

Regulatory Reform Subcommittee

Wednesday, March 17, 2021
1:00 PM – 3:00 PM
Webster Hall (212 Knott)

Meeting Packet

Chris Sprowls
Speaker

Bob Rommel
Chair

The Florida House of Representatives

Commerce Committee
Regulatory Reform Subcommittee

Chris Sprowls
Speaker

Bob Rommel
Chair

AGENDA

Wednesday, March 17, 2021
Webster Hall (212 Knott)
1:00 PM – 3:00 PM

I. Call to Order & Roll Call

II. Welcoming Remarks

III. Consideration of the following bills(s):

HB 317 by *Rep. Caruso*
Public Accountancy

HB 331 by *Rep. McClure*
Displacement of Private Waste Companies

C /HB 385 by *Local Administration & Veterans Affairs Subcommittee, Rep. Hage*
Alcoholic Beverage Licenses, Lake and Sumter Counties

CS/HB 473 by *Civil Justice & Property Rights Subcommittee, Rep. Toledo*
Construction Liens and Bonds

HB 751 by *Rep. Clemons*
City of Gainesville, Alachua County

CS/HB 755 by *Criminal Justice & Public Safety Subcommittee, Rep. Fischer*
Arrest Booking Photographs

HB 953 *by Rep. Chambli s, Rep. Plakon*
Criminal History in Professional Licensing Applications

HB 991 by *Rep. Busatta Cabrera*
Petroleum Fuel Measuring Devices

303 House Office Building, 402 South Monroe treet, Tallahassee, Florida 32399-1300
(850) 717-4870 Fax: (850) 410-0096

HB 1307 by *Rep. Beltran*
Telephone Solicitation

HB 6053 by *Rep. Yarborough*
Doorstep Waste Containers

IV. Adjournment

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Regulatory Reform Subcommittee

Start Date and Time:	Wednesday, March 17, 2021 01:00 pm
End Date and Time:	Wednesday, March 17, 2021 03:00 pm
Location:	Webster Hall (212 Knott)
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 317 Public Accountancy by Caruso
HB 331 Displacement of Private Waste Companies by McClure
CS/HB 385 Alcoholic Beverage Licenses, Lake and Sumter Counties by Local Administration & Veterans Affairs Subcommittee, Hage
CS/HB 473 Construction Liens and Bonds by Civil Justice & Property Rights Subcommittee, Toledo
HB 751 City of Gainesville, Alachua County by Clemons
CS/HB 755 Arrest Booking Photographs by Criminal Justice & Public Safety Subcommittee, Fischer
HB 953 Criminal History in Professional Licensing Applications by Chambliss, Plakon
HB 991 Petroleum Fuel Measuring Devices by Busatta Cabrera
HB 1307 Telephone Solicitation by Beltran
HB 6053 Doorstep Waste Containers by Yarborough

This meeting will be live-streamed on https://thefloridachannel.org/. Persons who wish to attend must register at www.myfloridahouse.gov, at least three hours before the meeting, and pick up a pass at the Legislative Welcome Center on the 4th Floor of the Capitol beginning one hour before the start of the meeting. Audience seating will be socially distanced and will be available on a first-come, first-served basis. Registration closes three hours before the meeting starts.

NOTICE FINALIZED on 03/15/2021 4:13PM by Rigas.Amanda

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 317 Public Accountancy
SPONSOR(S): Caruso and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 616

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform Subcommittee		Wright	Anstead
2) Commerce Committee			

SUMMARY ANALYSIS

In Florida, public accountancy is regulated by the Board of Accountancy under the Department of Business and Professional Regulation. The practice of public accountancy includes offering to the public the performance of services involving audits, reviews, compilations, tax preparation, management advisory or consulting services, or preparation of financial statements. In order to practice public accountancy, a person must be licensed as a certified public accountant (CPA).

Every biennium, CPAs must complete 80 hours of continuing professional education (CPE), by board rule. At least 5 percent of the total hours required by the board must be in the subject of public accounting ethics.

Applicants for CPA licensure by endorsement must be of good moral character; complete certain CPE requirements; and either not be licensed but have passed an equivalent examination in another state or territory, or hold a license from another state or territory if the criteria issuance is equivalent to that of Florida.

Inactive status for CPA licenses can be initiated voluntarily by the licensee, or for failure to meet the CPE license renewal requirements. The board is authorized to adopt rules establishing the minimum requirements for placing a license on inactive status, renewing an inactive license, and reactivating the inactive license. Currently, a retired status for CPA licensure does not exist.

The bill:

- Clarifies the licensure by endorsement provision for applicants that have passed an examination but do not hold a license in "another" state or territory, to instead not require a license in "any" state or territory;
- Allows nonresidents seeking CPA license renewal to satisfy the CPE requirements (except for the ethics component), with either the applicable CPE requirements in the state in which the applicant's office is located, or Florida CPE requirements, if the other state has no CPE license renewal requirements;
- Specifies that a "majority" of the total CPE hours required for ethics training must include a review of certain provisions and related administrative rules; and
- Creates a "retired status" for active or inactive CPA licensees over 55 years old;

The bill does not have a fiscal impact on state or local governments.

The bill has an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Florida Board of Accounting (board) in the Department of Business and Professional Regulation (DBPR) is the agency responsible for regulating and licensing more than 35,000 active and inactive certified public accountants (CPA) and more than 5,400 accounting firms in Florida. The Division of Certified Public Accounting provides administrative support to the 9-member board, which consists of 7 CPAs and 2 laypersons.[1]

To engage in the practice of public accounting, an individual or firm must be licensed and business entities must meet certain formation requirements.[2]

The "practice of public accountancy" includes offering to the public the performance of services involving audits, reviews, compilations, tax preparation, management advisory or consulting services, or preparation of financial statements.[3]

The initial licensing fee for a CPA license is $50, and the biennial renewal fee is $105.[4]

A person may be charged with a first-degree misdemeanor if they are not a licensed CPA and they perform:[5]

- Services involving the expression of an opinion on financial statements,
- The attestation as an expert in accountancy to the reliability or fairness of presentation of financial information,
- The utilization of any form of opinion or financial statements that provide a level of assurance,
- The utilization of any form of disclaimer of opinion which conveys an assurance of reliability as to matters not specifically disclaimed, or
- The expression of an opinion on the reliability of an assertion by one party for the use by a third party.

License by Endorsement

An applicant is eligible for licensure by endorsement if the applicant:[6]

- is of good moral character;
- has completed 80 hours of continuing professional education (CPE) if it has been at least 2 years since passing the licensing examination;[7] and either:
    - is not licensed, but has otherwise met the licensing requirements and has passed a licensing examination that is substantially equivalent to the Florida examination; or
    - holds a valid license to practice public accounting issued by another state or territory of the United States, if the criteria for issuance of such license are substantially equivalent to a Florida license or is otherwise permitted.

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[1] S. 473.303, F.S.
[2] S. 473.302, F.S.
[3] S. 473.302(8), F.S.
[4] Email from Roger Scarborough, Director of the Division of Public Accounting, Florida Department of Business and Professional Regulation, RE: CPAs (Feb. 8, 2021).
[5] S. 473.322(1)(c), F.S.
[6] S. 468.8414(3), (4), F.S.
[7] R. 61H1-29.003, F.A.C.

Continuing Education

CPAs are required to complete 80 hours[8] of CPE in public accounting subjects every 2 years to renew their license. The board has the authority to prescribe by rule additional CPE hours, not to exceed 25 percent of the total hours required, for failure to complete the hours required for renewal by the end of the reestablishment period.[9]

At least 25 percent of the total hours required by the board must be in accounting-related and auditing-related subjects, as distinguished from other subjects that include federal and local taxation matters and management services.[10]

Five percent of the total hours required by the board must be in ethics applicable to the practice of public accounting. This requirement must be administered by providers approved by the board and include a review of the provisions of ch. 455, F.S., ch. 473, F.S., and the related administrative rules.[11]

Inactive Licenses

CPAs are authorized to request their license be placed on inactive status, or the licensee may be placed on inactive status for failing to meet the CPE requirements for license renewal. The board is authorized to adopt rules establishing the minimum requirements for placing a license on inactive status, renewing an inactive license, and reactivating the inactive license.[12]

The fee for reactivating an inactive CPA license is $380.[13] The maximum CPE requirements for reactivating an inactive or delinquent license are 120 hours, including:

- At least 30 hours in accounting-related and auditing-related subjects;
- Not more than 30 hours in behavioral subjects; and
- A minimum of 8 hours in ethics subjects approved by the board.

Retired Status

The American Institute of CPAs (AICPA) estimates that approximately 75 percent of its members will be eligible to retire by the year 2020. According to AICPA, "many of these retirees are well respected business leaders in their communities who would like to find ways to continue to be of service, without necessarily remaining an active CPA in practice."[14]

The AICPA provides a uniform retired CPA status in their model rules that states may adopt allowing retired CPAs to offer a limited array of volunteer, uncompensated services to the public. Inactive CPAs, of at least 55 years of age are allowed to refer to themselves as "Retired-CPAs" and register as such with their state board of accountancy. They are able to participate in activities such as volunteer tax preparation services, government-sponsored business mentoring programs, and on boards of nonprofit organizations.[15]

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[8] S. 473.312(1)(a), F.S. allows the board to require between 48 and 80 hours of CPE every 2 years. The board requires 80 hours in r. 61H1-33.003, F.A.C.
[9] S. 473.312(1)(a), F.S.
[10] *Id.*
[11] S. 473.312(1)(b),(c), F.S.
[12] S. 473.313, F.S.
[13] R. 61H1-31.006, F.A.C.
[14] American Institute of Certified Public Accountants, https://www.aicpa.org/advocacy/state/retiredcpastatusexposuredraft.html.
[15] *Id.*

Effect of the Bill

The bill revises the CPA license by endorsement provision for applicants that have passed an examination but do not hold a license in "another" state or territory. The bill simply changes "another" state or territory to "any" state or territory.

The bill allows nonresident CPA licensees who are seeking renewal of a license in this state to satisfy the CPE requirements (except for the ethics component), if the nonresident licensee has complied with applicable CPE requirements in the state in which his or her office is located. If the state in which the nonresident licensee's office is located has no CPE license renewal requirements, the nonresident licensee must comply with Florida CPE requirements.

The bill specifies that a "majority" of the total CPE hours required for ethics training must include a review of the provisions of ch. 455, F.S., ch. 473, F.S., and the related administrative rules. Currently, no amount is specified.

The bill creates a "retired status" for CPA licensees. The bill defines a "retired licensee" as a licensee whose license has been placed in retired status by the department.

Retired status license applicants are required to:

- Be at least 55 years old;
- Hold a current active or inactive CPA license;
- Apply for the status to DBPR; and
- Be in good standing and not the subject of any sanction or disciplinary action.

Applications must be prescribed by the board and the applicant must attest that they have no association with accounting or any of the services described in s. 473.302(8)(a), (c), or (d), F.S.

Licensees granted retired status who reenter the workforce in a position that has an association with accounting or any of the services described in s. 473.302(8)(a), (c), or (d), F.S., automatically lose the retired status except for the uncompensated volunteer services that retirees are allowed to participate in.

Licensees granted retired status are allowed to:

- Serve without compensation on a board of directors or board of trustees;
- Provide volunteer tax preparation services;
- Participate in a government-sponsored business mentoring program such as the Internal Revenue Service's Volunteer Income Tax Assistance program or the Small Business Administration's SCORE program; and
- Participate in an advisory role for a similar charitable, civic, or other nonprofit organization.

The board must require retired licensees to affirm in writing their understanding of the limited types of activities allowed while in retired status and their professional duty to ensure competency to participate in the activities.

Retired licensees are authorized to:

- Accept routine reimbursement for actual costs of travel and meals associated with volunteer services or de minimis per diem amounts paid to the licensee to cover such expenses as allowed by law;
- Use the title of "retired CPA" on business cards, letterhead or other printed or electronic documents as long as it is used in a manner that is not confusing to the public; and
- Reactivate the license in a conditional manner determined by the board. The conditions of reactivation must require the payment of fees and the completion of any CPE requirements.

Retired licensees are not required to:

- Have a certificate issued with the word "retired" on the certificate; or
- Maintain the CPE requirements under s. 473.312, F.S.

Retired licensees are prohibited from offering or rendering professional services that require:

- The licensee's signature; and
- Use of the CPA title, regardless of whether the word "retired" is attached to such title.

B. SECTION DIRECTORY:

Section 1	Amends s. 473.308, F.S., revising a requirement for obtaining a license by endorsement.
Section 2	Amends s. 473.311, F.S., providing license renewal requirements for nonresident licensees.
Section 3	Amends s. 473.312, F.S., providing requirements for continuing education content.
Section 4	Amends s. 473.313, F.S., providing requirements for retired status licenses.
Section 5	Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Some out-of-state CPAs may need to complete less CPE in order to maintain a Florida CPA license.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The board will need to update rules regarding CPE and generate rules for retired status licenses. There is sufficient rulemaking authority to do so.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to public accountancy; amending s. 473.308, F.S.; requiring certain applicants to not be licensed in any state or territory in order to be licensed by endorsement; amending s. 473.311, F.S.; providing license renewal requirements for nonresident licensees; amending s. 473.312, F.S.; requiring that a majority of the hours required for continuing education include specific content; amending s. 473.313, F.S.; authorizing certain Florida certified public accountants to apply to the Department of Business and Professional Regulation to have their license placed in a retired status; providing requirements for such conversion; providing requirements and prohibitions for retired licensees; authorizing retired licensees to use a specified title under certain circumstances; providing that retired licensees are not required to maintain continuing education requirements; authorizing retired licensees to reactivate their licenses if certain conditions are met; defining the term "retired licensee"; providing an effective date.

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

Section 1. Subsection (7) of section 473.308, Florida Statutes, is amended to read:

473.308 Licensure.—

(7) The board shall certify as qualified for a license by endorsement an applicant who:

(a) Is not licensed and has not been licensed in any ~~another~~ state or territory and who has met the requirements of this section for education, work experience, and good moral character and has passed a national, regional, state, or territorial licensing examination that is substantially equivalent to the examination required by s. 473.306; or

(b)1. Holds a valid license to practice public accounting issued by another state or territory of the United States, if the criteria for issuance of such license were substantially equivalent to the licensure criteria that existed in this state at the time the license was issued;

2. Holds a valid license to practice public accounting issued by another state or territory of the United States but the criteria for issuance of such license did not meet the requirements of subparagraph 1.; has met the requirements of this section for education, work experience, and good moral character; and has passed a national, regional, state, or territorial licensing examination that is substantially equivalent to the examination required by s. 473.306; or

3. Holds a valid license to practice public accounting

issued by another state or territory of the United States for at least 10 years before the date of application; has passed a national, regional, state, or territorial licensing examination that is substantially equivalent to the examination required by s. 473.306; and has met the requirements of this section for good moral character.

Section 2. Subsection (1) of section 473.311, Florida Statutes, is amended to read:

473.311 Renewal of license.—

(1)(a) The department shall renew a license issued under s. 473.308 upon receipt of the renewal application and fee and upon certification by the board that the Florida certified public accountant has satisfactorily completed the continuing education requirements of s. 473.312.

(b) A nonresident licensee seeking renewal of a license in this state is determined to have met the continuing education requirements in s. 473.312, except for the requirements in s. 473.312(1)(c), if the licensee has complied with the continuing education requirements applicable in the state in which his or her office is located. If the state in which the nonresident licensee's office is located has no continuing education requirements for license renewals, the nonresident licensee must comply with the continuing education requirements in s. 473.312.

Section 3. Paragraph (c) of subsection (1) of section 473.312, Florida Statutes, is amended to read:

473.312 Continuing education.—

(1)

(c) Not less than 5 percent of the total hours required by the board shall be in ethics applicable to the practice of public accounting. This requirement shall be administered by providers approved by the board and a majority of the hours shall include a review of the provisions of chapter 455 and this chapter and the related administrative rules.

Section 4. Section 473.313, Florida Statutes, is amended to read:

473.313 Inactive status and retired status.—

(1) A Florida certified public accountant may request that her or his license be placed in an inactive status by making application to the department. The board may prescribe by rule fees for placing a license on inactive status, renewal of inactive status, and reactivation of an inactive license.

(a) ~~(2)~~ A license that has become inactive under this subsection ~~(1)~~ or for failure to complete the requirements in s. 473.312 may be reactivated under s. 473.311 upon application to the department. The board may prescribe by rule continuing education requirements as a condition of reactivating a license. The maximum continuing education requirements for reactivating a license are 120 hours, including at least 30 hours in accounting-related and auditing-related subjects, not more than 30 hours in behavioral subjects, and a minimum of 8 hours in

ethics subjects approved by the board, for the reactivation of a license that is inactive or delinquent.

(b) ~~(3)~~ A license that is delinquent for failure to report completion of the requirements in s. 473.312 may be reactivated under s. 473.311 upon application to the department. Reactivation requires the payment of an application fee as determined by the board and certification by the Florida certified public accountant that the applicant satisfactorily completed the continuing education requirements set forth under s. 473.311. If the license is delinquent on January 1 because of failure to report completed continuing education requirements, the applicant must submit a complete application to the board by March 15 immediately after the delinquent period.

(c) ~~(4)~~ Any Florida certified public accountant holding an inactive license may be permitted to reactivate such license in a conditional manner. The conditions of reactivation shall require the payment of fees and the completion of required continuing education.

(d) ~~(5)~~ Notwithstanding the provisions of s. 455.271, the board may, at its discretion, reinstate the license of an individual whose license has become null and void if the individual has made a good faith effort to comply with this section but has failed to comply because of illness or unusual hardship. The individual shall apply to the board for reinstatement in a manner prescribed by rules of the board and

shall pay an application fee in an amount determined by rule of the board. The board shall require that the individual meet all continuing education requirements as provided in paragraph (a) ~~subsection (2)~~, pay appropriate licensing fees, and otherwise be eligible for renewal of licensure under this chapter.

(2) A Florida certified public accountant who is at least 55 years of age and currently holds an active or inactive license under this chapter may apply to the department for her or his license to be placed in retired status. The application must be prescribed by the board and must state that the applicant has no association with accounting or any of the services described in s. 473.302(8)(a), (c), or (d). If a licensee who has been granted retired status reenters the workforce in a position that has an association with accounting or any of the services described in s. 473.302(8)(a), (c), or (d), the licensee automatically loses her or his retired status except as provided in paragraph (a).

(a) A retired licensee who serves without compensation on a board of directors or board of trustees, provides volunteer tax preparation services, participates in a government-sponsored business mentoring program such as the Internal Revenue Service's Volunteer Income Tax Assistance program or the Small Business Administration's SCORE program, or participates in an advisory role for a similar charitable, civic, or other nonprofit organization shall continue to be eligible for retired

status.

(b) The board shall require a retired licensee to affirm in writing her or his understanding of the limited types of activities in which she or he may engage while in retired status and that she or he has a professional duty to ensure that she or he holds the professional competencies necessary to participate in such activities.

(c) Licensees may convert their license to retired status only if they hold a license in good standing and are not the subject of any sanction or disciplinary action.

(d) A retired licensee may accept routine reimbursement for actual costs of travel and meals associated with volunteer services or de minimis per diem amounts paid to the licensee to cover such expenses as allowed by law.

(e) A retired licensee may use the title of "retired CPA" on any business card or letterhead or any other printed or electronic document. However, such title must not be applied in such a manner that could confuse the public as to the current status of the licensee. The licensee is not required to have a certificate issued with the word "retired" on the certificate.

(f) A retired licensee is not required to maintain the continuing education requirements under s. 473.312.

(g) A retired licensee may not offer or render professional services that require her or his signature and use of the CPA title, regardless of whether the word "retired" is

attached to such title.

(h) A retired licensee may reactivate her or his license in a conditional manner determined by rule of the board. The conditions of reactivation must require the payment of fees and the completion of any required continuing education.

For the purposes of this subsection, the term "retired licensee" means a licensee whose license has been placed in retired status by the department.

Section 5. This act shall take effect July 1, 2021.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 331 Displacement of Private Waste Companies
SPONSOR(S): McClure
TIED BILLS: **IDEN./SIM. BILLS:** SB 694

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local Administration & Veterans Affairs Subcommittee	14 Y, 4 N	Renner	Miller
2) Regulatory Reform Subcommittee		Brackett DB	Anstead La
3) State Affairs Committee			

SUMMARY ANALYSIS

Counties and municipalities must provide and regulate waste disposal services, but may contract some or all of these services to others. If a private company provides waste disposal services for a local government, and the local government decides to provide the services and displace the private company from continuing to provide the service, the local government must:

- Hold at least one public hearing that is publically noticed, with separate notice provided to the private company providing the waste disposal service at least **45 days** before the hearing;
- Take measures to provide waste disposal services within one year of the final public hearing; and
- Give the private company notice of the displacement at least **three years** before the local government provides the waste disposal services **or pay** the private company an amount equal to the company's preceding **15 month's gross receipts**.

The requirement to provide three years' notice or pay the preceding 15 month's gross receipts does not apply if the local government and the private company agree to a different notice period or compensation amount.

The bill removes the discretion for the local government to pay a displaced company in lieu of providing a 3-year notice period. The bill makes **mandatory the 3 years' notice requirement** before local governments may provide actual service **and** requires local governments to pay displaced private waste companies an amount equal to the company's **gross receipts for the preceding 18 months** after the 3-year waiting period ends. Local governments and private companies may no longer negotiate different notice periods or buyout terms.

