials.

² Under s. 496.405, F.S., each charitable organization or sponsor that intends to solicit contributions in this state by any means or have funds solicited on its behalf by any other person, charitable organization, sponsor, commercial co-venturer, or professional solicitor, or that participates in a charitable sales promotion or sponsor sales promotion, must register with the Department of Agriculture and Consumer Services. Solicitations for a named individual are exempt from registration if the contributions are provided to the beneficiary, and solicitations by an organization of its membership are also exempt from registration. Section 496.406, F.S.

Health Studios

Health studios provide “instruction, training, or assistance in a program of physical exercise” or “equipment or facilities in furtherance of a program of physical exercise.”³ The Legislature first enacted regulation of health studios in 1977, finding that “there exist in connection with a substantial number of contracts for health studio services certain practices and business and financing methods which have worked undue financial hardship upon some of the citizens of our state.”⁴ The Department of Agriculture and Consumer Services (department) describes that, “[i]n the past, some health studios went out of business after collecting thousands of dollars in prepaid membership dues from consumers. Florida law now affords consumers some protection against this type of problem.”⁵

Unless exempted from registration,⁶ health studios are required to register with the department.⁷ Those health studios required to register must post a \$50,000 security in the form of a surety bond, a letter of credit, or a certificate of deposit.⁸ The security provides money that can be used to repay consumers whose health studio goes out of business and does not provide an alternate facility of equal quality within five driving miles.⁹ A health studio is exempt from this security requirement if:

- The health studio collects payments for health-studio services on a monthly basis,¹⁰ or
- The health studio has operated continuously under the same ownership for five years; has had no civil, criminal, or administrative adjudications against it; and has no unresolved consumer complaints.¹¹

In addition, the department may reduce the \$50,000-security requirement to an amount not less than \$10,000 if a health studio demonstrates its outstanding contracts for health studio services total less than \$5,000.¹² Current law provides criminal penalties for knowingly making false representations to the department with the intent of obtaining an exemption of any kind from these security requirements.¹³ These violations are punished as a third-degree felony and may apply to a health studio owner and, in the case of corporate ownership, any officer of the corporation, or any manager of a health studio or the health studio’s business location.¹⁴ The department reports that it is involved in litigation against the former owner of a health studio who conspired to make false representations to the department, but the current law does not extend to the former owner.

Health studios must hold funds received for future health-studio services in an escrow account,¹⁵ are required to allow consumers to cancel contracts for future services under certain circumstances,

³ Section 501.0125(1), F.S.

⁴ Section 501.012, F.S.

⁵ Division of Consumer Services, Dep’t of Agriculture & Consumer Services, *Health Studios: Now You Know* (last modified Apr. 7, 2000), at http://doacs.state.fl.us/~cs/healthstudio_text.html.

⁶ Bona fide nonprofit organizations; gymnastics schools; golf, tennis, and racquetball clubs; facilities used solely for dance, aerobic exercise, or martial arts; and country clubs are exempt from registration. Section 501.013, F.S.

⁷ Section 501.015, F.S.

⁸ *Id.*; s. 501.016, F.S.

⁹ Section 501.016(1), F.S.; Division of Consumer Services, Dep’t of Agriculture & Consumer Services, *Health Studios: Now You Know*, at http://doacs.state.fl.us/~cs/healthstudio_text.html (last modified Apr. 7, 2000).

¹⁰ Section 501.016(3), F.S.

¹¹ Section 501.016(6), F.S.

¹² Section 501.016(4), F.S.

¹³ Section 501.019(2), F.S.

¹⁴ *Id.*

¹⁵ Section 501.016(5), F.S.

and must provide refunds for canceled contracts in proportion to the remaining period of the contract. The circumstances when a health studio must allow cancellation of a contract include:¹⁶

- The consumer cancels within three days of making the contract.
- The health studio goes out of business or moves its facilities more than five driving miles away.
- The consumer dies or becomes physically unable to avail him or herself of a substantial portion of the health-studio services.

If a consumer cancels within three days of making a contract for future health-studio services, the health studio must provide a refund within 30 days.¹⁷ The law does not specify, however, when health studios must provide refunds when contracts are canceled for the other statutorily prescribed circumstances.