The bill may have a negative insignificant fiscal impact on local governments. *See* FISCAL COMMENTS section.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Home Rule Authority

The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.[1] Counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by the vote of the electors.[2] Likewise, municipalities have governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform municipal functions and provide services, and exercise any power for municipal purposes except when expressly prohibited by law.[3]

County governments have authority to provide fire protection, ambulance services, parks and recreation, libraries, museums and other cultural facilities, waste and sewage collection and disposal, and water and alternative water supplies.[4] Municipalities are afforded broad home rule powers with the exception of annexation, merger, exercise of extraterritorial power, or subjects prohibited or preempted by the Federal or State Constitutions, county charter, or statute.[5]

Solid Waste

Counties have the authority to provide and regulate waste and sewage collection and disposal.[6] A county may require any person within the county to demonstrate the existence of some arrangement or contract by which the person's solid waste[7] will be disposed of in a manner consistent with county ordinance or state or federal law.[8] Counties also have authority to adopt ordinances that govern the disposal of solid waste generated outside the county at the county's solid waste disposal facility.[9]

The Department of Environmental Protection (DEP) is responsible for implementing and enforcing the solid waste management program, which provides guidelines for the storage, separation, processing, recovery, recycling, and disposal of solid waste throughout the state.[10] Counties are responsible for operating solid waste disposal facilities, which are permitted through DEP, in order to meet the needs of the incorporated and unincorporated areas of the county[11] and may contract with other persons to fulfill some or all of its solid waste responsibilities.[12] Each county must ensure that municipalities within its boundaries participate in the preparation and implementation of recycling and solid waste management programs through interlocal agreements or other means.[13]

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[1] Art. VIII, s. 1(f), Fla. Const.
[2] Art. VIII, s. 1(g), Fla. Const.
[3] Art VIII, s. 2(b). *See also* s. 166.021(1), F.S.
[4] S. 125.01, F.S.
[5] S. 166.021, F.S.
[6] S. 125.01(1)(k)1., F.S.
[7] S. 403.703(36), F.S., defines solid waste as sludge unregulated under the federal Clean Water Act or Clean Air Act, sludge from a waste treatment works, water supply treatment plant, or air pollution control facility, or garbage, rubbish, refuse, special waste, or other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from domestic, industrial, commercial, mining, agricultural, or governmental operations.
[8] S. 125.01(1)(k)2., F.S.
[9] S. 403.706(1), F.S.
[10] *See* s. 403.705, F.S.
[11] S. 403.706(1), F.S.
[12] S. 403.706(8), F.S.
[13] S. 403.706(3), F.S.

In providing services or programs for solid waste management, local governments and state agencies are encouraged to use the most cost-effective means for providing services and are encouraged to contract with private entities for any or all such services or programs to assure that those services are provided on the most cost-effective basis.[14] Local governments are expressly prohibited from discriminating against privately owned solid waste management facilities solely because they are privately owned.[15]

Competition with Private Companies

Current law[16] addresses competition between private waste management companies and local government solid waste departments for third party service contracts. Private companies have had concerns about public entities subsidizing their costs with funds from other government operations, allowing the public entities to unfairly compete for contracts.[17] Balancing those concerns, the law requires that local governments providing specific solid waste collection services in direct competition with a private company must comply with local environmental, health, and safety standards applicable to private companies providing competitive collection services.[18] Additionally, local governments may not enact or enforce any license, permit, registration procedure, or associated fee that:

- Does not apply to the local government and for which there is no substantially similar requirement applicable to the local government; and
- Provides the local government with a material advantage in competing with a private company on terms of cost or the prompt or efficient provision of such collection services, excluding zoning, land use, or comprehensive planning requirements.[19]

When providing solid waste collection services outside of its jurisdiction in competition with private companies, a local government is prohibited from instituting predatory pricing schemes.[20] Private companies have legal remedies against local governments that violate these statutory prohibitions.[21]

Displacement of Private Garbage, Trash, and Refuse Collection Services

A local government, or group of local governments, may not displace a private company[22] providing garbage, trash, or refuse collection without following certain statutory requirements. The term "displacement" refers to a local government deciding to provide a solid waste collection service and prohibiting a private company from continuing to provide the same service it was providing at the time the local government decision was made.[23]

Displacement does not include situations such as public and private sector competition for individual contracts; a local government refusing to renew an expiring contract with a private company; local government action in response to any act by a private company that is a threat to public health or safety or a substantial public nuisance; contracts between local governments and private companies absent an ordinance that displaces another private company; a majority of property owners in the displacement area petitioning for the local governing body to take over collection services; municipal

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[14] S. 403.7063, F.S.
[15] *Id.*
[16] S. 403.70605. *See* ch. 2000-304, s. 1, Laws of Fla.
[17] *See* Florida House of Representatives, *CS/HB 1425 Final Analysis*, p. 2 (May 12, 2000), available at http://archive.flsenate.gov/data/session/2000/House/bills/analysis/pdf/HB1425S1Z.CA.pdf (last visited Feb. 4, 2021).
[18] S. 403.70605(1)(a), F.S.
[19] S. 403.70605(1)(a)2., F.S.
[20] S. 403.70605(2), F.S.; *see also* ss. 542.18 and 542.19, F.S.
[21] *See* s. 403.70605(1)(b) and (2)(c), F.S.; *see also* ss. 542.18 and 542.19, F.S.
[22] "Private company" does not include another local government providing solid waste collection services. S. 403.70605(4)(b), F.S.
[23] S. 403.70605(3)(a), F.S.

annexations honoring existing solid waste contracts pursuant to law; or a private company licensed to provide service for a limited time whose license expires and is not renewed by the local government.[24]

Before displacing a private company, a local government must first hold at least one public hearing, publically noticed, with separate notice by mail to private companies providing service in the jurisdiction at least 45 days before the hearing.[25] The local government must take measures to provide services within one year of the final public hearing, and give three years' notice to a private company before actually providing the service that displaces the company. To avoid the three years' notice requirement, the local government may pay the displaced company an amount equal to the company's preceding fifteen months' gross receipts for the displaced service in the displacement area. The local government and the private company are not prohibited from agreeing to a different notice period or compensation amount.[26]

If a private company refuses to continue operations under the terms and conditions of its existing agreement during the three year notice period, the company no longer falls within the definition of displaced.[27] In addition, the notice period is deemed to have run as of the date the private company stops providing services within the displacement area.[28]

Other Restrictions on Terminating Private Solid Waste Collection Services

A new municipality, not including the merger of existing municipalities, cannot incorporate without honoring any existing solid waste contracts for five years or the remainder of the contract term, whichever is shorter.[29] Similarly, municipalities cannot annex additional land subject to existing solid waste contracts without honoring the existing contracts for five years or the remainder of the contract term, whichever is shorter.[30] If an exclusive franchisee has provided services in an area to be annexed for at least the preceding six months, the franchisee may continue to provide service in the area for the shorter of five years or the expiration of its service contract as long as it meets certain conditions including providing the service at a reasonable cost.[31]

Effect of the Bill

The bill removes the discretion for the local government to pay a displaced company in lieu of providing a three year notice period. The bill makes the three years' notice to a private company mandatory and requires a local government to pay a displaced private waste company an amount equal to the company's preceding eighteen months' gross receipts after the notice period ends. Local governments and private companies may no longer negotiate different notice periods or buyout terms.

B. SECTION DIRECTORY:

Section 1. Amends s. 403.70605, F.S., mandating local governments initiate a three years' notice period before displacing private waste companies, after which the local governments must pay displaced companies an amount equal to their gross receipts for the preceding eighteen months.

Section 2. Provides an effective date of July 1, 2021.

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[24] S. 403.70605(3)(a), F.S.
[25] S. 403.70605(3), F.S.
[26] S. 403.70605(3)(c), F.S.
[27] S. 403.70605(3)(a)5., F.S.
[28] S. 403.70605(3), F.S.
[29] *See* s. 165.061(1)(f), F.S.; *see also* art. I, s.10, Fla. Const.
[30] *See* s. 171.062(4), F.S.; *see also* art. I, s.10, Fla. Const.
[31] S. 171.062(4)(a)2., F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   See FISCAL COMMENTS section.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There may be a positive economic impact on the private sector because private waste collection companies will receive an amount equal to their gross receipts for the preceding 18 months after the three year waiting period ends.

D. FISCAL COMMENTS:

There may be a negative fiscal impact on local governments because they will be required to pay displaced companies an amount equal to a company's preceding 18 months' of gross receipts after the three year waiting period ends.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

C. The bill neither provides authority nor requires rulemaking by executive branch agencies.

D. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to displacement of private waste companies; amending s. 403.70605, F.S.; requiring a local government to pay a specified amount of compensation to a displaced private waste company at the end of a specified notice period; removing a provision authorizing a local government to pay a specified amount of compensation to a private waste company as an alternative to delaying displacement for a specified period; removing a provision authorizing a local government and private waste company to negotiate such compensation and notice; providing an effective date.

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

Section 1. Paragraph (c) of subsection (3) of section 403.70605, Florida Statutes, is amended to read:

403.70605 Solid waste collection services in competition with private companies.—

(3) DISPLACEMENT OF PRIVATE WASTE COMPANIES.—

(c) Following the final public hearing held under paragraph (b), but not later than 1 year after the hearing, the local government may proceed to take those measures necessary to provide the service. The ~~A~~ local government shall provide 3

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

years' notice to the ~~a~~ private company before it engages in the actual provision of the service that displaces the company. At the end of the 3-year notice period ~~As an alternative to delaying displacement 3 years~~, the ~~a~~ local government shall ~~may~~ pay the ~~a~~ displaced company an amount equal to the company's preceding 18 ~~15~~ months' gross receipts for the displaced service in the displacement area. The 3-year notice period shall lapse as to any private company being displaced when the company ceases to provide service within the displacement area. ~~Nothing in this paragraph prohibits the local government and the company from voluntarily negotiating a different notice period or amount of compensation.~~

Section 2. This act shall take effect July 1, 2021.

REGULATORY REFORM SUBCOMMITTEE

HB 331 by Rep. McClure
Displacement of Private Waste Companies

AMENDMENT SUMMARY
March 17, 2021

Amendment 1 by Rep. McClure (line 34):
The amendment:

- Continues to allow local governments and private companies to negotiate displacement notice periods or buyout terms that are different from the ones in current law.
- Provides that the bill does not apply if a local government has provided the 3 years' notice of displacement to a private company on or before December 31, 2020.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

Committee/Subcommittee hearing bill: Regulatory Reform Subcommittee

Representative McClure offered the following:

Amendment (with title amendment)

Remove lines 34-38 and insert:

ceases to provide service within the displacement area. Nothing in this paragraph prohibits the local government and the company from voluntarily negotiating a different notice period or amount of compensation.

Section 2. This act does not apply to any displacement as defined in s. 403.70605(3), if the local government provided the 3 years' notice to the displaced private company or companies on or before December 31, 2020.

Section 3. This act shall take effect July 1, 2021.

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

Remove lines 10-12 and insert:
a specified period; providing applicability; providing an

HOUSE OF REPRESENTATIVES LOCAL BILL STAFF ANALYSIS

BILL #: CS/HB 385 Alcoholic Beverage Licenses, Lake and Sumter Counties
SPONSOR(S): Local Administration & Veterans Affairs Subcommittee, Hage
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local Administration & Veterans Affairs Subcommittee	17 Y, 0 N, As CS	Renner	Miller
2) Regulatory Reform Subcommittee		Thompson	Anstead
3) State Affairs Committee			

SUMMARY ANALYSIS

Florida's Beverage Law places a limit on the number of "quota licenses" that the Department of Business and Professional Regulation (DBPR) may issue per county. A quota license allows a business to serve any alcoholic beverage regardless of alcohol content, including liquor. DBPR is not limited by the Beverage Law on the number of licenses it may issue for businesses that serve only malt beverages and wine.

Ch. 2002-334, Laws of Fla., as amended, authorizes the Division to grant special alcoholic beverage licenses to an entertainment or lodging complex within the commercial district of a retirement community in the incorporated Town of Lady Lake and in certain unincorporated areas of Sumter County (later revised to include other areas in Sumter County). The entertainment lodging complex seeking the special alcoholic beverage license must be managed, controlled, and operated by a primary business entity under one business name and may include only individual business entities that are owned, managed, controlled, and operated independently of the primary business entity and that are separately licensed by the Division.

The entity may include one or more restaurants, bars, breweries or brew pubs, clubhouses, recreation centers, lodging or banquet facilities, special activity tents, or similar structures located within any area in which a restaurant or lounge is a permitted use as defined by the Town of Lady Lake or Sumter County ordinances.

The licenses do not entitle the licensee to maintain or construct any structure on the premises that is prohibited by the ordinances or regulations of the Town of Lady Lake or Sumter Counties.

The bill revises one of the governmental entities within which the specified businesses are eligible to receive such licenses, by replacing the Town of Lady Lake with Lake County.

The bill revises the boundaries within Lake and Sumter County to provide that a commercial district of a retirement community may be issued a special alcoholic beverage license within incorporated and unincorporated portions of both counties.

The bill revises the criteria for the alcoholic beverage licenses to provide that the licensee must adhere to applicable county or municipal ordinances or regulations.

According to the Economic Impact Statement, implementation, administration, and enforcement costs of the extended boundaries will be minimally insignificant and will have no fiscal impact to the state.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Alcoholic Beverage Licensing

The Division of Alcoholic Beverages and Tobacco (DABT) within the Department of Business and Professional Regulation (DBPR) is responsible for regulating the conduct, management, and operation of the manufacturing, packaging, distribution, and sale within the state of alcoholic beverages under Florida's Beverage law.[1]

The Beverage Law does not limit the number of licenses DABT may issue to businesses selling malt beverages or wine.[2] However, the Beverage Law does limit the number of licenses that may be issued that allow a business to sell any alcoholic beverage regardless of alcoholic content, including liquor or distilled spirits.[3] This license, often referred to as a "quota license," is limited to one license per 7,500 residents in a county with a minimum of three licenses for each county that has approved the sale of intoxicating liquors.[4]

There are several exceptions to the quota license limitation. Businesses meeting the requirements of the exceptions may be issued a special license by DABT allowing the business to serve any alcoholic beverages regardless of alcoholic content.[5]

Alcoholic Beverage Licenses in Lady Lake and Sumter County

DABT may grant special alcoholic beverage licenses to an entity operating an entertainment or lodging complex within the commercial district of a retirement community in the Town of Lady Lake and in certain areas of unincorporated Sumter County.[6] The authorization does not specify one particular entity, but the described areas include two downtown squares owned by The Villages: Lake Sumter Landings (in unincorporated Sumter County) and Spanish Springs (in the incorporated Town of Lady Lake).[7] A 2014 revision deleted the term "unincorporated area" describing Sumter County in order to encompass all areas of Sumter County.[8]

The entertainment lodging complex seeking the special alcoholic beverage license must be managed, controlled, and operated by a primary business entity under one business name and may include only individual business entities that are owned, managed, controlled, and operated independently of the primary business entity and that are separately licensed by the Division.[9] The entity may include one or more restaurants, bars, breweries or brew pubs, clubhouses, recreation centers, lodging or banquet facilities, special activity tents, or similar structures located within any area in which a restaurant or lounge is a permitted use as defined by the Town of Lady Lake or Sumter County ordinances.[10] The

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[1] Chs. 561-565 and 567-568, F.S.
[2] *See* ss. 563.02 and 564.02, F.S.
[3] S. 561.20(1), F.S. *See* s. 565.02(1)(a)-(f), F.S.
[4] S. 561.20(1), F.S.
[5] S. 561.20(2), F.S.
[6] Ch. 2002-334, Laws of Fla., as amended.
[7] *See* Florida House of Representatives, *HB 605 Final Analysis*, p. 2(May 15, 2014), http://leagis:8080/sites/2012-2014/2014/Public/Bills/0600-0699/0605/Analysis/h0605z.LFAC.pdf (last visited Feb. 8, 2021).
[8] Ch. 2014-229, s. 2, Laws of Fla.
[9] Ch. 2002-334, Laws of Fla., as amended by 2014-229, s. 1, Laws of Fla.
[10] *Id.*

licenses do not entitle the licensee to maintain or construct any structure on the premises that is prohibited by the ordinances or regulations of the Town of Lady Lake or Sumter County.[11]

Effect of the Bill

The bill revises the authority of DABT to grant special alcoholic beverage licenses to an entity operating an entertainment or lodging complex within the commercial district of a retirement community in the Town of Lady Lake and in certain areas of unincorporated Sumter County, as follows:

- Revises one of the governmental entities that specified businesses within are eligible to receive such licenses, by replacing the Town of Lady Lake with Lake County;
- Revises the boundaries within Lake and Sumter Counties to provide that a commercial district of a retirement community may be issued a special alcoholic beverage license within incorporated and unincorporated portions of both counties; and
- Revises the criteria for the alcoholic beverage licenses to provide that the licensee must adhere to applicable county or municipal ordinances or regulations.

B. SECTION DIRECTORY:

Section 1: Amends ch. 2002-334, Laws of Florida, as amended, revising criteria for special alcoholic beverage licenses for certain entities operating within Lake and Sumter Counties; revising boundaries.

Section 2: Provides that the bill takes effect upon becoming a law.

II. NOTICE/REFERENDUM AND OTHER REQUIREMENTS

A. NOTICE PUBLISHED? Yes [X] No []

IF YES, WHEN? December 22, 2020

WHERE? *Daily Sun*, a daily newspaper published in Lake County, Fl.

B. REFERENDUM(S) REQUIRED? Yes [] No [X]

IF YES, WHEN?

C. LOCAL BILL CERTIFICATION FILED? Yes [X] No []

D. ECONOMIC IMPACT STATEMENT FILED? Yes [X] No []

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

The bill neither authorizes nor requires administrative rulemaking by executive branch agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

[11] *Id.*

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 3, 2021, the Local Administration & Veterans Affairs Subcommittee adopted one technical amendment and reported the bill favorably as a committee substitute. The amendment removes a term previously deleted in 2014 that was included as a text deletion in the bill.

This analysis is drafted to the committee substitute as approved by the Local Administration & Veterans Affairs Subcommittee.

A bill to be entitled

An act relating to alcoholic beverage licenses, Lake and Sumter Counties; amending ch. 2002-334, Laws of Florida, as amended; revising criteria for special alcoholic beverage licenses for certain entities operating within Lake and Sumter Counties; revising boundaries; providing an effective date.

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

Section 1. Chapter 2002-334, Laws of Florida, as amended by chapter 2014-229, Laws of Florida, is amended to read:

Section 1. (1) Any entity operating an entertainment or lodging complex within the commercial district of a retirement community within Lake County ~~in the Town of Lady Lake~~ may be issued a special alcoholic beverage license by the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation permitting the sale of alcoholic beverages, and the manufacture and sale of malt beverages, for consumption on premises only. The complex, including the use of areas or facilities pursuant to the authorization of a community development district, must be managed, controlled, and operated by a primary business entity under one business name and may include only individual business entities that are owned, managed, controlled, and operated independently of the primary

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

business entity and that are separately licensed by the Division of Alcoholic Beverages and Tobacco pursuant to this act. The complex must be located within the following boundaries of Lake County ~~the Town of Lady Lake~~:

That portion of Sections 6 and 7, Township 18 South, Range 24 East, Town of Lady Lake, Florida, more particularly described as Lots C, D, E, F, G, H, K, Y, and Z, and Tracts 1 and 2, within THE VILLAGE CENTER SUBDIVISION, according to the Plat thereof recorded in Plat Book 33, Page 93, Public Records of Lake County, Florida.

Portions of Township 20 South, Range 24 East including portions of Sections 6-9, 16-17, 31 and portions of Township 21 South, Range 24 East including portions of Sections 5-7.

~~These boundaries encompass a contiguous area separated only by deeded or dedicated rights-of-way.~~

(2) For purposes of this section, the term "entity operating an entertainment or lodging complex within the commercial district of a retirement community" means any entity operating an entertainment or lodging complex that may include

one or more restaurants, bars, breweries or brew pubs, clubhouses, recreation centers, lodging facilities, banquet facilities, special activity tents, or similar structures or meeting areas, or any combination thereof, consisting of any real estate development located within the property described in subsection (1) and located within any area in which a restaurant or lounge is a permitted use as defined by applicable county or municipal ~~the Town of Lady Lake~~ ordinances or regulations and meeting the following criteria:

(a) A minimum of 15,000 visitors must annually visit the commercial district of the retirement community.

(b) The complex must provide meeting facilities for at least 250 persons.

(c) The complex must contain at least two restaurants or lounges having at least 4,000 square feet of service area equipped to serve full-course meals to 250 persons at one time.

For purposes of this section, the owner, operator, or controlling entity need not be the same to qualify under criteria listed in paragraphs (a), (b), and (c).

(3) The license authorized by this section shall not entitle the licensee to maintain or construct any structure on the premises that is prohibited by applicable county or municipal ~~the~~ ordinances or regulations ~~of the Town of Lady Lake~~. This license shall not exempt the licensee from complying

with applicable county or ~~the~~ municipal ordinances or regulations ~~of the Town of Lady Lake~~. All provisions of the alcoholic beverage laws of the State of Florida not inconsistent herewith shall apply to such license and licensee.

Section 2. (1) Any entity operating an entertainment or lodging complex within the commercial district of a retirement community within Sumter County may be issued a special alcoholic beverage license by the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation permitting the sale of alcoholic beverages, and the manufacture and sale of malt beverages, for consumption on premises only. The complex, including the use of areas or facilities pursuant to the authorization of a community development district, must be managed, controlled, and operated by a primary business entity under one business name and may include only individual business entities that are owned, managed, controlled, and operated independently of the primary business entity and that are separately licensed by the Division of Alcoholic Beverages and Tobacco pursuant to this act. The complex must be located within the following boundaries of Sumter County:

Portions of Township 18 South, Range 23 East including portions of Sections 13-17, 21-28, and 33-36.