Section 501.019(2), F.S., provides that any “health studio owner or, in the case of corporate ownership, any officer of the corporation, or any manager of a health studio or health studio's business location”, who knowingly makes a false representation to the department with the intent to obtain an exemption from the health studio regulations of s. 501.016, F.S. (which requires a bond or other surety if the health studio collects advance fees), commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, F.S.

Pawnbroking

Dealing in stolen property is a crime punishable as a second-degree felony.¹⁸ Section 539.001(12), F.S., provides a list of acts that a licensed pawnbroker is prohibited from committing. It is not a violation of s. 539.001(12), F.S., for a pawnbroker to knowingly accept stolen property in a pawn or purchase transaction. In addition to administrative penalties, a pawnbroker who willfully violates the Florida Pawnbroking Act is subject to criminal penalties, punished as a first-degree misdemeanor.¹⁹ In a recent burglary trial where a pawnbroker acknowledged accepting stolen property, the DACS was unable to pursue any administrative action against the pawnbroker in spite of the admission.

In addition, the Florida Pawnbroking Act (act) defines the term “agency” to mean the Division of Consumer Services of the Department of Agriculture and Consumer Services,²⁰ and this term is used throughout the act. Subsection (21) of the act, however, refers to “department,” rather than “agency” when granting rulemaking authority. Also, the act uses the term “department” rather than “agency” in s. 539.001(4)(b) and (5)(c), F.S. In subsection (5)(c), the act uses both the terms “department” and “agency,” and it is unclear in at least one reference whether the act refers to the Division of Consumer Services or the Department of Law Enforcement.

Business Opportunities

The Department of Agriculture and Consumer Services (department) describes a “business opportunity [as] an offer to assist a person in starting his or her own business by providing – either through sales or lease – products, equipment, supplies or service[s] needed to carry on the

¹⁶ Section 501.017(1)(a), (b) & (d), F.S.

¹⁷ Section 501.017(1)(a), F.S.

¹⁸ See s. 812.019(1), F.S. (“Any person who traffics in, or endeavors to traffic in, property that he or she knows or should know was stolen shall be guilty of a felony of the second degree, punishable as provided in ss. 775.082, 775.083, and 775.084[, F.S].”)

¹⁹ Section 539.011(17)(b), F.S.

²⁰ Section 539.001(2)(a), F.S.

business.”²¹ Business opportunities range from addressing envelopes or assembling toys at home at a cost of a few dollars, to establishing vending machine routes or installing pay telephones for thousands of dollars. Often, the department reports, these promotions imply that investors can see a substantial return with minimal effort.²² Under current law, a “business opportunity” is defined as the sale or lease of goods or services to an individual to enable that person to start a business if the individual is charged more than \$500 and the seller represents that:²³

- Assistance will be provided in securing locations for vending machines, racks, display cases, amusement machines, or other similar devices,
- The seller will purchase the goods produced by the individual using materials sold to the individual by the seller,
- The seller guarantees in writing that the seller will refund monies paid if the individual does not receive income in excess of the charges for the business opportunity, or
- The seller will provide a sales or marketing program that will enable the individual to derive income.

When the seller of a business opportunity guarantees *in writing* that it will refund monies paid if the individual does not receive income in excess of the charges for the business opportunity, current law requires the seller to post a \$50,000 security in the form of a surety bond, trust account, or guaranteed letter of credit. An individual who is damaged by a violation of the Sale of Business Opportunities Act (act)²⁴ or by a breach of contract may bring a civil action for no more than actual damages against the security. These damages may not exceed the amount of the security (\$50,000).

The department reports that these security requirements are inconsistent with the security requirements for other programs implemented by the department in that: 1) a damaged individual may only seek damages in circuit court in lieu of an administrative action; and 2) the security may be posted as a trust account. The department noted that no seller of business opportunities has ever posted a trust account. The department also reports that, when sellers of business opportunities make verbal guarantees that they will refund monies paid if the individual does not receive income in excess of the charges for the business opportunity, these sellers are not required to post a security. The department further relates that some sellers of business opportunities avoid the security requirement by making only verbal guarantees and not putting these guarantees in writing.

The Sale of Business Opportunities Act applies to the seller of a business opportunity if the seller makes representations that it will provide a sales or marketing program that will enable the individual to derive income; however, the law currently exempts a seller when the “sales program or marketing program [is] made in conjunction with the licensing of a trademark or service mark that is registered under the laws of any state or of the United States.”²⁵ The department reports that some sellers of business opportunities obtain a registered trademark or service mark to avoid the requirements of the act, but sell business opportunities that are unrelated to the trademark or service mark.

²¹ Division of Consumer Services, Dep’t of Agriculture & Consumer Services, *Business Opportunities: Now You Know* (last modified Apr. 7, 2000), at http://doacs.state.fl.us/~cs/busop_text.html.

²² *Id.*

²³ Section 559.801(1)(a), F.S.

²⁴ Sections 559.80-559.815, F.S.

²⁵ Section 559.801(1)(a)4., F.S.

Before placing advertisements or making any offer to sell a business opportunity in this state, the seller of a business opportunity must annually file with the department a copy of the written disclosure statement.²⁶ This disclosure statement must include:²⁷

- Information about the seller and management personnel.
- The company's background and operations.
- Details about the actual services to be provided.
- Financial data.
- Details about training programs that may be required.
- A copy of the business opportunity contract.

If the seller identifies sales or earnings that may be reached through the business opportunity, the disclosure statement must include information about the number of persons who actually achieved anticipated sales or earnings levels and the number of recent purchasers of the business opportunity.²⁸

The Sale of Business Opportunities Act includes a list of prohibited acts.²⁹ These prohibited acts specify several forms of misrepresentation, fraud, and other violations that are subject to administrative, civil, and criminal prosecution.³⁰ Criminal violations are punishable as a third-degree felony.³¹

Motor Vehicle Repair

Under the Florida Motor Vehicle Repair Act (act),³² any person who, for compensation, engages or attempts to engage in the repair of motor vehicles owned by other persons is defined as a motor vehicle repair shop³³ and is subject to regulation unless the repair shop is exempted from the provisions of the act.³⁴ These repairs include all maintenance of and modifications and repairs to motor vehicles, and diagnostic work incident thereto, including, but not limited to, the rebuilding or restoring of rebuilt vehicles, body work, painting, warranty work, and other work customarily undertaken by motor vehicle repair shops.³⁵

The act currently applies to motor vehicle repair shops located in public schools or charter technical career centers. A charter technical career center is a public school or a public technical center operated under a charter granted by a local school board or a community college district board of trustees or a consortium, including one or more school boards and community college district boards of trustees that includes the district in which the facility is located, which is nonsectarian in

²⁶ Section 559.805, F.S.

²⁷ Section 559.803, F.S.

²⁸ Section 559.803(10), F.S.

²⁹ Section 559.809, F.S.

³⁰ See ss. 559.813 & 559.815, F.S.

³¹ Section 559.815, F.S.

³² Sections 559.901-559.9221, F.S.

³³ Section 559.903(7), F.S.

³⁴ See s. 559.902, F.S.

³⁵ Section 559.903(9), F.S.

its programs, admission policies, employment practices, and operations and is managed by a board of directors.³⁶ Thus, public schools and charter technical career centers must register with the department and comply with all other provisions of the act.

Since 1993,³⁷ motor vehicle repair shops have been required to register with the department annually and pay a registration fee unless exempted. The amount of the registration fee varies. A repair shop performing only minor repair services³⁸ pays a \$25 registration fee.³⁹ All other repair shops pay a registration fee based on the number of employees: \$50 (one to five employees), \$150 (six to 10 employees), and \$300 (11 or more employees).⁴⁰ Before 1997, repair shops performing only minor repairs were exempt from registration and payment of a registration fee.⁴¹ The act was subsequently amended to require registration by minor repair shops, but established the lesser \$25 fee.⁴² In addition, the act allows a minor repair shop that received a certificate of exemption from the department before July 1, 1997, to remain exempt from registration until the certificate expired. This exemption remains in the statute.⁴³ The Department of Agriculture and Consumer Services (department) reports that it has become increasingly difficult to distinguish between repair shops performing minor repairs and shops performing major repairs. Further, the department relates their belief that many of the repair shops currently registered as “minor” are performing major repairs.