Portions of Township 19 South, Range 22 East including portions of Section 36 and portions of Township 20 South, Range 22 East including portions of Sections 1 & 12 and portions of Township 19 South, Range 23 East including portions of Sections 1-4, 8-14, 16-21, 23-29, 31-36 and portions of Township 20 South, Range 23 East including portions of Sections 1-3, 6, 10-17, 20-28, and 31-36 and portions of Township 21 South, Range 23 East including portions of Sections 1-11.

~~Portions of Township 19 South, Range 23 East including portions of Sections 1-4, 8-14, 16-17, 23-24, and portions of Township 18 South, Range 23 East including portions of Sections 13-17, 21-28, and 33-36.~~

These boundaries encompass a contiguous area separated only by deeded or dedicated rights-of-way.

(2) For purposes of this section, the term "entity operating an entertainment or lodging complex within the commercial district of a retirement community" means any entity operating an entertainment or lodging complex that may include one or more restaurants, bars, breweries or brew pubs, clubhouses, recreation centers, lodging facilities, banquet facilities, special activity tents, or similar structures or

meeting areas, or any combination thereof, consisting of any real estate development located within the property described in subsection (1) and located within any area in which a restaurant or lounge is a permitted use as defined by applicable county or municipal ~~Sumter County~~ ordinances or regulations and meeting the following criteria:

(a) A minimum of 15,000 visitors must annually visit the commercial district of the retirement community.

(b) The complex must provide meeting facilities for at least 250 persons.

(c) The complex must contain at least two restaurants or lounges having at least 4,000 square feet of service area equipped to serve full-course meals to 250 persons at one time.

For purposes of this section, the owner, operator, or controlling entity need not be the same to qualify under criteria listed in paragraphs (a), (b), and (c).

(3) The license authorized by this section shall not entitle the licensee to maintain or construct any structure on the premises that is prohibited by applicable county or municipal ~~the~~ ordinances or regulations ~~of Sumter County~~. This license shall not exempt the licensee from complying with applicable county or municipal ~~the~~ ordinances or regulations ~~of Sumter County~~. All provisions of the alcoholic beverage laws of the State of Florida not inconsistent herewith shall apply to

such license and licensee.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 473 Construction Liens and Bonds
SPONSOR(S): Civil Justice & Property Rights Subcommittee, Toledo and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 622

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	16 Y, 1 N, As CS	Mawn	Jones
2) Regulatory Reform Subcommittee		Brackett DB	Anstead La
3) Judiciary Committee			

SUMMARY ANALYSIS

A person who provides services, labor, or materials for improving, repairing, or maintaining real property (except public property) may place a construction lien on the property if they are not paid for their services in certain situations as long as they follow certain procedures set forth in ch. 713, F.S., Florida's Construction Lien Law.

CS/HB 473:

- Modifies the notice of commencement and notice of nonpayment forms.
- Prohibits anyone from requiring a person to sign a waiver or release of lien or a waiver of right to claim against a payment bond that is different from the statutory form in exchange for payment unless the person is required to do so under a direct contract he or she signed.
- Provides that any provision in a waiver or release of lien or in a waiver of right to claim against a payment bond that is not related to the waiver is unenforceable unless the party signing the waiver agreed to such terms under a direct contract.
- Authorizes construction liens to be placed on private leasehold interests on public property.
- Allows general or building contractors providing construction or program management services to claim construction liens for such services.
- Authorizes a lienor to record one claim of lien for services or materials provided under multiple direct contracts under specified conditions.
- Requires an owner to serve a notice of termination on anyone not in privity with the owner who timely served a notice to owner after the notice of termination was recorded.
- Changes when a notice of termination must be recorded and served, and when such notice is effective.
- Modifies service requirements for various notices and other documents required or authorized by the construction lien law.
- Authorizes a subcontractor, laborer, or material supplier intending to make a claim against a payment bond to serve the surety with a copy of the notice of nonpayment, instead of an original document.
- Specifies that the methods for discharging a lien may also be used to release a lien, in whole or in part.
- Modifies the requirements for recording a satisfaction of lien with the clerk's office.
- Entitles the prevailing party in an action to enforce a lien transferred to a security to recover reasonable attorney fees and costs.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida law ensures that people working on construction projects are paid for their work. Any person who provides services, labor, or materials for improving, repairing, or maintaining real property (except public property) may place a construction lien[1] on the property, provided the person complies with statutory procedures.[2] These procedures require sending various written notices, demands, and other instruments to the homeowner, contractor, subcontractor, lender, and building officials, including a:

- Notice of Commencement;[3]
- Notice to Owner;[4]
- Claim of Lien;[5]
- Notice of Termination;[6]
- Waiver or Release of Lien;[7]
- Notice of Contest of Lien;[8]
- Contractor's Final Payment Affidavit;[9] and
- Demands of Written Statement of Account.[10]

Notice of Commencement

Before construction begins, a property owner or the owner's authorized agent must generally file a notice of commencement with the clerk of court in the county where the property is located.[11] The notice of commencement must also be posted at the construction site and filed with the building department before the first inspection.[12] The notice of commencement determines the priority of construction liens, provides details needed to fill out a notice to owner, establishes the date on which the statute of limitations begins to run, and protects owners from double payments.[13]

Current law provides a statutory form for the notice of commencement, which notice must be substantially similar to the form and contain information describing:

- The real property on which the improvement will be located;
- The improvement;
- The name and address of the owner and contractor;
- Information relating to a surety bond,[14] if a bond applies;

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[1] A lien is a claim against property that evidences a debt, obligation, or duty. Fla. Jur. 2d Liens § 37:1.
[2] Ch. 713, F.S.
[3] S. 713.13, F.S.
[4] S. 713.06(2), F.S.
[5] S. 713.08, F.S.
[6] S. 713.132, F.S.
[7] S. 713.20, F.S.
[8] S. 713.22(2), F.S.
[9] S. 713.06(3), F.S.
[10] S. 713.16, F.S.
[11] S. 713.13(1)(a), F.S.
[12] *Id.*; S. 713.135(1)(d), F.S.
[13] *Stocking Building Supply of Florida, Inc. v. Soares Da Costa Construction Services, LLC*, 76 So. 3d 313, 319 (Fla 3d DCA 2011); The Florida Senate Committee on Regulated Industries, *Review of the Florida Construction Lien Law*, November 2007, http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-149ri.pdf (last visited Mar. 1, 2021); Fred Dudley, William A. Buzzett, & Deborah Kaveney Kearney, *Construction Lien Law Reform: The Equilibrium of Change*, 18 Fla. St. U. L. Rev., 278 (1991).
[14] A surety bond is a promise to be liable for another's debt, default, or failure. It is a three-party contract by which one party (the surety) guarantees the performance or obligations of a second party (the principal) to a third party (the obligee). National Association of Security Bond Providers, *What are Surety Bonds*, https://www.nasbp.org/getabond/about-surety#:~:text=A%20surety%20bond%20is%20a,third%20party%20(the%20obligee) (last visited Mar. 1, 2021).

- Contact information for the project's lender;
- Contact information designated by the owner, upon whom notices may be served;
- The notice's expiration date; and
- A warning in uppercase type that the notice must be recorded, and that payments made after the notice expires could be improper and lead to the owner paying twice.[15]

The notice of commencement must also include:

- The name and address of the owner or lessee if the lessee contracted for the work;
- The owner or lessee's interest in the property;
- A statement that the ownership interest is a leasehold interest if a lessee contracted for the work;
- The name and address of the fee simple titleholder[16] (if different from the owner); and
- Any person designated by the owner to receive a claim of lien.[17]

Payment Bond

A payment bond is a type of surety bond that guarantees a contractor will pay all subcontractors, laborers, and material suppliers for their work.[18] It forms a three-part contract between the owner, the contractor, and the surety to ensure that liens are not filed on the property, because the surety guarantees that subcontractors, laborers, and material suppliers will be paid for their work or materials. Current law requires contractors to obtain a payment bond for public projects over $100,000.[19]

Notice to Owner

To secure the right to claim a construction lien, a person working on a construction project who is not in direct contract ("privity") with the owner (such as a subcontractor or a material supplier) must take several additional steps, including serving a notice to owner[20] in the statutory form provided. The notice must include the person's name and address and the nature of the services or materials furnished to the owner's property.[21] The notice informs the owner that someone with whom he or she is not in privity is providing services or materials on the property and that such person expects the owner to ensure he or she is paid.[22] The notice to owner must be served no later than 45 days after the person begins furnishing labor, services, or materials.[23]

Waiver or Release of Lien

Once the owner receives a notice to owner, he or she must obtain a waiver or release of lien from the person who sent the notice before paying the contractor unless a payment bond applies. Otherwise, a payment to the contractor may constitute an improper payment and the owner will be liable to the person who sent the notice if the contractor does not pay him or her.[24] A waiver or release of lien can be a partial waiver or a final waiver for all of the person's services or materials.[25] A person may not waive or release his or her right to file a lien before doing work or providing materials, but a person may waive or release the right to file a lien before receiving payment for his or her services or materials.[26]

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[15] S. 713.13(1)(a), F.S.
[16] Fee simple title is an interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs. Black's Law Dictionary (11th ed. 2019).
[17] S. 713.13(1)(d), F.S.
[18] S. 713.23, F.S.
[19] S. 255.05(1)(d), F.S.
[20] A notice to owner is unnecessary when a payment bond applies. S. 713.06(2), F.S.
[21] S. 713.06(2)(a), F.S.
[22] *Stocking Building Supply*, 76 So. 3d at 317.
[23] *Id.*
[24] *Id.*; S. 713.06, F.S.
[25] S. 713.20, F.S.
[26] *Id.*

Current law provides a statutory form for a waiver or release of lien but does not require that the waiver or release of lien be in such form.[27] Current law also prohibits an owner from requiring a person to sign a waiver or release of lien that is substantially different from the form but does not prohibit the inclusion of additional provisions.[28] Failure to carefully inspect a waiver or release of lien before signing it may result in inadvertently waiving or releasing all claims, damages, losses, or expenses.[29]

Right to Claim Against a Payment Bond

Before paying a subcontractor, laborer, or material supplier, a contractor may request that such person provide a waiver of right to claim against the payment bond. A waiver of right to claim against a payment bond serves as a receipt acknowledging payment for services performed or materials provided and waives the ability to seek payment from the surety.[30]

Current law provides a statutory form for a waiver of right to claim against a payment bond and prohibits a contractor from requiring a person to sign a waiver that is substantially different from the form.[31] However, parties are not required to use the statutory waiver form, and a waiver of right to claim against a payment bond may include additional provisions.[32] Failure to carefully inspect the document before signing may result in waiving or releasing all claims, damages, losses, or expenses.[33]

Extent of Lien

A construction lien extends to the right, title, and interest of the person who contracts for the improvement to the extent such right, title, and interest exists at the improvement's commencement or is acquired in the real property.[34] However, when a lessee makes an improvement under an agreement between the lessee and his or her lessor, the lien also extends to the lessor's interest.[35] If a lease expressly provides that the lessor's interest will not be subject to the construction liens relating to improvements made by the lessee, the lessee must notify the contractor making any such improvements of the provision, and the knowing and willful failure of the lessee to provide such notice renders the contract voidable at the contractor's option.[36]

A lessor's interest is not subject to construction liens for improvements made by a lessee when:

- The lease is recorded in the official records of the county where the property is located before the recording of a notice of commencement for improvements to the property and the lease's terms expressly prohibit such liability;
- The lease's terms expressly prohibit such liability, and a notice advising that leases for the rental of premises on a property prohibit such liability has been recorded in the official records of the county in which the property is located before the recording of a notice of commencement for improvements to the premises and the notice includes specified information; or
- The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park.[37]

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[27] *Id.*
[28] *Id.*
[29] Alex Benarroche, *Florida's "Non-Required" Statutory Lien Waivers Can Lead to Confusion*, https://www.levelset.com/blog/florida-statutory-lien-waivers-lead-to-confusion/ (last visited Mar. 1, 2021); Craig Distel, *Understanding waivers and releases for Florida construction contractors*, https://mcdonaldhopkins.com/Insights/Blog/Industry-Insights/2018/12/20/Understanding-waivers-and-releases-for-Florida-construction-contractors (last visited Mar. 1, 2021).
[30] Ss. 255.05(2), and 713.235, F.S.
[31] *Id.*
[32] *Id.*
[33] *See* Benarroche, *supra* note 27.
[34] S. 713.10(1), F.S.
[35] *Id.*
[36] S. 713.10(2)(a), F.S.
[37] S. 713.10(2)(b), F.S.

Claim of Lien

To record a construction lien on real property, a person must record a claim of lien with the clerk of court in the county where the property is located and serve the owner with the claim of lien within 15 days of recording the lien.[38] If a claim of lien is not recorded, the lien is void to the extent that the failure to record the claim prejudices any person entitled to rely on service of the claim of lien.[39]

A person may file a claim of lien at any time during the progress of the work but may not file a claim of lien later than 90 days after the person's final furnishing of labor or materials.[40] A person may record a single claim of lien for multiple services or materials provided to different properties as long as such services or materials were provided under the same contract, the person is in privity with the owner, and the properties have the same owner.[41] However, a person may not record a single claim of lien for multiple services or materials if there is more than one contract, even if the contracts for services and materials are with the same owner.[42]

Licensed General and Building Contractors

Licensed construction contractors are either certified by or registered with the Construction Industry Licensing Board ("CILB") within the Department of Business and Professional Regulation ("DBPR"). "Certified contractors" are persons who pass the state competency examination and obtain a certificate of competency issued by DBPR.[43]

Certified contractors can contract in any jurisdiction in the state without fulfilling the competency requirements of the local jurisdiction.[44] "Registered contractors" are persons who have taken and passed a competency examination administered by a local government and who have then registered with DBPR.[45] Registered contractors can perform contracting only in the local jurisdiction where their license is issued.[46]

Contractors, whether certified or registered, may be general contractors or building contractors. A licensed "general contractor" is a person who may contract for and perform any type of construction service unless the work must be subcontracted to a licensed subcontractor.[47] A licensed "building contractor" is a person who may contract for and perform construction services for commercial and residential buildings not exceeding three stories in height, or for any size building if the construction does not affect the building's structural frame, unless such work must be subcontracted to a licensed subcontractor.[48]

Construction and Program Management Services

A construction manager is responsible for the overall management of a construction project.[49] This includes preconstruction planning, reviewing designs, estimating costs, determining the value of different building products, project scheduling, contract negotiation, bid procedures, and coordination of trade contractors and safety programs.[50] A program manager is "responsible for schedule control, cost

[38] S. 713.08, F.S.
[39] S. 713.08(4), F.S.
[40] S. 713.08(5), F.S.
[41] S. 713.09, F.S.
[42] *Id.*; *see also Lee v. All Florida Construction Co.*, 662 So. 2d 365, 366-67 (Fla. 5th DCA 1995).
[43] S. 489.105(8), F.S.
[44] *Id.*
[45] S. 489.105(10), F.S.
[46] S. 489.103, F.S.
[47] Ss. 489.105(3), and 489.113, F.S.
[48] *Id.*
[49] The Florida Bar, *Florida Construction Law Practice*, Chapter 4: Rights and Liabilities of Construction Managers (9th ed. 2018).
[50] *Id.*

control, and coordination in providing or procuring planning, design, and construction services."[51] DBPR does not regulate construction or program managers, and such managers are generally not required to be licensed contractors, engineers, or architects if hired by a local government or private entity. However, if a construction or program manager is performing any activity that otherwise requires a professional license, he or she must have that specific license or employ someone with such license.[52]

Current law allows local governments to hire construction managers and program management entities for construction projects. The construction manager is "responsible for construction project scheduling and coordination in both preconstruction and construction phases and generally responsible for the successful, timely, and economical completion of the construction project."[53] The program management entity is "responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services."[54]

Construction managers and program management entities hired by local governments are not required to be a licensed contractor, engineer, or architect. However, if such persons or entities are not licensed, they must hire a licensed professional to perform any job that does require a license.[55]

Current law also allows the state to hire construction managers for construction projects. Construction managers hired by the state must be licensed general or building contractors. The construction manager "coordinates and supervises a construction project from the conceptual development stage through final construction, including the scheduling, selection, contracting with, and directing of specialty trade contractors, and the value engineering of a project."[56]

Though the construction lien law allows any person who provides services, labor, or materials for improving real property (except public property) to place a construction lien on the property,[57] it is unclear if construction or program managers may do so because they do not necessarily provide labor, services, or materials that improves real property.[58]

Further, the lien law provides that a contractor may file a lien for any money owed to him or her for labor, services, or materials[59] but defines a "contractor" as any person other than a materialman or laborer who contracts with an owner to improve the owner's real property.[60] The definition also includes a licensed architect or engineer who improve real property through a design-build contract[61] but does not include construction or program manager services.[62] Some courts have determined that construction or program managers may not file construction liens.[63]

Construction Liens for Private Leasehold Interests in Public Property

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[51] S. 255.103(3), F.S.
[52] *Id.*
[53] S. 255.103(2), F.S.
[54] S. 255.103(3), F.S.
[55] *Id.*
[56] S. 255.32(1), F.S.
[57] *See, generally*, ch. 713, F.S.
[58] Scott Wolfe, Jr., *Can Construction Managers File Mechanics Liens?*, https://www.levelset.com/blog/can-construction-managers-file-mechanics-liens/ (last visited Mar. 1, 2021).
[59] S. 713.05, F.S.
[60] S. 713.01(8), F.S.
[61] S. 713.01(8), F.S.
[62] *Id.*
[63] *See, e.g., O'Kon and Company, Inc. v. Riedel*, 540 So. 2d 836, 839-40 (Fla. 1st DCA 1988) ("Chapter 713, which provides for professionals offering services to file a lien for services, does not include 'project managers.'"); *see also, e.g., Medellin v. MLA Consulting, Inc.*, 69 So. 3d 372 (Fla. 5th DCA 2011) (A person cannot file a construction lien for home construction consulting services because it does not improve real property.); *See also* The Florida Bar *supra* note 47.

Although construction liens generally apply to the owner of the property improved, construction liens may also apply in situations where the property owner's tenant has contracted for the improvement.[64] However, if a tenant contracts for real property improvements, the contractor is only able to file a lien against the tenant's leasehold interest. A contractor cannot file a lien against the real property, unless the tenant contracted for an improvement with the owner's agreement.[65]

Construction liens may not be filed against public property, but construction lien law is silent as to whether such liens may be filed against the private leasehold interests of a tenant on public property.[66] According to industry experts, construction liens are sometimes filed against private leasehold interests on public property, such as when airlines and car rental agencies lease property within public airports.[67]

Notice of Termination

An owner may terminate a notice of commencement before it expires by recording a notice of termination that includes:

- All the information in the notice of commencement;
- The notice of commencement's reference numbers from the official records of the clerk of court and effective date;
- The date the notice of commencement is terminated, which may not be earlier than 30 days after the notice of termination is recorded;
- A statement that all persons who worked on the property have been paid in full; and
- A statement that the owner has served a copy of the notice of termination to the contractor and every person in privity with the owner who timely served a notice to owner.[68]

An owner may record a notice of termination after:

- Completion of the construction project; or
- Work stops on the project and every person who worked on the property has been paid.[69]

If the owner serves a copy of the notice of termination on every person in privity with the owner and who served a notice to owner before the recording of the notice of termination, a notice of commencement terminates 30 days after the notice of termination is recorded or on the termination date stated in the notice, whichever is later.[70]

Manner of Serving Documents

Documents authorized or required under the construction lien law, and notices to contractors for payment bonds for public construction projects, must be served by:

- Actual delivery to the person being served; if a partnership, to one partner; if a corporation, to an officer, director, managing agent, or business agent; or if a limited liability company, to a member or manager.
- Common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, to the person being served with postage or shipping paid by the sender and with evidence of delivery; or
- Posting on the construction site if service cannot be performed by the other two methods.[71]

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[64] Adam B. Edgecombe, *How do construction liens impact a commercial landlord in Florida?* https://www.jimersonfirm.com/blog/2019/05/how-construction-liens-impact-commercial-landlord/ (last visited Mar. 1, 2021).
[65] S. 713.10, F.S.
[66] *See generally* ch. 713, F.S.
[67] H. Wesley, *Property Interests Subject to Construction Liens in Florida*, https://www.lorman.com/resources/property-interests-subject-to-construction-liens-in-florida-17322 (last visited Mar. 1, 2021); 8 Fla. Prac., Constr. Law Manual § 8.3 (2019-2020 ed.).
[68] S. 713.132(1), F.S.
[69] S. 713.132(3), F.S.
[70] S. 713.132(4), F.S.
[71] S. 713.18(1), F.S.