To advise the department in implementing the Florida Motor Vehicle Repair Act, the Legislature created the Motor Vehicle Repair Advisory Council.⁴⁴ The 11-member council is appointed by the Commissioner of Agriculture and includes eight industry members. Under current law, the industry representatives must include a person engaged solely in minor repair service.⁴⁵ In addition, the statute established staggered four-year terms for the initial council members and required these initial members to be registered with the department by October 1, 1993, in order to serve on the council.

The Florida Motor Vehicle Repair Act (act) makes it unlawful for a motor vehicle repair shop to make or charge for repairs which have not been expressly or impliedly authorized by the customer or to fraudulently alter any customer contract, estimate, invoice, or other document.⁴⁶ The act does not currently require a repair shop to submit copies of its estimate and invoice forms as part of the registration process. The department reports that the majority of violations are related to repair shops using improper forms or improperly completing these forms.

³⁶ Section 228.505(3)(a), F.S.

³⁷ See s. 4, ch. 93-219, L.O.F. (codified at s. 559.904, F.S.).

³⁸ “‘Minor repair service’ includes repairing and changing tires; lubricating vehicles; cleaning, adjusting, and replacing spark plugs; changing oil and air filters; replacing, adjusting, repairing, or servicing hoses and air filters; changing or otherwise servicing the coolant, automatic door lamp switch, battery, battery ground cable, battery hold-down strap, battery positive cable, battery-to-starter relay cable, oil filter, fan and alternator drive belts, fuses, headlamp foot dimmer, horns, ignition coil output wire, light bulbs and headlamps, ornamental accessories, power steering pump belt, wheels, except alignment, windshield washer tank, and wiper blades; and any other minor service, which may be performed by persons without the skills and knowledge required of motor vehicle mechanics and helpers and which the department has designated by rule to be a minor repair service. No service shall be designated as minor for purposes of this act, if the department finds that performance of the service requires mechanical expertise or has given rise to a high incidence of fraud or deceptive practices.” Section 559.903(5), F.S.

³⁹ Section 559.904(3), F.S.

⁴⁰ *Id.*

⁴¹ See s. 559.904(6), F.S. (1995).

⁴² Section 26, ch. 97-250, L.O.F.

⁴³ See s. 559.904(6), F.S.

⁴⁴ Section 559.9221(1), F.S.

⁴⁵ *Id.* s. 559.9221(1)(b), F.S.

⁴⁶ Section 559.920(2) & (6), F.S.

Motor vehicle repair shops are required under current law to provide written estimates of repair work that will exceed \$100.⁴⁷ The statute requires the written estimate to include the estimated cost of repair, including any diagnostic work. However, the statute does not specifically require the estimated cost of repair to include charges for shop supplies, hazardous waste, or other waste removal. Under current law, it is unlawful for a motor vehicle repair shop to charge more than the written estimate plus \$10 or 10 percent, whichever is greater, but not to exceed \$50, unless the motor vehicle repair shop has obtained the customer's permission to exceed the written estimate.⁴⁸ The department reports that many repair shops add an additional charge to repair invoices, ranging from 3 to 10 percent of the estimated cost of repair, which additional charge is entitled such things as shop supplies, hazardous waste fee, or waste disposal fee.

Under current law, the department may deny or refuse to renew the registration of a motor vehicle repair shop for failure to meet the requirements of the act or as the result of certain civil, criminal, or administrative adjudications.⁴⁹ However, current law does not allow the department to revoke a registration for those reasons.

C. EFFECT OF PROPOSED CHANGES:

Solicitation of Contributions

This bill amends s. 496.411, F.S., to add that any charitable organization or sponsor that is required to register under Chapter 496, F.S., must include the following information on "every printed solicitation, written confirmation, receipt, or reminder of a contribution":

- The charitable organization's or sponsor's registration number,
- The percentage, if any, of each contribution retained by any professional solicitor that has contracted with the charitable organization or sponsor, and
- The percentage of each contribution received by the organization or sponsor.

If the solicitation consists of more than a single item, the statement must be displayed prominently in the solicitation materials.

Health Studios

This bill amends s. 501.017, F.S., to require a health studio to provide the pro-rata refund within 30 days when the consumer lawfully cancels a contract because a studio goes out of business, changes location, or the consumer suffers a health-related condition authorizing cancellation.