Service of a document by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail is effective on the day the document is mailed, if it is:

- Sent to the last address shown in the notice of commencement or, in the absence of such a notice, to the last address shown in the building permit application or to the last known address of the person to be served; and
- Returned as being "refused," "moved, not forwardable," or "unclaimed," or is otherwise not delivered or deliverable through no fault of the person serving the item.[72]

However, for construction projects where there is a payment bond, a notice to contractor is effective on the date of mailing if:

- The notice is mailed by registered, Global Express Guaranteed, or certified mail, with postage prepaid, to the person to be served at the last address shown in the notice of commencement, the last address shown in the building permit application, or the last known address of the person being served;
- The notice is mailed within 40 days after the date the person first furnishes labor, services, or materials; and
- The person who served the notice maintains a registered or certified mail log that shows:
    - The mail number issued by the United States Postal Service ("USPS"), the name and address of the person served, and the date stamp of the USPS confirming the date of mailing; or
    - Maintains electronic tracking records generated by the USPS containing the tracking number, the name and address of the person served, and verification of the date of receipt by the USPS.[73]

Current law also provides that service of a construction lien notice on one property owner or on one partner of a partnership that owns a property is deemed to provide notice to all owners or partners.[74]

Notice to Contractor and Notice of Nonpayment

Under a payment bond, if the general contractor fails to pay a subcontractor, laborer, or material supplier, such person may seek payment directly from the surety. In order to receive protection under a payment bond for a public or private project, a subcontractor or material supplier[75] not in privity with the contractor must, within a certain time period[76] after commencing the furnishing of labor, services, or materials for a construction project, serve the contractor with a written notice of intent to seek protection under the bond.[77] A subcontractor, laborer, or material supplier not in privity with the contractor and who has not received payment for furnishing labor, services, or materials must also serve a written notice of nonpayment to the contractor and the surety.[78]

Online Notarization

Many notices established under the construction lien law must be signed in the presence of a notary.[79] The notary authenticates signatures and administers oaths on documents, thereby preventing fraud, and also determines whether the person signing the document is who he or she claims to be.[80]

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[72] S. 713.18(3), F.S.
[73] S. 713.18(2), F.S.
[74] S. 713.18, F.S.
[75] Laborers are exempt from this requirement. Ss. 255.05(2)(a)2., 337.18(1)(c), and 713.23(1)(c), F.S.
[76] Persons furnishing labor, services, or material for construction on public property or under service or maintenance contracts with the Florida Department of Transportation have 90 days to furnish the notice to contractor, while all other persons have 45 days. *Id.*
[77] *Id.*
[78] Ss. 255.05(2)(a)2. and 713.23(1)(d), F.S.
[79] Ss. 255.05(2), 713.13(1)(d), and 713.23(d), F.S.
[80] Florida Notary Association, Inc., *Resources – How to Become a Notary*, https://www.flnotary.com/requirements/ (last visited Mar. 1, 2021).

In 2019, the Legislature authorized the use of online notaries.[81] An online notary may perform an online notarization, regardless of the physical location of the principal at the time of the notarial act, if the notary:

- Is physically located in Florida; and
- Confirms that the principal desires for the notarial act to be performed by a Florida notary public under Florida law.[82]

However, the statutorily-created construction lien law notice and waiver forms have not been updated to acknowledge that an online notary may be used by the person signing the notice or waiver.[83]

Discharge of Liens

A construction lien may be discharged by:

- Entering satisfaction of the lien on the margin of the lien document recorded with the clerk's office, if allowed by law;
- Filing satisfaction with the clerk's office;
- Failing to begin an action to enforce the lien within the statutorily-prescribed time frame;
- The circuit court of the county where the property is located issuing an order; or
- Recording in the clerk's office a court judgment or decree showing the action's final determination.[84]

Attorney's Fees and Costs

The prevailing party in an action to enforce a lien or a claim against a payment bond is entitled to recover his or her reasonable attorney fees and costs.[85]

Effect of Proposed Changes

Notice of Commencement

CS/HB 473 modifies the statutorily-provided notice of commencement form to require both owner information and lessee information, if applicable, and to reflect that the person signing the notice may use an online notary.

Waiver or Release of Lien and Waiver of Right to Claim Against a Payment Bond

The bill provides that a person may not be required to sign a waiver or release of lien or a waiver of right to claim against a payment bond that is different from the statutory forms in exchange for payment, or to induce payment, unless the person signing the waiver entered into a direct contract requiring him or her to do so.[86] The bill also provides that any provision in a waiver or release of lien or a waiver of right to claim against a payment bond that is unrelated to the waiver is unenforceable, unless the person signing the waiver agreed to such terms in a direct contract.

Construction Liens for Private Leasehold Interests in Public Property

The bill amends the definition of "real property" to include private leasehold interests on public property, thereby allowing a person to file a construction lien against such an interest.

Licensed General and Building Contractors and Construction Management Services

[81] Ch. 2019-71, Laws of Fla.
[82] S. 117.265(3), F.S.
[83] *See* ch. 713, F.S.
[84] S. 713.21, F.S.
[85] S. 713.29, F.S.
[86] This means that the party agreed to the terms firsthand.

The bill amends the construction lien law's definition of "contractor" to include any licensed general[87] or building[88] contractor who provides construction or program management services. This gives licensed general and building contractors who provide such services the ability to claim construction liens for their services.

The bill provides that construction management services includes responsibility for scheduling and coordination in both preconstruction and construction phases and for the successful, timely, and economical completion of the construction project. The bill also provides that program management services includes responsibility for schedule control, cost control, and coordination in providing or procuring planning, design, and construction.

Claim of Lien

The bill authorizes a person to record a single claim of lien for services or materials provided under multiple contracts and for multiple properties as long as the contracts are directly with the owner and the owner is the same owner for all the contracts and properties.

Notice of Termination

The bill:

- Requires an owner to serve a copy of the notice of termination on any person who timely serves a notice to owner after the notice of termination is recorded and to state in the notice that he or she will do so.
- Deletes a provision allowing an owner to record a notice of termination after construction completion or when construction ceases before completion, requiring instead that such notice be recorded only after all lienors have been paid in full or pro rata as authorized by law.
- Clarifies that the notice of termination must include the date affixed to the notice of commencement by the clerk of court.

Finally, the bill requires that a notice of termination be served before recording on each lienor in privity with the owner and on each person who timely served a notice to owner before the recording of the notice of termination. The notice must be recorded in the official records of the county in which the improvement is located and, if properly served, the notice terminates the notice of commencement 30 days after the notice of termination is recorded. However, a notice of commencement is not terminated as to any lienor not in privity with the owner who timely services a notice to owner after the notice of termination is recorded until 30 days after such person is served with the notice of termination.

Manner of Serving Documents

The bill:

- Clarifies that "actual delivery" of a notice means "hand delivery."
- Clarifies that service of a notice sent through the mail is effective upon mailing or shipping.

Further, the bill deletes provisions allowing service to be made to an address contained in the building permit application under specified conditions and modifies the remaining service provisions so that service must, unless otherwise specifically provided by law, be made to the:

- Address contained in the notice of commencement or any amendment thereto; or
- In the absence of a properly indexed notice of commencement that contains the information specified in s. 713.13(1)(b), F.S., to the last known address of the person to be served.

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[87] "Licensed general contractor" under the bill has the same meaning as in s. 489.105(3)(a), F.S.
[88] "Licensed building contractor" under the bill has the same meaning as in s. 489.105(3)(b), F.S.

Notice of Nonpayment

The bill provides that a subcontractor, laborer, or material supplier must still provide a notice of nonpayment to the general contractor to receive protection under a payment bond but requires such person to only provide a copy of the notice to the surety. The bill also modifies the statutory notice of nonpayment form to reflect that the person signing the notice may use an online notary.

Discharge of Lien

The bill provides that the methods specified for discharging a lien may also be used to release a lien, in whole or in part, and makes conforming changes. The bill also specifies that, if a satisfaction or release is filed with the clerk's office, the satisfaction or release must include the lienor's notarized signature and set forth the official reference numbers and recording date associated with the subject lien.

Attorney Fees and Costs

The bill provides that a prevailing party in an action to enforce a lien transferred to a security may recover his or her reasonable attorney fees and costs.

The bill provides an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1: Amends s. 255.05, F.S., relating to bond of contractor constructing public buildings; form; action by claimants.
Section 2: Amends s. 337.18, F.S., relating to surety bonds for construction or maintenance contracts; requirement with respect to contract award; bond requirements; defaults; damage assessments.
Section 3: Amends s. 713.01, F.S., relating to definitions.
Section 4: Amends s. 713.09, F.S., relating to single claim of lien.
Section 5: Amends s. 713.10, F.S. relating to extent of lien.
Section 6: Amends s. 713.13, F.S., relating to notice of commencement.
Section 7: Amends s. 713.132, F.S., relating to notice of termination.
Section 8: Amends s. 713.18, F.S., relating to manner of serving notices and other instruments.
Section 9: Amends s. 713.20, F.S., relating to wavier or release of lien.
Section 10: Amends s. 713.21, F.S., relating to discharge of lien.
Section 11: Amends s. 713.23, F.S., relating to payment bond.
Section 12: Amends s. 713.235, F.S., relating to waivers of right to claim against payment bond; forms.
Section 13: Amends s. 713.29, F.S., relating to attorney's fees.
Section 14: Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may cause more subcontractors, laborers, and materialmen to receive compensation for their work, which may have a positive indeterminate impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 4, 2021, the Civil Justice and Property Rights Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Restored to current law the provision:
  - Specifying when an owner's payment under a construction contract constitutes an improper payment, so that such payments are only improper if made after the notice of commencement expires.
  - Requiring service to be on a partner if a partnership; on an officer, director, managing agent, or business agent if a corporation; or on a member or manager if a limited liability company.
- Removed the option to serve documents required under the construction lien law to either the last address shown in the notice of commencement or to the last known address of the person to be served, providing that documents may only be served to the last known address in the absence of a properly indexed notice of commencement.

This analysis is drafted to the committee substitute as passed by the Civil Justice and Property Rights Subcommittee.

A bill to be entitled

An act relating to construction liens and bonds; amending s. 255.05, F.S.; requiring that a copy of a notice of nonpayment be served on the surety; revising the process for notarizing a notice of nonpayment; prohibiting a person from requiring a claimant to furnish a certain waiver in exchange for or to induce certain payments; providing that specified provisions in certain waivers are unenforceable; providing an exception; requiring service of documents to be made in a specified manner; amending s. 337.18, F.S.; providing that certain waivers apply to certain contracts; requiring service of documents to be made in a specified manner; amending s. 713.01, F.S.; revising definitions; amending s. 713.09, F.S.; authorizing a lienor to record one claim of lien for multiple direct contracts; amending s. 713.10, F.S.; revising the extent of certain liens; amending s. 713.13, F.S.; revising information to be included in a notice of commencement; revising the process for notarizing a notice of commencement; amending s. 713.132, F.S.; revising requirements for a notice of termination; amending s. 713.18, F.S.; requiring service of documents relating to construction bonds to be made in a specified manner; making technical

changes; amending s. 713.20, F.S.; prohibiting a person from requiring a lienor to furnish a certain waiver or release in exchange for or to induce certain payments; providing that specified provisions in certain waivers or releases are unenforceable; providing an exception; amending s. 713.21, F.S.; authorizing the full or partial release of a lien under specified conditions; amending s. 713.23, F.S.; requiring that a copy of a notice of nonpayment be served on the surety; revising the process for notarizing a notice of nonpayment under a payment bond; amending s. 713.235, F.S.; prohibiting a person from requiring a lienor to furnish a certain waiver or release in exchange for or to induce certain payments; providing that specified provisions in certain waivers or releases are unenforceable; providing an exception; amending s. 713.29, F.S.; authorizing attorney fees in actions to enforce a lien that has been transferred to security; providing an effective date.

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

Section 1. Paragraphs (a), (d), and (f) of subsection (2) of section 255.05, Florida Statutes, are amended, and subsection (12) is added to that section, to read:

255.05 Bond of contractor constructing public buildings; form; action by claimants.—

(2)(a)1. If a claimant is no longer furnishing labor, services, or materials on a project, a contractor or the contractor's agent or attorney may elect to shorten the time within which an action to enforce any claim against a payment bond must be commenced by recording in the clerk's office a notice in substantially the following form:

NOTICE OF CONTEST OF CLAIM
AGAINST PAYMENT BOND

To: ...(Name and address of claimant)...

You are notified that the undersigned contests your notice of nonpayment, dated ....., ..., and served on the undersigned on ....., ..., and that the time within which you may file suit to enforce your claim is limited to 60 days after the date of service of this notice.

DATED on ....., ...

Signed: ...(Contractor or Attorney)...

The claim of a claimant upon whom such notice is served and who

fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of such notice is extinguished automatically. The contractor or the contractor's attorney shall serve a copy of the notice of contest on ~~to~~ the claimant at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of the notice and record the notice.

2. A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 45 days after commencing to furnish labor, services, or materials for the prosecution of the work, serve the contractor with a written notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for furnishing his or her labor, services, or materials shall serve a written notice of nonpayment on the contractor and a copy of the notice on the surety. The notice of nonpayment shall be under oath and served during the progress of the work or thereafter but may not be served earlier than 45 days after the first furnishing of labor, services, or materials by the claimant or later than 90 days after the final furnishing of the labor, services, or materials by the claimant or, with respect to rental equipment, later than 90 days after the date that the rental equipment was last on the job site available for use. Any notice of nonpayment served by a claimant who is not in privity with the contractor

which includes sums for retainage must specify the portion of the amount claimed for retainage. An action for the labor, services, or materials may not be instituted against the contractor or the surety unless the notice to the contractor and notice of nonpayment have been served, if required by this section. Notices required or permitted under this section must be served in accordance with s. 713.18. A claimant may not waive in advance his or her right to bring an action under the bond against the surety. In any action brought to enforce a claim against a payment bond under this section, the prevailing party is entitled to recover a reasonable fee for the services of his or her attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions. The time periods for service of a notice of nonpayment or for bringing an action against a contractor or a surety <u>are</u> ~~shall be~~ measured from the last day of furnishing labor, services, or materials by the claimant and may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. The negligent inclusion or omission of any information in the notice of nonpayment that has not prejudiced the contractor or surety does not constitute a default that operates to defeat an otherwise valid bond claim. A claimant who serves a fraudulent notice of nonpayment forfeits his or her

rights under the bond. A notice of nonpayment is fraudulent if the claimant has willfully exaggerated the amount unpaid, willfully included a claim for work not performed or materials not furnished for the subject improvement, or prepared the notice with such willful and gross negligence as to amount to a willful exaggeration. However, a minor mistake or error in a notice of nonpayment, or a good faith dispute as to the amount unpaid, does not constitute a willful exaggeration that operates to defeat an otherwise valid claim against the bond. The service of a fraudulent notice of nonpayment is a complete defense to the claimant's claim against the bond. The notice of nonpayment under this subparagraph must include the following information, current as of the date of the notice, and must be in substantially the following form:

NOTICE OF NONPAYMENT

To: ...(name of contractor and address)...

...(name of surety and address)...

The undersigned claimant notifies you that:

1. Claimant has furnished ...(describe labor, services, or materials)... for the improvement of the real property identified as ...(property description).... The corresponding

amount unpaid to date is $...., of which $.... is unpaid retainage.

2. Claimant has been paid to date the amount of $.... for previously furnishing ...(describe labor, services, or materials)... for this improvement.

3. Claimant expects to furnish ...(describe labor, services, or materials)... for this improvement in the future (if known), and the corresponding amount expected to become due is $.... (if known).

I declare that I have read the foregoing Notice of Nonpayment and that the facts stated in it are true to the best of my knowledge and belief.

DATED on ....., ...

...(signature and address of claimant)...

STATE OF FLORIDA
COUNTY OF .....

The foregoing instrument was sworn to (or affirmed) and subscribed before me by means of ☐ physical presence or sworn to (or affirmed) by ☐ online notarization this .... day of ...., ...(year)..., by ...(name of signatory)....

...(Signature of Notary Public - State of Florida)...

...(Print, Type, or Stamp Commissioned Name of Notary Public)...

Personally Known ..... OR Produced Identification .....

Type of Identification Produced

(d) A person may not require a claimant to furnish a waiver that is different from the forms in paragraphs (b) and (c) in exchange for, or to induce payment of, a progress payment or final payment unless the claimant has entered into a direct contract that requires the claimant to furnish a waiver that is different from the forms in paragraphs (b) and (c).

(f) Any provisions in a waiver which are ~~that is~~ not related to the waiver of a claim or a right to claim against a payment bond as provided in this subsection are unenforceable, unless the claimant has otherwise agreed to those provisions in the direct contract ~~substantially similar to the forms in this subsection is enforceable in accordance with its terms~~.

(12) Unless otherwise provided in this section, service of any document must be made in accordance with s. 713.18.

Section 2. Paragraph (c) of subsection (1) of section 337.18, Florida Statutes, is amended, and subsection (6) is

added to that section, to read:

337.18 Surety bonds for construction or maintenance contracts; requirement with respect to contract award; bond requirements; defaults; damage assessments.—

(1)

(c) A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 90 days after commencing to furnish labor, materials, or supplies for the prosecution of the work, furnish the contractor with a notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for his or her labor, materials, or supplies shall deliver to the contractor and to the surety written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment. The notice of nonpayment may be served at any time during the progress of the work or thereafter but not before 45 days after the first furnishing of labor, services, or materials, and not later than 90 days after the final furnishing of the labor, services, or materials by the claimant or, with respect to rental equipment, not later than 90 days after the date that the rental equipment was last on the job site available for use. An action by a claimant, except a laborer, who is not in privity with the contractor for the labor, materials, or supplies may not be instituted against the contractor or the surety unless

both notices have been given. Written notices required or permitted under this section must ~~may~~ be served in accordance with ~~any manner provided in~~ s. 713.18, and provisions for the waiver of a claim or a right to claim against a payment bond contained in s. 713.235 apply to all contracts under this section.

(6) Unless otherwise provided in this section, service of any document must be made in accordance with s. 713.18.

Section 3. Subsections (4), (8), and (26) of section 713.01, Florida Statutes, are amended to read:

713.01 Definitions.—As used in this part, the term:

(4) "Clerk's office" means the office of the clerk of the circuit court of the county, or another office serving as the county recorder as provided by law, in which the real property is located.

(8) "Contractor" means a person other than a materialman or laborer who enters into a contract with the owner of real property for improving it, or who takes over from a contractor as so defined the entire remaining work under such contract. The term "contractor" includes an architect, landscape architect, or engineer who improves real property pursuant to a design-build contract authorized by s. 489.103(16). The term also includes a licensed general contractor or building contractor, as those terms are defined in s. 489.105(3)(a) and (b), respectively, who provides construction management services, which include

responsibility for scheduling and coordination in both preconstruction and construction phases and for the successful, timely, and economical completion of the construction project, or who provides program management services, which include responsibility for schedule control, cost control, and coordination in providing or procuring planning, design, and construction.

(26) "Real property" means the land that is improved and the improvements thereon, including fixtures, except any such property owned by the state or any county, municipality, school board, or governmental agency, commission, or political subdivision. The term includes a private leasehold interest that is improved, and the improvements thereon, on land that is owned by the state or any county, municipality, school board, or governmental agency, commission, or political subdivision.

Section 4. Section 713.09, Florida Statutes, is amended to read:

713.09 Single claim of lien.—A lienor may ~~is required to~~ record only one claim of lien covering his or her entire demand against the real property when the amount demanded is for labor or services or material furnished for more than one improvement under the same direct contract or multiple direct contracts. The single claim of lien is sufficient even though the improvement is for one or more improvements located on separate lots, parcels, or tracts of land. If materials to be used on one or

more improvements on separate lots, parcels, or tracts of land ~~under one direct contract~~ are delivered by a lienor to a place designated by the person with whom the materialman contracted, other than the site of the improvement, the delivery to the place designated is prima facie evidence of delivery to the site of the improvement and incorporation in the improvement. The single claim of lien may be limited to a part of multiple lots, parcels, or tracts of land and their improvements or may cover all of the lots, parcels, or tracts of land and improvements. If a ~~In each~~ claim of lien under this section is for multiple direct contracts, the owner under the direct contracts ~~contract~~ must be the same person for all lots, parcels, or tracts of land against which a single claim of lien is recorded.

Section 5. Paragraph (b) of subsection (2) of section 713.10, Florida Statutes, is amended, and subsection (4) is added to that section, to read:

713.10 Extent of liens.—

(2)

(b) The interest of the lessor is not subject to liens for improvements made by the lessee when:

1. The lease, or a short form or a memorandum of the lease that contains the specific language in the lease prohibiting such liability, is recorded in the official records of the county where the premises are located before the recording of a notice of commencement for improvements to the premises and the

terms of the lease expressly prohibit such liability; or

2. The terms of the lease expressly prohibit such liability, and a notice advising that leases for the rental of premises on a parcel of land prohibit such liability has been recorded in the official records of the county in which the parcel of land is located before the recording of a notice of commencement for improvements to the premises, and the notice includes the following:

a. The name of the lessor.

b. The legal description of the parcel of land to which the notice applies.

c. The specific language contained in the various leases prohibiting such liability.

d. A statement that all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability.

~~3. The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.~~

A notice that is consistent with subparagraph 2. effectively prohibits liens for improvements made by a lessee even if other leases for premises on the parcel do not expressly prohibit liens or if provisions of each lease restricting the application of liens are not identical.

(4) The interest of the lessor is not subject to liens for

improvements made by the lessee when the lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.

Section 6. Paragraphs (a), (c), and (d) of subsection (1) of section 713.13, Florida Statutes, are amended to read:

713.13 Notice of commencement.—

(1)(a) Except for an improvement that is exempt under ~~pursuant to~~ s. 713.02(5), an owner or the owner's authorized agent before actually commencing to improve any real property, or recommencing completion of any improvement after default or abandonment, whether or not a project has a payment bond complying with s. 713.23, shall record a notice of commencement in the clerk's office and forthwith post either a certified copy thereof or a notarized statement that the notice of commencement has been filed for recording along with a copy thereof. The notice of commencement shall contain the following information:

1. A description sufficient for identification of the real property to be improved. The description should include the legal description of the property and also should include the street address and tax folio number of the property if available or, if there is no street address available, such additional information as will describe the physical location of the real property to be improved.

2. A general description of the improvement.

3. The name and address of the owner, the owner's interest

in the site of the improvement, and the name and address of the fee simple titleholder, if other than such owner.

4. The name and address of the lessee, if the ~~A~~ lessee ~~who~~ contracts for the improvements as ~~is~~ an owner as defined in s. 713.01 ~~under s. 713.01(23) and must be listed as the owner together with a statement that the ownership interest is a leasehold interest~~.

5.~~4.~~ The name and address of the contractor.

6.~~5.~~ The name and address of the surety on the payment bond under s. 713.23, if any, and the amount of such bond.

7.~~6.~~ The name and address of any person making a loan for the construction of the improvements.

8.~~7.~~ The name and address within the state of a person other than himself or herself who may be designated by the owner as the person upon whom notices or other documents may be served under this part; and service upon the person so designated constitutes service upon the owner.

(c) If the contract between the owner and a contractor named in the notice of commencement expresses a period of time for completion for the construction of the improvement greater than 1 year, the notice of commencement must state that it is effective for a period of 1 year plus any additional period of time. Any payments made by the owner after the expiration of the notice of commencement are considered improper payments.

(d) A notice of commencement must be in substantially the

following form:

Permit No..... Tax Folio No.....

NOTICE OF COMMENCEMENT

State of....

County of....

The undersigned hereby gives notice that improvement will be made to certain real property, and in accordance with Chapter 713, Florida Statutes, the following information is provided in this Notice of Commencement.

1. Description of property: ...(legal description of the property, and street address if available)....

2. General description of improvement:.....

3.a. Owner: ...name and address....

b. Owner's phone number:.... ~~Owner information or Lessee information if the Lessee contracted for the improvement:~~

~~a. Name and address:.....~~

c.~~b.~~ Interest in property:.....

d.~~c.~~ Name and address of fee simple titleholder (if different from Owner listed above):.....

4.a. Lessee, if the lessee contracted for the improvement: ...(name and address)....

b. Lessee's phone number:..... ~~a.~~

5.a. Contractor: ...(name and address)....

b. Contractor's phone number:.....

6.~~5.~~ Surety (if applicable, a copy of the payment bond is attached):

a. Name and address:.....

b. Phone number:.....

c. Amount of bond: $.....

7.a.~~6.a.~~ Lender: ...(name and address)....

b. Lender's phone number:.....

8.~~7.~~ Persons within the State of Florida designated by Owner upon whom notices or other documents may be served as provided by Section 713.13(1)(a)8. ~~713.13(1)(a)7.~~, Florida Statutes:

a. Name and address:.....

b. Phone numbers of designated persons:.....

9.a.~~8.a.~~ In addition to himself or herself, Owner designates ..... of ..... to receive a copy of the Lienor's Notice as provided in Section 713.13(1)(b), Florida Statutes.

b. Phone number of person or entity designated by owner:.....

10.~~9.~~ Expiration date of notice of commencement (the expiration date will be 1 year after ~~from~~ the date of recording unless a different date is specified).....

WARNING TO OWNER: ANY PAYMENTS MADE BY THE OWNER AFTER THE

EXPIRATION OF THE NOTICE OF COMMENCEMENT ARE CONSIDERED IMPROPER PAYMENTS UNDER CHAPTER 713, PART I, SECTION 713.13, FLORIDA STATUTES, AND CAN RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE COMMENCING WORK OR RECORDING YOUR NOTICE OF COMMENCEMENT.

...(Signature of Owner or Lessee, or Owner's or Lessee's Authorized Officer/Director/Partner/Manager)...

...(Signatory's Title/Office)...

The foregoing instrument was acknowledged before me by means of ☐ physical presence or acknowledged before me by means of ☐ online notarization, this .... day of ...., ...(year)..., by ...(name of person)... as ...(type of authority, . . . e.g. officer, trustee, attorney in fact)... for ...(name of party on behalf of whom instrument was executed)....

...(Signature of Notary Public - State of Florida)...

...(Print, Type, or Stamp Commissioned Name of Notary Public)...

Personally Known .... OR Produced Identification ....

Type of Identification Produced.....

Section 7. Subsections (1), (3), and (4) of section 713.132, Florida Statutes, are amended to read:

713.132 Notice of termination.—

(1) An owner may terminate the period of effectiveness of a notice of commencement by executing, swearing to, and recording a notice of termination that contains:

(a) The same information as the notice of commencement;

(b) The official records' ~~recording office document book and page~~ reference numbers and recording date affixed by the recording office on ~~of~~ the recorded notice of commencement;

(c) A statement of the date as of which the notice of commencement is terminated, which date may not be earlier than 30 days after the notice of termination is recorded;

(d) A statement specifying that the notice applies to all the real property subject to the notice of commencement or specifying the portion of such real property to which it applies;

(e) A statement that all lienors have been paid in full; and

(f) A statement that the owner has, before recording the notice of termination, served a copy of the notice of termination ~~on the contractor and~~ on each lienor who has a

direct contract with the owner or who has timely served a notice to owner, and a statement that the owner will serve a copy of the notice of termination on each lienor who timely serves a notice to owner after the notice of termination has been recorded. The owner is not required to serve a copy of the notice of termination on any lienor who has executed a waiver and release of lien upon final payment in accordance with s. 713.20.

(3) An owner may ~~not~~ record a notice of termination at any time after ~~except after completion of construction, or after construction ceases before completion and~~ all lienors have been paid in full or pro rata in accordance with s. 713.06(4).

(4) If an owner or a contractor, by fraud or collusion, knowingly makes any fraudulent statement or affidavit in a notice of termination or any accompanying affidavit, the owner and the contractor, or either of them, ~~as the case may be,~~ is liable to any lienor who suffers damages as a result of the filing of the fraudulent notice of termination, ~~;~~ and any such lienor has a right of action for damages ~~occasioned thereby~~.

(5) ~~(4)~~ A notice of termination must be served before recording on each lienor who has a direct contract with the owner and on each lienor who has timely and properly served a notice to owner in accordance with this part before the recording of the notice of termination. A notice of termination must be recorded in the official records of the county in which

the improvement is located. If properly served before recording in accordance with this subsection, the notice of termination terminates the period of effectiveness of the notice of commencement 30 days after the notice of termination is recorded in the official records ~~is effective to terminate the notice of commencement at the later of 30 days after recording of the notice of termination~~ or a later ~~the~~ date stated in the notice of termination as the date on which the notice of commencement is terminated. However, if a lienor who began work under the notice of commencement before its termination lacks a direct contract with the owner and timely serves his or her notice to owner after the notice of termination has been recorded, the owner must serve a copy of the notice of termination upon such lienor, and the termination of the notice of commencement as to that lienor is effective 30 days after service of the notice of termination ~~if the notice of termination has been served pursuant to paragraph (1)(f) on the contractor and on each lienor who has a direct contract with the owner or who has served a notice to owner~~.

Section 8. Section 713.18, Florida Statutes, is amended to read:

713.18 Manner of serving documents ~~notices and other instruments~~.—

(1) Unless otherwise specifically provided by law, service of any document ~~notices, claims of lien, affidavits,~~

~~assignments, and other instruments~~ permitted or required under this part, s. 255.05, or s. 337.18, or copies thereof when so permitted or required, ~~unless otherwise specifically provided in this part,~~ must be made by one of the following methods:

(a) By hand ~~actual~~ delivery to the person to be served; if a partnership, to one of the partners; if a corporation, to an officer, director, managing agent, or business agent; or, if a limited liability company, to a member or manager.

(b) By common carrier delivery service or by registered, Global Express Guaranteed, or certified mail to the person to be served, with postage or shipping paid by the sender and with evidence of delivery, which may be in an electronic format.

(c) By posting on the site of the improvement if service as provided by paragraph (a) or paragraph (b) cannot be accomplished.

(2) Notwithstanding subsection (1), service of a notice to owner or a preliminary notice to contractor under this part, s. 255.05, or s. 337.18~~, or s. 713.23~~ is effective as of the date of mailing and the requirements for service under this section have been satisfied if:

(a) The notice is mailed by registered, Global Express Guaranteed, or certified mail, with postage prepaid, to the person to be served and addressed as prescribed ~~at any of the addresses set forth~~ in subsection (3);

(b) The notice is mailed within 40 days after the date the

lienor first furnishes labor, services, or materials; and

(c)1. The person who served the notice maintains a registered or certified mail log that shows the registered or certified mail number issued by the United States Postal Service, the name and address of the person served, and the date stamp of the United States Postal Service confirming the date of mailing; or

2. The person who served the notice maintains ~~electronic~~ tracking records approved or generated by the United States Postal Service containing the postal tracking number~~, the name and address of the person served,~~ and verification of the date of receipt by the United States Postal Service.

(3)(a) Notwithstanding subsection (1), service of a document under ~~an instrument pursuant to~~ this section is effective on the date of mailing or shipping, and the requirements for service under this section have been satisfied, ~~the instrument~~ if the document ~~it~~:

1. Is sent to the last address shown in the notice of commencement or any amendment thereto or, in the absence of a properly indexed notice of commencement that contains the information specified in s. 713.13(1)(b), ~~notice of commencement, to the last address shown in the building permit application, or~~ to the last known address of the person to be served unless otherwise specifically provided in this part, s. 255.05, or s. 337.18; and

2. Is returned as being "refused," "moved, not forwardable," or "unclaimed," or is otherwise not delivered or deliverable through no fault of the person serving the document ~~item~~.

(b) If the address shown in the notice of commencement or any amendment thereto ~~to the notice of commencement, or, in the absence of a notice of commencement, in the building permit application,~~ is incomplete for purposes of mailing or delivery, the person serving the document ~~item~~ may complete the address and properly format it according to United States Postal Service addressing standards using information obtained from the property appraiser or another public record without affecting the validity of service under this section.

(4) A document ~~notice~~ served by a lienor on one owner or one partner of a partnership owning the real property is deemed served on ~~notice to~~ all owners and partners.

Section 9. Subsections (6) and (8) of section 713.20, Florida Statutes, are amended to read:

713.20 Waiver or release of liens.—

(6) A person may not require a lienor to furnish a lien waiver or release of lien that is different from the forms in subsection (4) or subsection (5) in exchange for, or to induce payment of, a progress payment or final payment unless the lienor has entered into a direct contract that requires the lienor to furnish a waiver or release that is different from the

forms in subsection (4) or subsection (5).

(8) Any provisions in a lien waiver or lien release which are ~~that is~~ not related to the waiver or release of a lien or the right to claim a lien as provided in this section are unenforceable, unless the lienor has otherwise agreed to those provisions in the direct contract ~~substantially similar to the forms in subsections (4) and (5) is enforceable in accordance with the terms of the lien waiver or lien release~~.

Section 10. Section 713.21, Florida Statutes, is amended to read:

713.21 Discharge of lien.—A lien properly perfected under this chapter may be discharged, or released in whole or in part, by any of the following methods:

(1) By entering satisfaction of the lien upon the margin of the record thereof in the clerk's office when not otherwise prohibited by law. This satisfaction shall be signed by the lienor, the lienor's agent or attorney and attested by said clerk. Any person who executes a claim of lien has ~~shall have~~ authority to execute a satisfaction in the absence of actual notice of lack of authority to any person relying on the same.

(2) By the satisfaction or release of the lienor, duly acknowledged and recorded in the clerk's office. The satisfaction or release must include the lienor's notarized signature and set forth the official records' reference numbers and recording date affixed by the recording office on the

subject lien. Any person who executes a claim of lien has ~~shall have~~ authority to execute a satisfaction or release in the absence of actual notice of lack of authority to any person relying on the same.

(3) By failure to begin an action to enforce the lien within the time prescribed in this part.

(4) By an order of the circuit court of the county where the property is located, as provided in this subsection. Upon filing a complaint therefor by any interested party the clerk shall issue a summons to the lienor to show cause within 20 days why his or her lien should not be enforced by action or vacated and canceled of record. Upon failure of the lienor to show cause why his or her lien should not be enforced or the lienor's failure to commence such action before the return date of the summons the court shall forthwith order cancellation of the lien.

(5) By recording in the clerk's office the original or a certified copy of a judgment or decree of a court of competent jurisdiction showing a final determination of the action.

Section 11. Paragraph (d) of subsection (1) of section 713.23, Florida Statutes, is amended to read:

713.23 Payment bond.—

(1)

(d) In addition, a lienor who has not received payment for furnishing his or her labor, services, or materials must, as a

condition precedent to recovery under the bond, serve a written notice of nonpayment on ~~to~~ the contractor and a copy of the notice on the surety. The notice must be under oath and served during the progress of the work or thereafter, but may not be served later than 90 days after the final furnishing of labor, services, or materials by the lienor, or, with respect to rental equipment, later than 90 days after the date the rental equipment was on the job site and available for use. A notice of nonpayment that includes sums for retainage must specify the portion of the amount claimed for retainage. The required notice satisfies this condition precedent with respect to the payment described in the notice of nonpayment, including unpaid finance charges due under the lienor's contract, and with respect to any other payments which become due to the lienor after the date of the notice of nonpayment. The time period for serving a notice of nonpayment is ~~shall be~~ measured from the last day of furnishing labor, services, or materials by the lienor and may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. The failure of a lienor to receive retainage sums not in excess of 10 percent of the value of labor, services, or materials furnished by the lienor is not considered a nonpayment requiring the service of the notice provided under this paragraph. If the payment bond is not recorded before commencement of construction, the time period

for the lienor to serve a notice of nonpayment may at the option of the lienor be calculated from the date specified in this section or the date the lienor is served a copy of the bond. However, the limitation period for commencement of an action on the payment bond as established in paragraph (e) may not be expanded. The negligent inclusion or omission of any information in the notice of nonpayment that has not prejudiced the contractor or surety does not constitute a default that operates to defeat an otherwise valid bond claim. A lienor who serves a fraudulent notice of nonpayment forfeits his or her rights under the bond. A notice of nonpayment is fraudulent if the lienor has willfully exaggerated the amount unpaid, willfully included a claim for work not performed or materials not furnished for the subject improvement, or prepared the notice with such willful and gross negligence as to amount to a willful exaggeration. However, a minor mistake or error in a notice of nonpayment, or a good faith dispute as to the amount unpaid, does not constitute a willful exaggeration that operates to defeat an otherwise valid claim against the bond. The service of a fraudulent notice of nonpayment is a complete defense to the lienor's claim against the bond. The notice under this paragraph must include the following information, current as of the date of the notice, and must be in substantially the following form:

NOTICE OF NONPAYMENT

To ...(name of contractor and address)...

...(name of surety and address)...

The undersigned lienor notifies you that:

1. The lienor has furnished ...(describe labor, services, or materials)... for the improvement of the real property identified as ...(property description).... The corresponding amount unpaid to date is $...., of which $.... is unpaid retainage.

2. The lienor has been paid to date the amount of $.... for previously furnishing ...(describe labor, services, or materials)... for this improvement.

3. The lienor expects to furnish ...(describe labor, services, or materials)... for this improvement in the future (if known), and the corresponding amount expected to become due is $.... (if known).

I declare that I have read the foregoing Notice of Nonpayment and that the facts stated in it are true to the best of my knowledge and belief.

DATED on ....., ...

...(signature and address of lienor)...

STATE OF FLORIDA
COUNTY OF.....

The foregoing instrument was sworn to (or affirmed) and subscribed before me by means of ☐ physical presence or sworn to (or affirmed) by ☐ online notarization, this .... day of ...., ...(year)..., by ...(name of signatory)....

...(Signature of Notary Public - State of Florida)...

...(Print, Type, or Stamp Commissioned Name of Notary Public)...

Personally Known ..... OR Produced Identification .....

Type of Identification Produced

Section 12. Subsections (3) and (5) of section 713.235, Florida Statutes, are amended to read:

713.235 Waivers of right to claim against payment bond; forms.—

(3) A person may not require a claimant to furnish a waiver that is different from the forms in subsections (1) and (2) in exchange for, or to induce payment of, a progress payment or final payment unless the claimant has entered into a direct contract that requires the claimant to furnish a waiver that is

different from the forms in subsections (1) and (2).

(5) Any provisions in a waiver which are ~~that is~~ not related to the waiver of a claim or a right to claim against the payment bond as provided in this section are unenforceable, unless the claimant has otherwise agreed to those provisions in the claimant's direct contract ~~substantially similar to the forms in this section is enforceable in accordance with its terms~~.

Section 13. Section 713.29, Florida Statutes, is amended to read:

713.29 Attorney ~~Attorney's~~ fees.—In any action brought to enforce a lien, including a lien that has been transferred to security, or to enforce a claim against a bond under this part, the prevailing party is entitled to recover a reasonable fee for the services of her or his attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions.

Section 14. This act shall take effect July 1, 2021.

HOUSE OF REPRESENTATIVES LOCAL BILL STAFF ANALYSIS

BILL #: HB 751 City of Gainesville, Alachua County
SPONSOR(S): Clemons
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local Administration & Veterans Affairs Subcommittee	18 Y, 0 N	Renner	Miller
2) Regulatory Reform Subcommittee		Willson MW	Anstead LA
3) State Affairs Committee			

SUMMARY ANALYSIS

Florida's Beverage Law places a limit on the number of "quota licenses" that the Department of Business and Professional Regulation (DBPR) may issue per county. A quota license allows a business to serve any alcoholic beverage regardless of alcoholic content, including liquor. DBPR is not limited by the Beverage Law on the number of licenses it may issue for businesses that serve only malt beverages and wine.

The bill creates an exception to ss. 561.01(11) and 561.20, F.S., permitting food trucks operators within a food truck park, as defined by the City of Gainesville's Code of Ordinances, to sell alcoholic beverages for consumption on the licensed premises located in Innovation Square within the City of Gainesville. The food truck park must have permanent fencing; municipal water, sewer, and solid waste connections; sun sails; tables; and seating.

Food truck operators are prohibited from selling alcoholic beverages by the package for consumption outside of the food truck park. There is no limit on the number of licenses issued to a food truck operator within a food truck park within Innovation Square.

According to the Economic Impact Statement, the bill is revenue neutral.

According to House Rule 5.5(b), a local bill providing an exemption from general law may not be placed on the Special Order Calendar for expedited consideration. Since this bill creates an exemption to general law, the provisions of House Rule 5.5(b) apply.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Alcoholic Beverage Licensing

The Division of Alcoholic Beverages and Tobacco (DABT) within the Department of Business and Professional Regulation (DBPR) is responsible for regulating the conduct, management, and operation of the manufacturing, packaging, distribution, and sale within the state of alcoholic beverages under Florida's Beverage Law.[1]

The Beverage Law does not limit the number of licenses DABT may issue to businesses who wish to sell malt beverages or wine.[2] However, the Beverage Law limits the number of licenses that may be issued allowing a business to sell any alcoholic beverage regardless of alcoholic content, including liquor or distilled spirits.[3] This license, often referred to as a "quota license," is limited to one license per 7,500 residents per county with a minimum of three licenses per county that has approved the sale of intoxicating liquors.[4]

There are several exceptions to the quota license limitation, and businesses meeting the requirements set out in statute[5] may be issued a special license by DBPR allowing the business to serve any alcoholic beverages regardless of alcoholic content.

Alcoholic beverages sold for consumption on premises must be consumed inside the licensed premises.[6] DBPR may approve a temporary expansion of the licensed premises to include a sidewalk or other outdoor area for special events.[7] The business must pay an application fee of $100, stipulate the timeframe for the special event, submit a sketch outlining the expanded premises, and submit written approval from the county or municipality.

City of Gainesville Food Truck Parks

The City of Gainesville specifically defines "food trucks"[8] and authorizes the sale and consumption of alcoholic beverages in food truck parks.[9] The ordinance defines a food truck park as land with three or more food truck pads[10] that is designed for food truck use with:[11]

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[1] Chs. 561-565 and 567-568, F.S.
[2] *See ss.* 563.02 and 564.02, F.S.
[3] S. 561.20(1), F.S. *See* s. 565.02(1)(a)-(f), F.S.
[4] S. 561.20(1), F.S.
[5] S. 561.20(2), F.S.
[6] *See* s. 561.01(11), F.S. (defining "licensed premises" and requiring written approval from the county or municipality to include a sidewalk or any other outside area as part of the licensed premise).
[7] S. 561.01(11), F.S.
[8] ***Food truck*** means a motorized self-contained wheeled vehicle, wheeled trailer, and other conveyances, regardless of the means of propulsion, that is used to vend immediately consumable food or beverage products and is classified as either: 1) Class I - mobile kitchens that have the capability to cook, prepare, and assemble food items on or in the unit; or 2) Class II - canteen units where no preparation or assembly of foods or beverages take place on or in the unit, but which may heat and serve pre-cooked foods or fruits, vegetables, pre-packaged foods or drinks. City of Gainesville Code of Ordinances, ch. 30, art. II, s. 30-2.1.
[9] City of Gainesville Code of Ordinances, ch. 30, art. V, div. 1, s. 30-5.13.
[10] City of Gainesville Code of Ordinances, ch. 30, art. II, s. 30-2.1 defines a "food truck pad" as an area designated within a food truck park that is designed for food truck use with provision for applicable utilities, including water, sewer, electricity, gas grease interceptors, and solid waste.
[11] City of Gainesville Code of Ordinances, ch. 30, art. V, div. 1, s. 30-5.13.

- Connections to electric utility services;
- Restrooms that are connected to water and sewer utility services and have plumbing;
- Handwashing stations; and
- Central solid waste disposal areas and recycling facilities.

Effect of the Bill

The bill creates an exception to ss. 561.01(11) and 561.20, F.S., permitting food trucks operators within a food truck park, as defined by the City of Gainesville's Code of Ordinances, to sell alcoholic beverages for consumption on the licensed premises located in Innovation Square within the City of Gainesville. The food truck park must have permanent fencing; municipal water, sewer, and solid waste connections; sun sails; tables; and seating.

Food truck operators are prohibited from selling alcoholic beverages by the package for consumption outside of the food truck park. There is no limit on the number of licenses issued to food truck operators within a food truck park within Innovation Square.

B. SECTION DIRECTORY:

Section 1. Creates an exception to general law, allowing food trucks within a food truck park to sell alcoholic beverages for consumption on the licensed premise located in Innovation Square within the City of Gainesville.

Section 2. Provides the act is effective upon becoming a law.

II. NOTICE/REFERENDUM AND OTHER REQUIREMENTS

A. NOTICE PUBLISHED? Yes [X] No []

IF YES, WHEN? December 17, 2020

WHERE? *The Gainesville Sun*, a daily newspaper published in Gainesville, Florida.