This bill amends s. 501.019(2), F.S., regarding criminal penalties for knowingly making a false representation to the department with the intent to obtain an exemption from the health studio bonding requirements, to remove the phrase "health studio owner or, in the case of corporate ownership, any officer of the corporation, or any manager of a health studio or health studio's business location", and replace it with simply "person". By doing so, this change removes one of the elements of the crime that must be proven by the state.

⁴⁷ Section 559.905, F.S.

⁴⁸ Section 559.909(3), F.S.

⁴⁹ Section 559.904(10), F.S.

Pawnbroking

This bill amends s. 539.001(12), F.S., to add that it is a violation of the Florida Pawnbroking Act for a licensed pawnbroker to “knowingly accept or receive misappropriated property from a conveying customer in a pawn or purchase transaction.”

This bill amends s. 539.001(21), F.S., to change the term “department” to the more accurate “agency”.

Business Opportunities

This bill removes the requirement that guarantees from the seller of a business opportunity must be *in writing* to subject the seller to the Sale of Business Opportunities Act (act). Thus, verbal guarantees that a seller will refund monies paid if the individual does not receive income in excess of the charges for the business opportunity would be subject to regulation. Specifically, all sellers making these guarantees would be required to post a \$50,000 security, file disclosure statements with the department, and comply with all other provisions of the act. This bill also amends the security requirements in current law to allow sellers of business opportunities to post certificates of deposit in lieu of the \$50,000 bond, and this bill removes the authority for a seller to post a trust account as security. This bill broadens the scope of civil actions that may be brought against a seller of a business opportunity to include fraud, misrepresentation, and financial failure. Further, this bill requires that consumer complaints be brought against the \$50,000 security as administrative proceedings before the department instead of before a circuit court. This bill establishes a presumption that the amount of a court judgment is prima facie evidence of the value of an administrative claim.

This bill further provides that, when a sales program or marketing program is made in conjunction with the licensing of a trademark or service mark that is registered under the laws of any state or of the United States, the Sale of Business Opportunities Act applies to the seller of a business opportunity unless the seller requires use of the trademark or service mark in the sales agreement.

This bill requires the seller of a business opportunity to include additional information in the written disclosure statement, which must be filed annually with the department before placing advertisements or making any offer to sell a business opportunity. This requirement would apply regardless of whether the seller makes reference to potential sales and earnings. The additional information that would be required in the disclosure statement includes:

- The total number of persons who purchased the business opportunity being offered by the seller within the past three years, and
- The names, addresses, and telephone numbers of the 10 persons who previously purchased the business opportunity from the seller and who are geographically closest to the potential purchaser.

This bill further provides that failure to provide or deliver the products, equipment, supplies, or services specified in the written business opportunity contract is a prohibited act. Consequently, sellers of business opportunities would be subject to civil, criminal, and administrative penalties for a violation. A criminal penalty would be punished as a third-degree felony.

Motor Vehicle Repair

This bill amends s. 559.902, F.S., to exempt motor vehicle repair shops located in public schools or charter technical career centers from the Florida Motor Vehicle Repair Act, thereby eliminating the requirement of annual registration with the department and compliance with other provisions of the act.

This bill removes the definition of the term “minor repair services” and consequently removes the distinction between motor vehicle repair shops performing minor versus major repairs. Thus, repair shops currently registered with the department as minor repair shops will not be eligible for the lesser \$25 registration fee. These repair shops will be required to register based upon the number of employees and will pay a registration fee between \$50 and \$300: one to five employees (\$50), six to 10 employees (\$150), or 11 or more employees (\$300). In addition, this bill removes obsolete provisions permitting a minor repair shop that received a certificate of exemption from the department before July 1, 1997, to remain exempt from registration until the certificate expires.

This bill also removes the requirement that one of the eight industry members serving on the Motor Vehicle Repair Advisory Council be engaged solely in minor repair service. Additionally, the obsolete provisions that established staggered four-year terms for the initial council members and that required these initial members to be registered with the department by October 1, 1993, in order to serve on the council, are removed.

This bill requires motor vehicle repair shops to submit copies of their estimate and invoice forms to the department as part of the registration process. This bill further requires motor vehicle repair shops to detail the estimated cost of repair, including charges for shop supplies, hazardous waste, or other waste removal, when providing a written estimate or repair work that will exceed \$100.