B. REFERENDUM(S) REQUIRED? Yes [] No [X]

IF YES, WHEN?

C. LOCAL BILL CERTIFICATION FILED? Yes [X] No []

D. ECONOMIC IMPACT STATEMENT FILED? Yes [X] No []

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

The bill neither authorizes nor requires administrative rulemaking by executive branch agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to City of Gainesville, Alachua County; providing an exception to general law; authorizing the issuance of a special license to mobile food dispensing vehicles to sell alcoholic beverages for the consumption of alcoholic beverages within a specified area; providing requirements; prohibiting a licensee from selling alcoholic beverages by the package for consumption outside the specified area; providing for the issuance of an unlimited number of licenses within specified area; providing that an operator is not exempt from meeting requirements to hold a license; providing boundaries; providing an effective date.

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

Section 1. (1) Notwithstanding ss. 561.20 and 561.01(11), Florida Statutes, in addition to any licenses that may be issued under the provisions of chapter 561, Florida Statutes, a special license to sell alcoholic beverages shall be issued to a mobile food dispensing vehicle in a food truck park, as defined and authorized in accordance with Sections 30-2.1 and 30-5.13 of the City of Gainesville's Code of Ordinances (2020), located in Innovation Square, and such alcoholic beverages may be consumed

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

by patrons within such food truck park as long as the food truck park has permanent fencing; municipal water, sewer, and solid waste; sun sails; tables; and seating. A license issued pursuant to this section does not permit the licensee to sell alcoholic beverages by the package for consumption outside of the food truck park. There is no limit on the number of special licenses issued in accordance with this act within a food truck park in Innovation Square. This act does not exempt an operator from having to otherwise meet the requirements to hold a license.

(2) For the purposes of this act, "Innovation Square" means the area described as an area of land situated in Section 5, Township 10 South, Range 20 East, in the City of Gainesville, being more particularly described as follows:

Begin at the intersection of the centerline of SW 6th Street with the centerline of SW 5th Avenue; thence westerly along said SW 5th Avenue to an intersection with the southerly projection of the west line of lots 14 and 15, block 7 of University Heights, as per plat thereof recorded in plat book "A", page 99 of the public records of Alachua County, Florida; thence northerly along said west line and its northerly project to an intersection with the centerline of SW 4th Avenue; thence westerly along SW 4th Avenue, to an intersection with the centerline of SW 10th Street;

thence northerly along SW 10th Street, to an intersection with the centerline of SW 2nd Avenue; thence westerly along SW 2nd Avenue, to an intersection with southerly projection on the west line of Lot 20, Block 5 of University Place, as per plat thereof recorded in Plat Book "A", page 77 of the public records of Alachua County, Florida; thence northerly along said west line and its northerly projection, to the centerline of SW 1st Place; thence easterly along said SW 1st Place, to an intersection with the centerline of SW 10th Street; thence northerly along SW 10th Street to an intersection with the centerline of SW 1st Avenue; thence easterly along SW 1st Avenue and its easterly projection, to an intersection with the centerline of SW 6th Street; thence southerly along SW 6th Street to the point of beginning.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 755 Arrest Booking Photographs
SPONSOR(S): Criminal Justice & Public Safety Subcommittee, Fischer
TIED BILLS: **IDEN./SIM. BILLS:** SB 1046

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	17 Y, 0 N, As CS	Mathews	Hall
2) Regulatory Reform Subcommittee		Wright	Anstead
3) Judiciary Committee			

SUMMARY ANALYSIS

An arrest booking photograph (commonly called a "mugshot") is a photograph taken upon a person's arrest that is generally used by law enforcement, a victim, or the public to identify the person. A law enforcement agency may make such booking photographs available to the public by publishing them on the agency's website. Following an arrest, a person's criminal charge may result in a dismissal or acquittal, making the person eligible to seal or expunge the arrest record. However, a person's booking photograph may remain on a publicly accessible website regardless of the outcome of their criminal case.

Commercial entities, such as Mugshots.com, use software and artificial intelligence to automatically aggregate arrest booking photographs from law enforcement agency websites to publish on their own websites. Section 901.43, F.S., prohibits a person or entity from soliciting or accepting a fee or other payment in exchange for removing an arrest booking photograph from a publically accessible print or electronic medium. A person whose booking photograph is published, or a legal representative, may make a written request to the publisher's registered agent to remove the photograph. Upon receiving such a request, the publisher must remove the photograph within 10 days and may not charge a fee for doing so. If the entity does not remove the photograph within 10 days, a person may bring a civil action to enjoin the continued publication of the photograph and a court may impose a penalty up to $1,000 a day for noncompliance with the injunction. Currently, s. 901.43, F.S., only applies to a person or entity that solicits or accepts payment to remove a booking photograph.

CS/HB 755 expands s. 901.43, F.S., to apply to any person or entity whose primary business model is the publishing and disseminating of arrest booking photographs for a commercial purpose or pecuniary gain. As such, companies that do not solicit or accept payment to remove a person's booking photograph, but rather profit by selling advertisements in the publication or on the electronic medium that publishes and disseminates booking photographs will be subject to the requirements of s. 901.43, F.S. A person whose booking photograph has been published and disseminated by such an entity may make a written request to have their photograph removed, and if the entity fails to comply with the written request, they may seek an injunction to enjoin the continued publication of the photograph and civil damages for noncompliance with such injunction.

The bill may have a positive indeterminate fiscal impact to state government by increasing the amount of fines recovered for a violation of s. 901.43, F.S., which are deposited into the General Revenue Fund.

The bill provides an effective date of October 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Dissemination of Arrest Booking Photographs

Florida law does not specifically prohibit mugshot companies from posting arrest booking photographs, but does prohibit charging a fee to remove such postings.[1] Section 901.43, F.S., prohibits any person or entity engaged in the business of publicly publishing arrest booking photographs from soliciting or accepting a fee or other form of payment to remove a photograph.[2] A person whose booking photograph is published, or a legal representative, may make a written request to the publisher's registered agent to remove the photograph. The request must:

- Be made in writing;
- Be sent by registered mail;
- Include sufficient proof of identification of the person whose arrest booking photograph was published; and
- Include specific information identifying the arrest booking photograph to be removed;[3]

The person or entity that published an arrest booking photograph must remove the photograph within 10 days of receiving the written request for removal.[4] If the photograph is not removed within 10 calendar days, the person seeking removal may bring a civil action to enjoin the continued publication of the photograph. Additionally, the court may impose a civil penalty of $1,000 per day for noncompliance and must award reasonable attorney fees and court costs. Any money recovered as a civil penalty must be deposited into the General Revenue Fund.[5]

Section 901.43, F.S., only applies to a person or entity that solicits or accepts payments to remove arrest booking photographs.[6] As such, websites that aggregate and publish arrest booking photographs, but profit by selling advertisements for services such as mugshot removal or reputation management, rather than by charging a fee to remove the photograph, continue to operate without being subject to the requirements and penalties in s. 901.43, F.S.[7]

Criminal History Records

All "documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency" are public records and open for public inspection, unless a specific exemption applies.[8]

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[1] S. 901.43, F.S.
[2] S. 901.43(1), F.S.
[3] S. 901.43(2), F.S.
[4] *Id.*
[5] S. 901.43(3), F.S.
[6] S. 901.43(5), F.S.
[7] Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 Rutgers U.L. Rev. 557, 568 (2018).
[8] Office of the Attorney General (Florida), *Government in the Sunshine Manual* (2020 Edition), at p. 56. (citing to s. 119.011(12),F.S.), http://myfloridalegal.com/webfiles.nsf/WF/MNOS-B9QQ79/$file/SunshineManual.pdf (last visited on Mar. 9, 2021).

Arrest and crime reports may be obtained and published by non-governmental publishers. This information includes booking photographs, arrest reports, charging documents, sentencing orders, and criminal history information.[9] Like all other records prepared by Florida government agencies, arrest and crime reports are subject to public disclosure unless specifically exempted.[10] Arrest record information may be requested through a public records request by members of the public, traditional news media, companies that provide criminal history or criminal record information for a service or subscriber fee, and companies that are often referred to as "mugshot" companies.

Public record information pertaining to a person's arrest for the alleged commission of a crime includes the arrest report and arrest booking photograph. With few exceptions, arrest record information (including a booking photograph) must be disclosed pursuant to a public records request.[11] However, the arrest record information of a juvenile charged with a misdemeanor is confidential and exempt,[12] and a public records custodian may choose to not electronically publish the arrest or booking photograph of a child that is not confidential and exempt.[13]

Expunction and Sealing of Criminal Records

Florida has established mechanisms by which a person may have their criminal record sealed[14] or expunged[15] under certain circumstances. When a record is sealed or expunged, the record is not available to the public in response to a public records request.

A person who meets other specified criteria may be eligible to petition a court to expunge a criminal history record if:

- An indictment, information, or other charging document was not filed or issued in the case giving rise to the criminal history record; or
- An indictment information, or other charging document filed or issued in the case giving rise to the criminal history record, was dismissed or nolle prosequi by the state attorney or statewide prosecutor, or was dismissed by a court of competent jurisdiction or a judgment of acquittal was rendered by a judge, or a verdict of not guilty was rendered by a judge or jury.[16]

Similarly, a person who meets other specified criteria may be eligible to petition a court to seal a criminal history record if:

- The criminal history record is not ineligible for court-ordered sealing under s. 943.0584, F.S.;[17] and

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[9] The Florida Department of Law Enforcement (FDLE) is the central repository of criminal history information for the State of Florida. For a fee, a search of Florida criminal history information regarding a person may be performed. Excluded from the search is sealed or expunged information. FDLE, Criminal History Information, *Frequently Asked Questions,* https://cchinet.fdle.state.fl.us/search/app/faq?8 (last visited on Mar. 9, 2021).

[10] Office of the Attorney General (Florida), *supra* n. 8 at 97.

[11] Op. Att'y Gen. 94-90 (October 25, 1994) (footnotes omitted), http://www.myfloridalegal.com/ago.nsf/Opinions/83A1D5004064269D852562210063168E (last visited on Mar. 9, 2021).

[12] Ss. 943.053(3), and 985.04(2), F.S.

[13] S. 985.04(2)(a)(2), F.S.

[14] Sealing of a criminal history record means the preservation of a record under such circumstances that it is secure and inaccessible to any person not having a legal right to access the record or the information contained and preserved therein. S. 943.045(19), F.S.

[15] Expunction of a criminal history record means the court-ordered physical destruction or obliteration of a record or portion of a record by any criminal justice agency having custody thereof, or as prescribed by the court issuing the order, except that criminal history records in the custody of FDLE must be retained in all cases for purposes of evaluating subsequent requests by the subject of the record for sealing or expunction, or for purposes of recreating the record in the event an order to expunge is vacated by a court of competent jurisdiction. S. 943.045(16), F.S.

[16] S. 943.0585, F.S.

[17] Criminal history records for offenses including, but not limited to, crimes like terrorism, murder, and certain sexual misconduct are ineligible for court-ordered expunction or sealing. The complete list of ineligible offenses is provided under s. 943.0584, F.S.

- The person has not been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains.[18]

In some scenarios, a person who is arrested for a criminal offense and who later obtains a sealing or expunction of the related criminal history record may not enjoy the full benefit of the sealing or expunction if their associated arrest record remains publicly accessible on a website or other publication.

Right of Publicity

Section 540.08(1), F.S., prohibits a person from publishing, printing, displaying, or otherwise publicly using for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the person's express written or oral consent to such use. There are exceptions for:

- Publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes;
- The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use on or in connection with the initial sale or distribution; and
- Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph.[19]

When necessary consent is not obtained, the person whose name, portrait, photograph, or other likeness is used may bring an action to enjoin the unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.[20]

Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) protects consumers from deceptive and misleading acts and protects consumers and legitimate business enterprises from those engaging in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in trade or commerce. FDUTPA applies to any act or practice occurring in the conduct of any trade or commerce, even between purely commercial interests. It also applies to private causes of action arising from single unfair or deceptive acts in the conduct of any trade or commerce, even if it involves only a single party, a single transaction, or a single contract. The Attorney General may enjoin any person who has violated, is violating, or is otherwise likely to violate any portion of FDUTPA.[21]

Refusal to remove an arrest booking photograph after a person makes a written request under s. 901.43, F.S, constitutes an unfair or deceptive trade practice in accordance with part II of ch. 501, F.S.[22]

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[18] S. 943.059, F.S.
[19] S. 540.08(4), F.S.
[20] S. 540.08(2), F.S.
[21] Whenever the Department of Legal Affairs has reason to believe that a person has been, or is, violating FDUTPA, and it appears that a cease and desist order against such violation would be in the interest of the public, it shall issue and serve upon such person a complaint and order stating its charges in that respect and containing a notice of a hearing upon a day and at the place therein fixed at least 30 days after the service of said complaint, and said hearing shall be held in conformity with the provisions of chapter 120. S. 501.208, F.S.
[22] S. 901.43(4), F.S.

Effect of Proposed Changes

CS/HB 755 expands s. 901.43, F.S., to include any person or entity whose primary business model is the publishing and disseminating of arrest booking photographs for a commercial purpose or pecuniary gain. As such, companies that do not solicit or accept payment to remove a person's booking photograph, but rather profit by selling advertisements in a publication or on an electronic medium that publishes and disseminates arrest booking photographs will be subject to the requirements of s. 901.43, F.S. Under the bill, a person whose booking photograph has been published and disseminated by such an entity may make a written request to have their photograph removed, and if the entity fails to comply with the written request, they may seek an injunction to enjoin the continued publication of the photograph and civil damages for noncompliance with such injunction.[23]

Entities such as a law enforcement agency or a legitimate newspaper or television station are not subject to the restrictions and civil remedies established by the bill, as the primary business model of such persons or entities is not the publishing or disseminating of arrest booking photographs for a commercial purpose or pecuniary gain.

The bill provides an effective date of October 1, 2021.

B. SECTION DIRECTORY:

Section 1: Amends s. 901.43, F.S., relating to the dissemination of arrest booking photographs.
Section 2: Provides an effective date of October 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill may have a positive indeterminate fiscal impact to state government by increasing the amount of fines recovered for violations of s. 901.43, F.S., which are deposited into the General Revenue Fund.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

[23] 47 U.S. Code § 230 (Section 230) states that "[n]o provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," and prohibits all inconsistent causes of action and prohibits liability imposed under any State or local law. The bill may implicate Section 230, in limited circumstances, for potentially holding an online business liable for hosting or not removing arrest booking photographs posted by another.

The bill may have a negative fiscal impact on the private sector by increasing the number of entities which may be fined for a violation of s. 901.43, F.S.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 9, 2021, the Criminal Justice & Public Safety Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed an exception to applicability for the purpose of disseminating news to the public, including gathering, publishing, or broadcasting information to the public for a news-related purpose.

This analysis is drafted to the committee substitute as passed by the Criminal Justice & Public Safety Subcommittee.

A bill to be entitled

An act relating to arrest booking photographs; amending s. 901.43, F.S.; expanding the applicability of provisions relating to the dissemination of arrest booking photographs to include a person or entity whose primary business model is the publishing or dissemination of such photographs for a commercial purpose or pecuniary gain; providing an effective date.

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

Section 1. Section 901.43, Florida Statutes, is amended to read:

901.43 Dissemination of arrest booking photographs.—

(1) Any person or entity engaged in the business of publishing through a publicly accessible print or electronic medium or otherwise disseminating arrest booking photographs of persons who have previously been arrested may not solicit or accept a fee or other form of payment to remove the photographs.

(2) A person whose arrest booking photograph is published or otherwise disseminated, or his or her legal representative, may make a request, in writing, for the removal of an arrest booking photograph to the registered agent of the person or entity who published or otherwise disseminated the photograph.

The written request for removal of the arrest booking photograph must be sent by registered mail and include sufficient proof of identification of the person whose arrest booking photograph was published or otherwise disseminated and specific information identifying the arrest booking photograph that the written request is seeking to remove. Within 10 days of receipt of the written request for removal of the arrest booking photograph, the person or entity who published or otherwise disseminated the photograph shall remove the arrest booking photograph without charge.

(3) The person whose arrest booking photograph was published or otherwise disseminated in the publication or electronic medium may bring a civil action to enjoin the continued publication or dissemination of the photograph if the photograph is not removed within 10 calendar days after receipt of the written request for removal. The court may impose a civil penalty of $1,000 per day for noncompliance with an injunction and shall award reasonable attorney fees and court costs related to the issuance and enforcement of the injunction. Moneys recovered for civil penalties under this section shall be deposited into the General Revenue Fund.

(4) Refusal to remove an arrest booking photograph after written request has been made constitutes an unfair or deceptive trade practice in accordance with part II of chapter 501.

(5) This section does not apply to any person or entity

that publishes or disseminates information relating to arrest booking photographs unless:

(a) The person or entity solicits or accepts payment to remove the photographs; or

(b) The person or entity's primary business model is the publishing and disseminating of arrest booking photographs for a commercial purpose or pecuniary gain.

Section 2. This act shall take effect October 1, 2021.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 953 Criminal History in Professional Licensing Applications
SPONSOR(S): Chambliss and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform Subcommittee		Wright	Anstead
2) Criminal Justice & Public Safety Subcommittee			
3) Commerce Committee			

SUMMARY ANALYSIS

The Department of Business and Professional Regulation (DBPR) regulates and licenses several Florida professions. Generally, DBPR, or a licensing board (board), may deny a license application if the applicant's criminal history:

- Relates to the practice of the applicant's profession, or
- Is an impairment to a finding of good moral character, if the profession requires good moral character.

When reviewing an applicant's criminal history, most boards take the number of years that have passed into account before using it as grounds to deny a license. Certain listed professions under DBPR have a separate time-limited review process for considering criminal history. The listed professions are:

- Construction trades contractors,
- Electrical contractors,
- Barbers, and
- Cosmetologists.

For these professions, the review is limited to **five** years prior to application. However, boards may consider forcible felonies and sexual predator crimes at any time if they relate to the practice of the profession.

As part of the requirements for licensure, construction and electrical contractor applicants are required to show good moral character, but barber and cosmetology applicants are not. The contractor boards may consider a contractor applicant's complete criminal history at any time if it relates to good moral character.

The bill shortens the review period, from five years to **two** years prior to application. However, boards may continue to consider forcible felonies and sexual predator crimes at any time if they relate to the practice of the profession.

The bill prohibits the contractor boards from considering crimes which relate to good moral character as grounds to deny a license if the conviction occurred more than two years before the date of application.

The bill requires the boards to approve educational program credits earned by inmates in any correctional institution vocational training or through an industry certification program for the purposes of satisfying training requirements for licensure.

The bill does not have a fiscal impact on state or local governments.

The bill has an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Department of Business and Professional Regulation Umbrella Chapter

The Department of Business and Professional Regulation (DBPR) has 12 divisions that regulate several Florida professions and businesses.[1] Chapter 455, F.S., applies to the regulation of professions constituting "any activity, occupation, profession, or vocation regulated by DBPR in the Divisions of Certified Public Accounting, Professions, Real Estate, and Regulation."[2] It also provides general DBPR powers and sets forth the procedural and administrative framework for all professional DBPR boards.[3]

Licensing Determinations and Criminal History

Generally, any state agency may deny an application for professional license, permit, or certification for a prior felony or first-degree misdemeanor conviction that is:

- Directly related to the profession's standards; and
- Reasonably related to the protection of the public health, safety, and welfare for the specific profession for which the license, permit, or certificate is sought.[4]

Notwithstanding any law to the contrary, an agency may not deny an application for a license, permit, certificate, or employment based solely on the applicant's lack of civil rights.[5]

DBPR or a licensing board may deny a license application for a person who was convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice, the applicant's profession,[6] or for other reasons listed in the applicable practice act. Some professions require applicants to be of good moral character, and boards may deny a license on such basis.

Florida law does not prohibit an individual from applying for licensure with DBPR while they are still incarcerated or under some form of supervised release, nor is such an individual charged an additional fee.[7] DBPR also currently allows some correctional training programs to be accepted for licensure purposes. [8]

Barbers

The Barbers' Board under DBPR governs the regulation and licensing of barbers and barbershops in the state. A barber license is required to perform barbering services.[9] Barbering services include hair services and limited skin care services when done for compensation, but not for medical purposes[10]

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[1] Section 20.165, F.S, creates the divisions of Administration; Alcoholic Beverages and Tobacco; Certified Public Accounting; Drugs, Devices, and Cosmetics; Florida Condominiums, Timeshares, and Mobile Homes; Hotels and Restaurants; Pari-mutuel Wagering; Professions; Real Estate; Regulation; Service Operations; and Technology.
[2] S. 455.01(6), F.S.
[3] The DBPR must also provide legal counsel for boards within the DBPR by contracting with the Department of Legal Affairs, by retaining private counsel, or by providing DBPR staff counsel. Ss. 455.203 and 455.221(1), F.S.
[4] S. 112.011(1)(b), F.S.
[5] S. 112.011(1)(c), F.S.
[6] S. 455.227(1)(c), F.S.
[7] Florida Department of Business and Professional Regulation, Agency Analysis of 2018 Senate Bill 1114, p. 2 (Jan. 8, 2018).
[8] Department of Business and Professional Regulation, Agency Analysis of 2021 House Bill 953, p. 6 (Mar. 4, 2021).
[9] S. 476.144(1), F.S.

To be eligible for licensure, barbers must:[11]

- Be at least 16 years old,
- Complete the required training,[12]
- Pass the written examination,[13] and
- Pay an application fee.[14]

Criminal History of Barbers

The Barbers' Board may deny a barber license application for any person having been convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of, or the ability to practice barbering.[15] There is not a good moral character requirement for barbers.