This bill also provides that the department may revoke the registration of a motor vehicle repair shop for failure to meet the requirements of the act or as the result of certain civil, criminal, or administrative adjudications.

D. SECTION-BY-SECTION ANALYSIS:

Solicitation of Contributions

Section 1: amends s. 496.411, F.S., to provide disclosure statement requirements for charitable organizations or sponsors.

Health Studios

Section 2: amends s. 501.017, F.S., to require a health studio to refund a consumer's money within 30 days when the consumer cancels a contract pursuant to statutory authority.

Section 3: amends s. 501.019, F.S., to provide a criminal violation for providing false information to the DACS.

Pawnbroking

Section 4: amends s. 539.001, F.S., to prohibit a pawnbroker from knowingly accepting stolen property.

Business Opportunities

Section 5: amends s. 559.801, F.S., to delete the requirement that representations guaranteeing certain income from a business opportunity must be made in writing.

Section 6: amends s. 559.803, F.S., to require the disclosure statement include the number of persons who have purchased the business opportunity within the past three years and the names, addresses and phone numbers of ten previous persons who have purchased the business opportunity from the provider who are geographically closest to the prospective purchaser.

Section 7: amends s. 559.807, F.S., to conform that section to s. 559.929, F.S. It allows a certificate of deposit to serve as a security instead of a trust account, provides for a right of action against that security, and makes clear that the security will be amenable and enforceable only in administrative proceedings involving DACS.

Section 8: amends s. 559.809, F.S., to prohibit a business opportunity seller from failing to deliver the products equipment, supplies or services as promised in the business opportunity contract.

Motor Vehicle Repair

Section 9: amends s. 559.902, F.S., to specify that the Motor Vehicle Repair Act does not apply to those motor vehicle repair shops located in public schools as defined in s. 228.041, F.S., or charter technical career centers as defined in s. 228.505, F.S.

Section 10: amends s. 559.904, F.S., to delete provisions relating to minor repairs and to require copies of a motor vehicle repair shop's estimate and invoice forms be submitted to the DACS as part of the registration application.

Section 11: amends s. 559.905, F.S., to require the repair shop to disclose, as a part of the written estimate, any charges for miscellaneous shop supplies or waste disposal charges.

Section 12: amends s. 559.9221, F.S., to delete references to minor repair in relation to the composition of the Motor Vehicle Repair Advisory Council and to delete no longer necessary language relating to the initial appointment of members to the advisory council.

Section 13: repeals s. 559.903(5), F.S., which is the definition of "minor repair service".

Section 14: provides that the act shall take effect October 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill requires motor vehicle repair shops performing only minor repair services to pay registration fees based on the number of employees. Currently, these repair shops pay a \$25 registration fee. The bill will require these repair shops to pay a registration fee between \$50 and \$300: one to five employees (\$50), six to 10 employees (\$150), or 11 or more employees (\$300). According to the Department of Agriculture and Consumer Services, there are 1,081 motor vehicle repair shops registered as minor repair shops.⁵⁰ The average number of employees working in minor repairs shops is unknown; therefore, it is difficult to estimate the

⁵⁰ These figures were current as of February 26, 2001.

amount of additional registration fees that will be generated. The department estimates the committee substitute will generate a slight increase in revenues.

2. Expenditures:

This bill requires that every motor vehicle repair shop annually file a copy of the shop's standard estimate and invoice form. It is unclear whether administratively the department will treat this as a mere filing requirement, or whether department employees will review the forms and audit them for compliance. Either way, there will be increased employee and storage costs that are unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires solicitation materials for charities to be revised to include additional disclosures. The costs associated with making the revisions are unknown.

The bill requires sellers of business opportunities to include additional information in their disclosure statements; the associated costs are unknown.

This bill eliminates the distinction between motor vehicle repair shops conducting only minor repairs, and other repair shops. The approximately 1,000 shops currently licensed for only minor work would have to re-register as a regular motor vehicle repair shop. The annual registration fee for shops currently classified as a minor repair shop is \$25, the fee for regular motor vehicle repair shops ranges from \$50 to \$300.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the state tax shared with counties or municipalities

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Article III, s. 6, Fla.Const., requires that “[e]very law shall embrace but one subject and matter properly connected therewith”. See *Thompson v. State*, 750 So.2d 643 (Fla. 1999).