Cosmetologists

The Board of Cosmetology under DBPR governs the licensing and regulation of cosmetologists, nail specialists, facial specialists, full specialists, and related salons in the state. A cosmetology license or a specialty registration is required to perform cosmetology services. Cosmetology services include hair services, nail services, and skin care services when done for compensation, but not for medical purposes.[16]

To qualify for a cosmetology or specialty license, an applicant must:[17]

- Be at least age 16 or have a high school diploma,
- Complete the required training,
- Pass the licensure examination (if applicable), and
- Pay an application fee.

Criminal History of Cosmetologists

The Board of Cosmetology may deny a cosmetology license application for any person having been convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of, or the ability to practice, cosmetology.[18] There is not a good moral character requirement for cosmetologists.

DBPR Contracting Professionals

The Construction Industry Licensing Board (CILB) under DBPR is responsible for licensing and regulating professionals in the construction industry described in part I of ch. 489, F.S..[19]

A construction contractor is a person who, for compensation, takes on a job or submits a bid to construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure for

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[10] S. 476.034(2), F.S.
[11] S. 476.114, F.S.
[12] Barbers are eligible to take the examination after 600 hours. If their examination is not successful, the full 900 hours must be completed. S. 476.114(2)(c), F.S. There is also an option to be a barber with a restricted license, which is 600 hours training in total and restricts such barbers from applying chemical solutions or preparations to hair. S. 476.144(6), F.S.; R. 61G3-16.006, F.A.C.
[13] R. 61-35.006, F.A.C.
[14] S. 476.114(2), F.S.
[15] S. 455.227(1)(c), F.S.
[16] S. 477.013(4), F.S.
[17] S. 477.019(2), F.S.
[18] S. 455.227(1)(c), F.S.
[19] S. 489.107, F.S.

others, or for resale to others,[20] including the attempted sale of contracting services and the negotiation or bid for a contract on these services.[21] This can also include receiving funds for the job from customers.[22]

The CILB is divided into two divisions with separate jurisdictions:

- Division I is comprised of the following types of contractors:
  - General,
  - Building, and
  - Residential.
- Division II is comprised of the following types of contractors:
  - Sheet metal,
  - Roofing,
  - Classes A, B, and C air conditioning,
  - Mechanical,
  - Commercial pool and spa,
  - Residential pool and spa,
  - Swimming pool and spa servicing,
  - Plumbing,
  - Underground utility and excavation,
  - Solar, and
  - Pollutant storage systems.

A specialty contractor is one whose scope of work and responsibility is limited to a particular phase of construction as detailed in an administrative rule adopted by the CILB.[23]

The Electrical Contractors' Licensing Board (ECLB) within DBPR is responsible for licensing and regulating electrical contractors and alarm system contractors described in part II of ch. 489, F.S.[24]

An electrical contractor engages in business as a contractor or performs electrical or alarm work for compensation, including the attempted sale of contracting services and the negotiation or bid for a contract on these services.[25] This can also include receiving funds for the job from customers.[26]

All construction contractor and electrical contractor applicants must meet the following criteria:[27]

- be at least 18 years of age;
- submit an application and fee;
- successfully pass the certification examination; and
- meet eligibility requirements according to a combination of education and experience as approved by the CILB or ECLB.

Criminal History of Contractors

The CILB and ECLB may deny a license application for any person having been convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of, or the ability to practice, contracting.[28]

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[20] S. 489.105(3), F.S.
[21] S. 489.105(6), F.S.
[22] *See* ss. 489.103(6), 489.126, F.S.
[23] For example, specialty swimming pool contractors have limited scopes of work for the construction of pools, spas, hot tub, and decorative or interactive water displays. R. 61G4-15.032 (2016), F.A.C.
[24] S. 489.507, F.S.
[25] S. 489.505(9), F.S.
[26] *See* s. 489.505(9), F.S.
[27] Ss. 489.111(2)(c)1.-3., 489.113, and 489.516, F.S.
[28] S. 455.227(2), F.S. See also ss. 489.129(1)(b) and 489.553(1)(d), F.S., providing the disciplinary grounds for construction contractors and electrical contractors, respectively.

Construction and electrical contractors must be of good moral character. In considering an applicant's good moral character, CILB and ECLB may consider any matter, including criminal background, that has a substantial connection to the good moral character of the applicant and the professional responsibilities of such a contractor by clear and convincing evidence.[29]

The CILB must consider the length of time since the commission of a crime and the applicant's rehabilitation in denying or approving licensure.[30] The CILB may not deny licensure based solely upon a felony conviction or the applicant's failure to provide proof of restoration of civil rights.[31] For licensing electrical contractors, the ECLB is not specifically required to consider the passage of time between the disqualifying criminal offense and the time of application before denying or granting a license or registration.

Criminal History Review Process – Current Situation

A time-limited review process for considering the criminal history of license applicants for certain listed professions was passed by the Legislature and signed into law on July 1, 2019.[32]

Such licensing application provisions apply to the following listed professions:[33]

- Barbers;
- Cosmetologists and cosmetology specialists;
- Air-conditioning contractors;
- Electrical contractors;
- Mechanical contractors;
- Plumbing contractors;
- Pollutant storage systems contractors;
- Roofing contractors;
- Sheet metal contractors;
- Solar contractors;
- Swimming pool and spa contractors;
- Underground utility and excavation contractors;
- Specialty contractors; and
- Any other profession for which the department issues a license, provided the profession is offered to inmates in any correctional facility as vocational training or through an industry certification program.

The process limits the period for which the applicable board of a listed profession may consider convictions, or any other adjudication, for crimes as an impairment to licensure to **five** years prior to application for listed professions. However, boards may consider forcible felonies and sexual predator crimes at any time if they relate to the practice of the profession.[34]

Additionally, the CILB and ECLB may still consider a contractor applicant's complete criminal history if it relates to good moral character.

A person may apply for a license in a listed profession before being released from confinement or supervision, and may not be charged an additional fee. The applicable board may not deny an application for a license solely on the basis of the applicant's current confinement or supervision.[35]

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[29] Ss. 489.111(2)(b), (3)(a) and 489.513(1)(b), (c), F.S.
[30] S. 489.115(6), F.S.
[31] *Id.*
[32] Ch. 2019-167, L.O.F.
[33] S. 455.213(3)(a), F.S.
[34] S. 455.213(3)(b)1., F.S.
[35] S. 455.213(3)(c)1., F.S.

The applicable board of a listed profession must permit an applicant under confinement or supervision to appear by teleconference or video conference, as appropriate, at any meeting of the applicable board or other hearing by the agency concerning their application, and the Department of Corrections (DOC) and the board must cooperate and coordinate to facilitate such appearance.[36] If a person who is under confinement or supervision is approved for a license for a listed profession, the applicable board must stay the issuance of the license until the applicant is lawfully released, and the applicant notifies the board of such release. The board must verify the applicant's release with the DOC before it issues such a license.[37]

The boards of the listed professions must list on DBPR's website the crimes that have not impaired a person's qualifications for licensure, and update the list annually. Such boards must also identify the crimes on DBPR's website that have impaired a person's qualifications for licensure, and update the list quarterly.[38]

Criminal Offenses

Sexual predator[39] registration criteria are described in s. 775.21(4)1, F.S. Criminal offenses that require registration include:[40]

- A capital, life, or first degree felony for:
  - Kidnapping or false imprisonment, where the victim is a minor and there is a sexual component to the crime;
  - Sexual battery;
  - Lewd or lascivious battery or molestation;
  - Selling or buying minors to engage in sexually explicit conduct;
- An offense that would require registration as a sexual offender, other than transmission of child pornography by electronic device or transmission of material harmful to minors, by a person with a prior conviction for a sexual offense; or
- A conviction for a similar offense committed in another jurisdiction.[41]

Forcible felonies include:

- Murder;
- Manslaughter;
- Sexual battery;
- Carjacking;
- Home-invasion robbery;
- Robbery;
- Burglary;
- Kidnapping;
- Aggravated assault;
- Aggravated battery; and
- Aggravated stalking.[42]

Criminal History Review Process – Effect of the Bill

[36] S. 455.213(3)(c)3.-4., F.S.
[37] S. 455.213(3)(c)2., F.S.
[38] S. 455.213(3)(e), F.S.
[39] A sexual predator is someone who has been convicted of a first-degree felony sex crime or has been convicted of two second-degree felony sex crimes within a ten-year period.
[40] S. 775.21(4), F.S.
[41] Ss. 787.01, 787.02, 847.0145, and 800.04, F.S.
[42] S. 776.08, F.S.

The bill reduces the time frame, from five years to **two** years before the date of application, that a board of a listed profession may use a criminal conviction as grounds to deny a license application. However, boards may continue to consider forcible felonies and sexual predator crimes at any time if they relate to the practice of the profession.

The bill prohibits the CILB and ECLB from considering criminal history related to good moral character as grounds to deny a license as a listed contractor if the conviction occurred more than two years before the date of application.

The bill requires a board of a listed profession to approve educational program credits for vocational training or an industry certification program offered to inmates in any correctional institution or facility to satisfy training requirements for licensure.

The bill has an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1: Amends s. 455.213, F.S.; relating to certain licensing procedures for applicants with certain criminal history.
Section 2: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may allow more people to become licensed in their chosen profession.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

DBPR has identified concerns with the bill as it relates to construction and electrical contractors.

"Construction and electrical contractors enter into contracts, accept deposits before work is performed, and may have access to their customer's financial information. The bill does not grant specific authority for application denial based upon theft, financial crimes, or other crimes that may relate to the practice of a profession and are more than two years old. Consequently, the bill may allow individuals who have committed such crimes at least two years prior to their application for licensure to obtain a license without consideration of the severity of the crime or the potential risk to the public."[43]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[43] DBPR, *supra* note 8, at 6.

A bill to be entitled

An act relating to criminal history in professional licensing applications; amending s. 455.213, F.S.; revising the period of time when a conviction, or any other adjudication, for a crime may not be grounds for denial of licensure in specified professions; removing a provision requiring good moral character for licensure in such professions; requiring the applicable board to approve certain education program credits offered to inmates in certain institutions or facilities to satisfy training requirements for licensure in specified professions; providing an effective date.

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

Section 1. Paragraph (b) of subsection (3) of section 455.213, Florida Statutes, is amended and paragraph (f) is added to that subsection, to read:

455.213 General licensing provisions.—

(3)

(b)~~1.~~ A conviction, or any other adjudication, for a crime more than 2 ~~5~~ years before the date the application is received by the applicable board may not be grounds for denial of a license specified in paragraph (a). For purposes of this

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

paragraph, the term "conviction" means a determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld. This paragraph does not limit the applicable board from considering an applicant's criminal history that includes a crime listed in s. 775.21(4)(a)1. or s. 776.08 at any time, but only if such criminal history has been found to relate to the practice of the applicable profession.

~~2. The applicable board may consider the criminal history of an applicant for licensure under subparagraph (a)3. if such criminal history has been found to relate to good moral character.~~

(f) The applicable board shall approve educational program credits offered to inmates in any correctional institution or correctional facility as vocational training or through an industry certification program for the purposes of satisfying applicable training requirements for licensure in a profession under paragraph (a).

Section 2. This act shall take effect July 1, 2021.

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

REGULATORY REFORM SUBCOMMITTEE

HB 953 by Reps. Chambliss and Plakon
Criminal History in Professional Licensing Applications

AMENDMENT SUMMARY
March 17, 2021

Amendment 1 by Rep. Chambliss (line 25):
The amendment allows the boards for barbers, cosmetologists, construction trades contractors, and electrical contractors to consider the criminal history of a license applicant beyond the 2 year review limitation if at any time during the 2 year period, the applicant was incarcerated.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

Committee/Subcommittee hearing bill: Regulatory Reform Subcommittee

Representative Chambliss offered the following:

Amendment

Remove line 25 and insert:

license specified in paragraph (a), unless at any point during the 2 year period the applicant was serving jail or prison time. For purposes of this

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 991 Petroleum Fuel Measuring Devices
SPONSOR(S): Busatta Cabrera
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 430

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform Subcommittee		Thompson	Anstead
2) Agriculture & Natural Resources Appropriations Subcommittee			
3) Commerce Committee			

SUMMARY ANALYSIS

Chapter 525, F.S., which governs gasoline and oil inspections in the state, makes DACS responsible for monitoring the accuracy of Florida's gas pumps, scales, price scanners, and other commercial weighing and measuring devices. This includes the responsibility of making sure that measuring devices used in selling or distributing petroleum fuel at wholesale and retail are working safely and properly.

DACS has the authority to issue warning letters, impose administrative fines, or revoke or suspend any registration issued by DACS for violations of the chapter of law governing gasoline and oil inspections.

Recently, local governments have been adopting fuel pump security measures that are more restrictive than the rules established by DACS related to reoccurring issues with skimmers at certain convenience stores.

The bill preempts to the state and DACS, the regulation of petroleum fuel measuring devices.

The bill removes DACS' authority to impose administrative fines and penalties for violations of petroleum fuel measuring device requirements, unless the owner or operator of a petroleum fuel measuring device fails to affix or install a security measure.

The bill may have an indeterminate fiscal impact on state and local government. See Fiscal Analysis and Economic Impact Statement.

The effective date of the bill is July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Petroleum Fuel Measuring Devices

The Division of Consumer Services (Division) within the Department of Agriculture and Consumer Services (DACS) is the state's clearinghouse for consumer complaints, information and protection. The Division regulates various businesses, such as charitable organizations and telemarketers. In addition, the Division protects consumers and businesses from unfair and unsafe business practices across a wide range of industries, including antifreeze, brake fluid, gasoline, liquefied petroleum (LP) gas, pesticides, water vending machines, and weighing and measuring devices.[1]

Chapter 525, F.S., which governs gasoline and oil inspections in the state, makes DACS responsible for monitoring the accuracy of Florida's gas pumps, scales, price scanners, and other commercial weighing and measuring devices to promote a fair and equitable marketplace and protect consumers. This includes the inspection of retail gas stations to ensure that fuel dispensers are working safely and properly.[2]

DACS Inspections

Current law requires DACS to inspect all measuring devices used in selling or distributing petroleum fuel at wholesale and retail, and to affix a sticker to each petroleum measuring device to signify that the device has been inspected and the device owner is responsible for its proper use and maintenance.[3]

Owners or managers of petroleum fuel measuring devices are responsible for ensuring accurate measurement by the device within certain tolerances defined by the rule. An appropriate security seal must be placed on all measuring devices found to be giving accurate measure within the tolerances defined by DACS so that the metering adjustment cannot be changed without breaking the seal.[4]

A measuring device found to be operating outside the tolerances defined by rule is deemed inaccurate and DACS, at its discretion, must either:

- Give, in writing, the owner or manager of the measuring device a reasonable time to repair the measuring device; or
- Condemn or prohibit further use of the measuring device by using an appropriate security seal to obstruct operation without breaking the seal.[5]

It is unlawful to operate a measuring device that has been condemned or prohibited from further use by DACS, without the written consent from DACS.[6]

It is also unlawful to:

- Install or operate a petroleum fuel measuring device in this state, which gives short measure.

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[1] The Florida Department of Agriculture and Consumer Services, http://www.freshfromflorida.com/Divisions-Offices/Consumer-Services (last visited Jan. 19, 2018).
[2] Department of Agriculture and Consumer Services, Weights and Measures, https://www.fdacs.gov/Business-Services/Weights-and-Measures (last visited Mar. 11, 2021).
[3] S. 525.07(1), F.S.
[4] S. 525.07(3), F.S.
[5] S. 525.07(4), F.S.
[6] S. 525.07(5), F.S.

- Break, cut, or remove any seal applied by DACS to a petroleum fuel measuring device or container, unless broken by a DACS registered meter mechanic for repair and adjustment. After repairs and adjustments are made, the adjusting mechanism must immediately be resealed by the registered meter mechanic with a seal clasp bearing at least the name or initials of the registered mechanic, and the mechanic must immediately notify DACS of this action.[7]

Entities that adjust the accuracy of petroleum fuel measuring devices are required to use test measures that have been calibrated with standards traceable to the National Institute of Standards and Technology[8] within one year prior to the date of the adjustment for volumes of less than 500 gallons and within three years before the date of the adjustment for volumes of 500 gallons or more.[9]

Security Measures

Owners or managers of retail petroleum fuel measuring devices are required to have affixed or installed onto the device a security measure to restrict the unauthorized access of customer payment card[10] information. The security measure must include one or more of the following:

- The placement of pressure-sensitive security tape over the panel opening that leads to the scanning device[11] for the retail petroleum fuel measuring device in a manner that will restrict the unauthorized opening of the panel.
- A device or system that will render the retail petroleum fuel measuring device or the scanning device in the measuring device inoperable if there is an unauthorized opening of the panel.
- A device or system that encrypts the customer payment card information in the scanning device.
- Another security measure approved by the department.[12]

When a retail petroleum fuel measuring device is found to have no security measure, or with an altered or damaged security measure, DACS is required to send a written notice of noncompliance to the owner or manager. Upon written notice, they are given five calendar days to comply. After the fifth day of noncompliance, DACS is authorized to prohibit further use of the device until a security measure is installed, replaced, or repaired. In addition, DACS is authorized to take the measuring device out of service if repeat violations are found on the same measuring device,[13] and may also seize any skimming device[14] for use as evidence.[15]

DACS is authorized to adopt rules to administer these requirements.[16]

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[7] S. 525.07(6) and (7), F.S.

[8] National Institute of Standards and Technology (NIST), *About NIST*, https://www.nist.gov/about-nist (last visited Mar. 1, 2021). The NIST, is a physical sciences laboratory and a non-regulatory agency of the United States Department of Commerce. Its mission is to promote innovation and industrial competitiveness. NIST's activities are organized into laboratory programs that include nanoscale science and technology, engineering, information technology, neutron research, material measurement, and physical measurement. From 1901–1988, the agency was named the National Bureau of Standards.

[9] S. 525.07(9), F.S.

[10] S. 817.625(1)(b), F.S., defines "payment card" as a credit card, charge card, debit card, or any other card that is issued to an authorized card user and that allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.

[11] S. 817.625(1)(d), F.S., defines "scanning device" as a scanner, reader, or any other electronic device that may be used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the computer chip, magnetic strip or stripe, or other storage mechanism of a payment card or from another device that directly reads the information from a payment card. The term does not include a skimming device.

[12] 525.07(10)(a), F.S.

[13] 525.07(10)(b), F.S.

[14] S. 817.625(1)(b), F.S.

[15] *See* s. 525.07(10), F.S.

[16] R. 5J-21.009, F.A.C.

Administrative Fines and Penalties

For violations of the chapter of law governing gasoline and oil inspections, DACS has the authority to issue warning letters, impose administrative fines, or revoke or suspend any registration issued by the department. In addition to the authority to issue a warning letter, impose an administrative fine in the Class II category, or revoke or suspend any DACS issued registration, violations are a first degree misdemeanor. DACS is authorized to submit cases for prosecution to the state attorney, and bring an action in circuit court to enjoin the violation.[17]

According to DACS, in calendar year 2020:

- Forty-seven warning letters were issued to device owners who were found to have skimmers for a second time.
- Fifty-six fines were levied against device owners who had previously received a warning letter, but whose devices were again found to be compromised by skimmers.
- There were no revocations or suspensions.
- There were no civil cases brought seeking injunctions.[18]

The Division of Consumer Services adheres to the following process during skimmer enforcement:

- First skimmer detected – Business is notified that a skimmer was located and offered free training on skimmer detection.
- Second skimmer detected (within one year) – Business receives a warning letter including the dates the skimmers were found, along with notice that if they do not put additional safeguards in place, the finding of additional skimmers could result in a penalty.
- Third and subsequent skimmers detected (within one year) – The business is asked to provide information on the changes to their security or pump-monitoring program aimed at reducing the skimmer risk to consumers. If no additional steps were taken, an administrative complaint is issued for violations of law, which may result in a fine.[19]

Card Skimmers

Current law defines a "skimming device" as a self-contained device that is:

- Designed to read and store in the device's internal memory information encoded on the computer chip, magnetic strip or stripe, or other storage mechanism of a payment card or from another device that directly reads the information from a payment card; and
- Incapable of processing the payment card information for the purpose of obtaining, purchasing, or receiving goods, services, money, or anything else of value from a merchant.[20]

According to DACS, card skimmers are small electronic devices illegally installed inside gas pumps that collect information from the magnetic strip on a credit or debit card when it is used during a transaction. They first began to appear in Florida in 2015 and have grown exponentially since.[21]

Initially these devices were attached to card readers on the outside of the gas pump, but now scammers are installing them inside the pump and often employing Bluetooth technology or integrated cell phone components to transmit card and PIN information.[22]

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[17] S. 525.16, F.S.
[18] Blair Bodenmiller, Assistant Director of the Division of Consumer Services, Department of Agriculture and Consumer Services, RE: HB 991 Skimmer Bill, (Mar. 4, 2021).
[19] *Id.*
[20] S. 817.625(1)(b), F.S.
[21] Department of Agriculture and Consumer Services, *Card Skimmers*, https://www.fdacs.gov/Consumer-Resources/Scams-and-Fraud/Card-Skimmers (last visited Mar. 11, 2021).
[22] *Id.*

DACS inspects gas pumps at about 9,000 gas stations, truck stops, and marinas each year, and has removed over 3,400 skimmers since 2015. Skimmers can be undetectable to consumers because of their location inside gas pumps, and have a potential for $1 million in fraudulent charges per skimmer.[23]

Local Regulations

The Florida Constitution grants local governments broad home rule authority. Non-charter county governments may exercise those powers of self-government that are provided by general or special law.[24] Those counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by vote of the electors.[25] Likewise, municipalities[26] have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform functions, provide services, and exercise any power for municipal purposes, except as otherwise provided by law.[27]

Currently, some local governments have adopted fuel pump security measures that are more restrictive than the rules established by DACS in response to repeated skimming violations of certain convenience stores. For instance, Lee County requires each fuel pump to be equipped with a visible lock, a system that would render the pump inoperable if it is accessed without a security code, or a device that encrypts customer payment card information.[28] Failure to affix an adequate security measure may result in fines of $250 per gas pump for every day that the appropriate devices are not installed.[29] Collier County,[30] Charlotte County,[31] and the Village of Estero[32] also have local fuel pump ordinances.