This bill provides that the agency, through administrative hearings, will determine whether a person defrauded by a business opportunity broker may collect against the bond or security. Under this bill, a defrauded purchaser of a business opportunity broker could sue in state court for an adjudication that the person was defrauded. Should either party be unhappy with the outcome, an appeal could be taken to the district court of appeal. Then, the defrauded person would have to go to the agency for administrative action to determine whether or not the defrauded person could collect on the bond or security. An appeal of the administrative action would go back to the district court of appeal. Article V, s. 1, Fla.Const, provides that state agencies “may be granted quasi-judicial power in matters connected with the functions of their offices.” Typically, administrative actions involve the interest of a state agency as one of the parties. It is unclear whether the interests of competing private parties is a “matter connected with the function of” the department.

B. RULE-MAKING AUTHORITY:

This bill replaces the term “department” with the term “agency” in subsection (21) of the Florida Pawnbroking Act in an attempt to clarify that the Department of Agriculture and Consumer Services has rulemaking authority to implement the act. However, the act defines “agency” to mean the Division of Consumer Services of the Department of Agriculture and Consumer Services. Consequently, it may be argued that this bill transfers rulemaking authority to the Division of Consumer Services from the division’s parent agency, the Department of Agriculture and Consumer Services. To avoid the possibly unintended consequence of transferring the department’s rulemaking authority to the Division of Consumer Services, this bill should perhaps be amended to further clarify rulemaking authority. Further, this bill does not replace the term “department” with “agency” in the two remaining instances where these terms are interposed.⁵¹ For internal consistency, this bill should perhaps be amended to clarify the terms in each instance.

C. OTHER COMMENTS:

Comments by the Committee on Agriculture & Consumer Affairs

The requirement that business opportunities disclose the number of purchasers for a 3-year period and the names and contact information for 10 persons who have purchased the product and who live near a potential purchaser may impinge upon a business owner’s interest in trade secrets. Customer lists and contact information are often protected as trade secrets. However, by making portions of customer lists publicly available through the disclosures required by the bill, a business opportunity may lose the ability to protect that information under trade secret law. See East Colonial Refuse Service, Inc. v. Velocci, 416 So.2d 1276 (Fla. 5th DCA 1982)(customer lists in the form of compilations made available to the public are not trade secrets).

⁵¹ See s. 539.001(4)(b) and (5)(c), F.S.

The amendment to s. 559.807, F.S., broadens the scope of suits that may be initiated on a security provided by a business opportunity. The bill would allow such suits on grounds of fraud, misrepresentation, and insolvency as well as the current law provisions for breach of contract. Section 559.809, F.S., lists a number of categories of misrepresentation relating directly to the business opportunity. By broadening the scope of the cause of action, the bill may increase claims and may allow for claims that are tangentially related to the business opportunity and the regulatory provisions of Chapter 559

Comments by the Committee on Judicial Oversight

Pawnbroking

The term "misappropriate" defines the theft of money or of intangible property. It is unclear how a pawnbroker, whose business it is to deal in tangible personal property, can knowingly receive misappropriated property. Section 812.019, F.S., provides that it is a crime to deal in "stolen" property.

Section 539.001(17), F.S., provides that a violation of the Florida Pawnbroking Act is a misdemeanor. Adding another prohibited activity also adds another criminal offense to the statutes. The title of this bill does not reflect that criminal penalties are attached to this new prohibited act.

Business Opportunities

As to the provision which requires that a business opportunity seller list the names, addresses, and phone numbers of the 10 persons who previously purchased the business opportunity from the seller and who are geographically closest to the potential purchaser, the following concerns arise:

- It is unclear how the seller will list the *10 persons* who previously purchased the business opportunity who are *geographically closest* to the potential purchaser. This provision raises the question whether the seller is required to list the last 10 purchasers worldwide, the last 10 purchasers within some area loosely defined as "geographically closest" to the potential purchaser, only those purchasers (but not necessarily 10) who are geographically closest to the potential purchaser of the last 10 purchasers, or 10 recent (but not necessarily the last 10) purchasers who are geographically closest to the potential purchaser.
- It is unclear how a seller who has numerous salespersons could possibly track the most recent purchasers, and provide that information to the other salespersons in the field.
- It is possible that disclosure of the names and addresses of other purchasers of the business opportunity may give rise to concerns regarding privacy, trade secrets, and the provision of an unfair business advantage over the previous purchasers. Also, a competitor could use such lists to solicit for a competing product. By making portions of customer lists publicly available through the disclosures required by the bill, a business opportunity seller may lose the ability to protect that information under trade secret law. See, *East Colonial Refuse Service, Inc. v. Velocci*, 416 So.2d 1276 (Fla. 5th DCA 1982) (customer lists in the form of compilations made available to the public are not trade secrets).

This bill allows certificates of deposit to be posted in lieu of surety bonds to meet the security requirements for sellers of business opportunities, and removes authority for trust accounts to be posted in lieu of bonds. Where this bill replaces the term "trust account" with "certificate of deposit"

in s. 559.807, F.S., this bill does not make a conforming change in ss. 559.803(8) and 559.805(1) and (3), F.S.

The penalties section of the Sale of Business Opportunities Act⁵² establishes that “[a]ny person who ... commits an act described in s. 559.809[, F.S.,] is guilty of a felony of the third degree.” Section 559.809, F.S., lists the acts that are prohibited for sellers of business opportunities. Thus, the penalties section, by specific reference to this section, incorporates these prohibited acts, thereby causing the acts to be punishable as a felony of the third degree. Section 8 of this bill provides that “[f]ailure to provide or deliver the products, equipment, supplies, or services as specified in the written contract required under s. 559.811[, F.S.]” is added to the list of prohibited activities. Through addition of this prohibited act in s. 559.809, F.S., this bill attempts to subject the prohibited act to criminal prosecution. However, in *Overstreet v. Blum*,⁵³ the Florida Supreme Court held that:

It is proper for [a] statute to adopt all or a part of another statute by *specific and descriptive reference* thereto. When this is done the adoption takes the statute as it exists at that time. ... Further, the adoption of another statute by specific reference takes the second statute as it then exists, unaffected by any subsequent amendment or repeal unless a contrary intent clearly appears.⁵⁴

Because the penalties section of the Sale of Business Opportunities Act incorporates prohibited acts by specific reference to s. 559.809, F.S., a court could rule that only those prohibited acts that were in existence when the penalties section was enacted are incorporated and, therefore, are subject to criminal prosecution. This may be cured by re-adopting s. 559.815, F.S. (the penalties section), in order to incorporate the new prohibited act.

The title of this bill does not reflect that criminal penalties are attached to this new prohibited act.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 18, 2001, the Council for Competitive Commerce adopted 4 amendments. The amendments:

- Return the Assistive Technology Device Warranty Act to its pre-1999 status, providing a minimum mandatory warranty for specific items that help the disabled in their everyday lives, including wheelchairs, specialty beds, and some communication devices. Regulatory activities of the Department of Agriculture and Consumer Services and the \$300 registration fee are repealed and specific assistive technology devices are added to the definition of home medical equipment in s. 400.925(8), F.S.
- Redefine the term “agency” in the Florida Pawnbroking Act, to mean the Department of Agriculture and Consumer Services, rather than the Division of Consumer Services.
- Correct cross references relating to guaranteed letters of credit or certificates of deposit required by disclosure statements in the Sale or Lease of Business Opportunities Law.
- Re-adopt the penalty section of the Sale or Lease of Business Opportunities Law to reflect that the penalties apply to the added language prohibiting a business opportunity seller from failing to deliver goods and/or services as promised in the business opportunity contract.

⁵² Section 559.815, F.S.

⁵³ 227 So. 2d 197 (Fla. 1969).

⁵⁴ (Emphasis added.)

STORAGE NAME: h1449a.ccc.doc

DATE: April 18, 2001

PAGE: 17

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Susan D. Reese

Staff Director:

Susan D. Reese

AS REVISED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Nathan L. Bond, J.D.

Staff Director:

Lynne Overton, J.D.

AS FURTHER REVISED BY THE COUNCIL FOR COMPETITIVE COMMERCE:

Prepared by:

Susan D. Reese

Staff Director:

Hubert "Bo" Bohannon