State Preemption

State preemption precludes a local government from exercising authority in a particular area, and requires consistency with the state constitution or state statute.[33] A local government enactment may be found inconsistent with state law if:

- The Legislature has preempted a particular subject area to the state; or
- The local regulation conflicts with a state statute.[34]

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.[35] Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.[36] When local ordinances have been enacted in the face of state preemption, the effect has been to find such ordinances null and void.[37]

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[23] *Id.*
[24] Art. VIII, s. 1(f), Fla. Const.
[25] Art. VIII, s. 1(g), Fla. Const.
[26] A municipality is a local government entity created to perform functions and provide services for the particular benefit of the population within the municipality, in addition to those provided by the county. The term "municipality" may be used interchangeably with the terms "town," "city," and "village."
[27] Art. VIII, s. 2(b), Fla. Const. *See also* s. 166.021(1), F.S.
[28] *See* Lee County, Florida Ordinance No. 19-09.
[29] *Id.*
[30] *See* Collier County, Florida Ordinance No. 18-55.
[31] *See* Charlotte County, Florida Ordinance No. 19-026.
[32] *See* Village of Estero, Ordinance No. 18-25.
[33] James R. Wolf and Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009), available at https://www.floridabar.org/the-florida-bar-journal/the-effectiveness-of-home-rule-a-preemption-and-conflict-analysis/.
[34] *Id.*
[35] *See City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309 (Fla. 2008).
[36] *Mulligan*, 934 So. 2d at 1243.
[37] *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

Implied preemption is a legal doctrine created to address those situations in which the courts may have been concerned by the legislature's failure to expressly preempt areas, which, for all intents and purposes, seemed dominated by the state. Findings of implied preemption are for a very narrow class of areas in which the state has legislated pervasively.[38]

Effect of the Bill

The bill preempts to the state and DACS, the regulation of petroleum fuel measuring devices.

The bill removes DACS' authority to impose administrative fines and penalties for violations of petroleum fuel measuring device requirements, unless the owner or operator of a petroleum fuel measuring device fails to affix or install a security measure.

B. SECTION DIRECTORY:

Section 1: Amends s. 525.07, F.S., relating to powers and duties of department; inspections; unlawful acts.

Section 2: Amends s. 525.16, F.S., relating to administrative fine; penalties; prosecution of cases by state attorney.

Section 3: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Indeterminate. Currently, DACS is unable to estimate a fiscal impact, if any, the proposed bill may have on the Department.[39]

2. Expenditures:

   Indeterminate. Currently, DACS is unable to estimate a fiscal impact, if any, the proposed bill may have on the Department.[40]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   Preempting local governments from enacting fuel pump security measures will prevent a local government from imposing and collecting fees and fines relating to such regulation and enforcement, which may have an indeterminate negative fiscal impact on local revenues, depending on each local government's current practice of such regulation and enforcement.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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[38] Wolf and Bolinder, *supra* note 17.
[39] Department of Agriculture and Consumer Services, Agency Analysis of HB 991 (2021), p. 2 (Mar. 1, 2021).
[40] *Id.*

The bill may provide a more predictable and uniform regulatory framework for fuel pump security measures in Florida. However, local jurisdictions that receive complaints from residents about having their credit card number stolen at local gas stations may be unable to take action against gas stations where frequent theft occurs. This may result in an increase in the illegal practice of card skimming.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

B. RULE-MAKING AUTHORITY:

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments

According to DACS:

> "Under the language of this bill, the Department would be stripped of its authority to impose monetary administrative penalties against those who violate the law by failing to maintain security measures after they are initially installed. Businesses that may currently be required to use more costly security measures pursuant to local ordinances would be permitted to default back to less expensive options, like security tape."[41]
>
> "This bill is likely to have a negative impact on the level of protection offered to consumers who pay at the pump. By removing locals' authority to create more stringent requirements, this bill is likely to reduce the amount of protection offered by some retailers. Similarly, removing the Department's ability to impose monetary penalties against those who fail to maintain their security measures will eliminate an additional incentive for doing more to protect consumers from skimmers."[42]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

[41] Department of Agriculture and Consumer Services, Agency Analysis of HB 991 (2021), p. 3 (Mar. 1, 2021).
[42] *Id.* at 4.

A bill to be entitled

An act relating to petroleum fuel measuring devices; amending s. 525.07, F.S.; preempting the regulation of petroleum fuel measuring devices to the state and the Department of Agriculture and Consumer Services; prohibiting the department from enforcing certain provisions for violations of rules relating to petroleum fuel measuring devices; providing an exception; amending s. 525.16, F.S.; exempting department petroleum fuel measuring device rules from enforcement under specified provisions; providing an exception; providing an effective date.

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

Section 1. Paragraph (f) of subsection (10) of section 525.07, Florida Statutes, is amended to read:

525.07 Powers and duties of department; inspections; unlawful acts.—

(10)

(f) The regulation of petroleum fuel measuring devices is preempted to the state and to the department, which shall enforce, and may adopt rules to administer, this subsection; however, s. 525.16 may not be used to enforce this subsection unless the owner or operator of a petroleum fuel measuring

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

device fails to affix or install a security measure.

Section 2. Subsection (6) is added to section 525.16, Florida Statutes, to read:

525.16 Administrative fine; penalties; prosecution of cases by state attorney.—

(6) This section may not be used to enforce rules adopted pursuant to s. 525.07(10)(f) unless the owner or operator of a petroleum fuel measuring device fails to affix or install a security measure.

Section 3. This act shall take effect July 1, 2021.

REGULATORY REFORM SUBCOMMITTEE

HB 991 by Rep. Busatta Cabrera
Petroleum Fuel Measuring Devices

AMENDMENT SUMMARY
March 17, 2021

Amendment 1 by Rep. Busatta Cabrera (strike-all):

- Preempts the regulation of petroleum fuel measuring devices to the state and to the Department of Agriculture and Consumer Services (DACS).
- Prohibits DACS from issuing a fine regarding security measure requirements for retail petroleum fuel measuring devices unless the owner or manager:
    - Is operating without an affixed or installed security measure, or has a damaged or altered security measure; and
        - Is found to be in violation four or more times in a year, or three times in 6 months; and
        - Has not implemented a security policy nor taken corrective action after receiving notice from DACS.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Regulatory Reform Subcommittee

Representative Busatta Cabrera offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Subsection (10) of section 525.07, Florida Statutes, is amended to read:

525.07 Powers and duties of department; inspections; unlawful acts.—

(10)(a) Each person who owns or manages a retail petroleum fuel measuring device shall have affixed to or installed onto the measuring device a security measure to restrict the unauthorized access of customer payment card information. The security measure must include one or more of the following:

1. The placement of pressure-sensitive security tape over the panel opening that leads to the scanning device for the retail petroleum fuel measuring device in a manner that will restrict the unauthorized opening of the panel.

2. A device or system that will render the retail petroleum fuel measuring device or the scanning device in the measuring device inoperable if there is an unauthorized opening of the panel.

3. A device or system that encrypts the customer payment card information in the scanning device.

4. Another security measure approved by the department.

(b) The owner or manager of a retail petroleum fuel measuring device without a security measure or with an altered or damaged security measure, upon written notice from the department of such noncompliance, shall have 5 calendar days to comply with this subsection. After the fifth day of noncompliance, the department may prohibit further use of the retail petroleum fuel measuring device until a security measure is installed, replaced, or repaired. A repeat violation found on the same retail petroleum fuel measuring device will be cause for the department to immediately take the measuring device out of service.

(c) For purposes of this subsection, the terms "scanning device" and "payment card" have the same meanings as defined in s. 817.625.

(d) This subsection applies only to retail petroleum fuel measuring devices that have a scanning device.

(e) The department may seize without warrant any skimming device, as defined in s. 817.625, for use as evidence.

(f) The department shall enforce, and may adopt rules to administer, this subsection.

(g) The regulation of petroleum fuel measuring devices is preempted to the state and to the department.

(h) The department may not issue a fine in accordance with s. 525.16, for violations of this subsection, unless the owner or manager of a petroleum fuel measuring device is found to be in violation of this subsection four or more times in a year, or three times in 6 months, and has not adopted a security policy to assist in preventing future alteration or damage to a security measure, and the department determines that the owner or manager has not taken measures to correct each violation within 5 days of receiving each notice of an altered or damaged security measure.

Section 2. Subsection (6) is added to section 525.16, Florida Statutes, to read:

525.16 Administrative fine; penalties; prosecution of cases by state attorney.—

(6) The department may not use this section to enforce s. 525.07(10) unless the owner or manager of a petroleum fuel measuring device is found to be in violation of s. 525.07(10)

four or more times in a year, or three times in 6 months, and has not adopted a security policy to assist in preventing future alteration or damage to a security measure, and the department determines that the owner or manager has not taken measures to correct each violation within 5 days of receiving each notice of an altered or damaged security measure.

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

Remove everything before the enacting clause and insert:
An act relating to petroleum fuel measuring devices; amending s. 525.07, F.S.; preempting the regulation of petroleum fuel measuring devices to the state and the Department of Agriculture and Consumer Services; prohibiting the department from enforcing security measure violations relating to petroleum fuel measuring devices; providing exceptions; amending s. 525.16, F.S.; prohibiting the department from enforcing security measure violations relating to petroleum fuel measuring devices; providing exceptions; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1307 Telephone Solicitation
SPONSOR(S): Beltran
TIED BILLS: **IDEN./SIM. BILLS:** SB 1682

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform Subcommittee		Thompson	Anstead
2) Civil Justice & Property Rights Subcommittee			
3) Commerce Committee			

SUMMARY ANALYSIS

Chapter 501, part IV, the Florida Telemarketing Act (FTA), requires non-exempt businesses engaged in telemarketing and their salespeople to be licensed by the Florida Department of Agriculture and Consumer Services (DACS) before operating in Florida. The law prohibits telephonic sales calls that use an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed. However, the law allows the use of an automated telephone dialing system with live messages if:

- The calls are made or messages given solely in response to calls initiated by the persons to whom the automatic calls or live messages are directed;
- The telephone numbers selected for automatic dialing have been screened to exclude any telephone subscriber who is included on the department's then-current "no sales solicitation calls" listing or any unlisted telephone number; or
- The calls concern goods or services that have been previously ordered or purchased.

The bill removes the prohibition of telephonic sales calls that use an automated system for the selection or dialing of telephone numbers, and the related exceptions, and replaces these provisions with a prohibition on telephonic sales calls that involve an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called without the prior "**express written consent**" of the called party. Such consent must include a clear and conspicuous disclosure informing the called party that by executing the agreement, the called party authorizes to receive automated telephonic sales calls, and is not required to sign or enter into such an agreement as a condition of purchasing any property, goods, or services.

The bill authorizes a called party aggrieved by a violation to bring an action to:

- Enjoin the violation; and
- Recover actual damages or $500, whichever is greater.

The bill authorizes the court to increase the amount of the award up to three times the amount available in cases involving willful and knowing violations.

The bill provides a rebuttable presumption that any telephonic sales call made to a Florida area code is considered to be made to a resident of this state or to a person who is in this state at the time of the telephonic sales call.

The bill is not expected to have a fiscal impact on state or local government.

The effective date of the bill is July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Florida Telemarketing Act

Chapter 501, part IV, the Florida Telemarketing Act (FTA), requires non-exempt businesses engaged in telemarketing and their salespeople to be licensed by the Florida Department of Agriculture and Consumer Services (DACS) before operating in Florida. Certain exempt entities must have a valid affidavit of exemption on file prior to operating in Florida. There are approximately 28 exemptions, including, but not limited to, the following: soliciting for religious, charitable, political or educational purposes, research companies, newspapers, book and video clubs, cable television, and persons or companies with whom the consumer has a prior business relationship.[1]

The FTA generally requires businesses that solicit the sale of consumer goods or services to:

- Be licensed;[2]
- Post a form of security;[3]
- License all of their salespeople;[4] and
- Provide DACS with a list of all telephone numbers used to make sales calls.[5]

An application for licensure as a telemarketer must include the applicant's identifying information, prior experience in the field, criminal and administrative history, especially relating to fraud, theft, or unfair and deceptive trade practices, phone numbers from which the telemarketer will make sales calls, and parent or affiliate entity under which it will transact business, if applicable.[6]

Additionally, a telemarketer applicant must submit with the application:

- A script that will be used by its salespersons during calls, or other related literature;
- The identity, address, date of birth, and alias of each of the applicant's principal officers, directors, trustees, shareholders, owners, partners, office managers, and salespersons who are employed by or affiliated with the applicant; and
- A $1,500 licensing fee.[7]

In Florida, it is unlawful for telemarketers to:

- Accept novelty payments.[8]
- Employ or be affiliated with an unlicensed salesperson.
- Be employed by or affiliated with an unlicensed commercial telephone seller.
- Operate without a license.
- Make calls before 8 a.m. or after 9 p.m. local time at the called person's location.
- Fail to provide the call recipient with their name and telephone number.[9]

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[1] S. 501.604, F.S.
[2] S. 501.605, F.S.
[3] Section 501.611, F.S., requires a $50,000 bond, irrevocable letter of credit issued for the applicant, or a certificate of deposit in favor of the Department for payment on findings of fraud, misrepresentation, breach of contract, or other violation by the applicant.
[4] Section 501.607, F.S.
[5] Section 501.605, F.S.
[6] S. 501.605(2), F.S.
[7] S. 501.605(5)(b), F.S.
[8] S. 501.603(8), F.S., defines a "novelty payment" as a payment method that does not have systematic monitoring and includes remotely created checks, remotely created payment orders, cash-to-cash money transfers (such as Western Union) and cash reload mechanisms (such as MoneyPak or ReloadIt). Novelty payment methods are not systematically monitored, have little to no consumer protection in the case of fraud or theft, and are used frequently in scams and other fraudulent activity.

Violations of the FTA are punishable by a civil fine of up to $10,000 per violation,[10] and the imposition of criminal penalties, including a third degree felony, and a second degree felony for repeated violations.[11] DACS, and the office of the state attorney, have investigative authority, including the power to subpoena witnesses, if a violation occurs.[12] Reasonable attorney's fees and costs may be awarded to the prevailing party in a civil action as part of a judgement or administrative order.[13]

Florida Do Not Call Act

DACS maintains the Florida Do Not Call Act, also known as the "Do Not Call" list, which prohibits unsolicited phone calls and text messages from telemarketers[14]. Residents who do not wish to receive sales calls may have their residential, mobile, or paging device telephone number included on this list.[15]

Telephone solicitors[16] are prohibited from making telephonic sales calls to consumers who register for the "Do Not Call" program. A "telephonic sales call" as a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services, soliciting an extension of credit for consumer goods or services, or obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.[17]

In addition to those consumers registered for the "Do Not Call" program, a telephone solicitor may not call or text a consumer who previously communicated to the telephone solicitor that they do not wish to be contacted. Businesses and charities are required to maintain a list of consumers who have made a do-not-call request, and it is a violation to call a consumer who has asked to be placed on the company's do-not-call list.[18]

When a telephone number is made available through a caller ID service during a telephonic sales call, the solicitor must ensure that the number is capable of receiving phone calls, and that the dialing of the number will connect the call recipient with the telephone solicitor or the seller on behalf of which the phone call was placed.[19]

Anyone who receives an unsolicited sales call can report the call to FDACS using the online Do Not Call Complaint Form.[20]

A telephone solicitor who violates the provisions of Florida's "Do Not Call" program are currently subject to an injunction and a civil penalty[21] with a maximum fine of $10,000 per violation, or an administrative fine[22] with a maximum of $1,000 per violation, in addition to the consumer's attorney fees and costs.

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[9] S. 501.616, F.S.
[10] S. 501.619, F.S.
[11] S. 501.623, F.S.
[12] S. 501.617, F.S.
[13] S. 501.621, F.S.
[14] The Florida Do Not Call List can be found at: https://www.fldnc.com/.
[15] *See* s. 501.059, F.S., FDACS, *Florida DO NOT CALL Program*, https://www.fldnc.com/About.aspx (last visited 1/2/2018). The Florida No Sales Solicitation Act added specific language to prohibit unwanted sales texts.
[16] Section 501.059(1)(f), F.S., defines "Telephone solicitor" as "a natural person, firm, organization, partnership, association, or corporation, or a subsidiary or affiliate thereof, doing business in this state, who makes or causes to be made a telephonic sales call, including, but not limited to, calls made by use of automated dialing or recorded message devices."
[17] S. 501.059(1)(g), F.S.
[18] S. 501.059(5), F.S.
[19] S. 501.059(8)(c), F.S.
[20] FDACS, http://www.freshfromflorida.com/Consumer-Resources/Florida-Do-Not-Call (last visited January 11, 2017).
[21] s. 501.059(9)(a), F.S.
[22] s. 501.059(9)(b), F.S.

Federal Telemarketers and National Do Not Call Registry

Although the states were the first to address consumers' requests to stop unwanted telemarketing calls[23], the federal government soon followed with a National Do Not Call Registry in 2003.[24] In July 2003, the federal government took action and issued a report and order establishing the National Do Not Call registry. The national registry covers all telemarketers (with the exception of certain nonprofit organizations), and applies to both interstate and intrastate calls. The registry is administered by the FTC. To reduce the number of hang-up and dead air calls consumers experience, the Commissions telemarketing rules also contain restrictions on the use of autodialers and requirements for transmitting caller ID information.

As the National Do Not Call Registry has gained popularity, some states have decided to forego the expense of maintaining their own lists. As of August 2016, only 12 states maintained their own Do Not Call lists: Colorado, Florida, Indiana, Louisiana, Massachusetts, Mississippi, Missouri, Oklahoma, Pennsylvania, Tennessee, Texas and Wyoming.[25] Thirty-one states have officially adopted the National Do Not Call Registry as their Do Not Call list.

In an effort to address a growing number of telephone marketing calls, Congress enacted in 1991 the Telephone Consumer Protection Act (TCPA). The TCPA restricts the making of telemarketing calls and the use of automatic telephone dialing systems and artificial or prerecorded voice messages. The rules apply to common carriers as well as to other marketers. In 1992, the Commission adopted rules to implement the TCPA, including the requirement that entities making telephone solicitations institute procedures for maintaining company-specific do-not-call lists.[26]

In July 2015, the FCC established rules indicating that telephone carriers can block unwanted calls at the request of consumers.[27] Following the FCC's ruling, the National Association of Attorneys General called upon the major telephone carriers to do more to provide these services to consumers.[28] Currently there are a number of call-blocking applications that provide some relief from unwanted and spam calls.[29]

On Nov. 16, 2017, the FCC adopted new rules to allow voice service providers to proactively block certain types of robocalls that are likely to be fraudulent because they come from certain types of phone numbers, including those that do not or cannot make outgoing calls. For example, perpetrators have used IRS phone numbers that don't dial out to impersonate the tax agency, informing the people who answer that they are calling to collect money owed to the U.S. government. Such calls appear to be legitimate to those who receive them and can result in fraud or identity theft. Service providers now can block such calls, as well as calls from invalid numbers, like those with area codes that don't exist, from numbers that have not been assigned to a provider, and from numbers allocated to a provider but not currently in use.[30]

FCC rule 47 C.F.R. § 64.1601, provides that telemarketers must comply with the following:

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[23] At least 28 states, starting with Florida in 1987, have implemented Do Not Call registries.
[24] Federal Trade Commission, *National Do Not Call Registry*, https://www.donotcall.gov/ (last visited Mar. 12, 2021).
[25] National Association of Attorneys General, Do Not Call: The History of Do Not Call and How Telemarketing Has Evolved, NAGTRI Journal, Vol. 1 No. 4., at Note 5.
[26] The FCC, Telemarketing and Robocalls, (last visted January 11, 2018) https://www.fcc.gov/general/telemarketing-and-robocalls.
[27] Declaratory Ruling and Order, In the Matter of Rules and Regulations Implementing the Telecommunications Consumer Protection Act of 1991, 30 FCC Rcd. 7961 (July 10, 2015).
[28] National Association of Attorneys General, Attorneys General Urge Phone Companies to Offer Technology that Blocks Unwanted Sales Calls or Texts, http://www.naag.org/naag/media/naag-news/attorneys-general-urge-federal-government-to-allow-phone-companies-to-block-unwanted-sales-calls-to-customers.php (last visited January 12, 2017).
[29] CTIA, The Wireless Association, How to Stop Robocalls, https://www.ctia.org/consumer-tips/robocalls.
[30] FCC, Stop Unwanted Calls and Texts, https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts (last visited January 11, 2018).

"(e) Any person or entity that engages in telemarketing, as defined in section 64.1200(f)(10) must transmit caller identification information.

(1) For purposes of this paragraph, caller identification information must include either CPN or ANI, and, when available by the telemarketer's carrier, the name of the telemarketer. It shall not be a violation of this paragraph to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller on behalf of which the telemarketing call is placed and the seller's customer service telephone number. **The telephone number so provided must permit any individual to make a do-not-call request during regular business hours.**

(2) Any person or entity that engages in telemarketing is prohibited from blocking the transmission of caller identification information.

(3) Tax-exempt nonprofit organizations are not required to comply with this paragraph."

With regard to telephone carriers, the FCC allows carriers to offer their customers external call-blocking apps on their landlines and allows carriers to block certain illegal robocalls directly. In addition, in December 2019, Congress enacted the "TRACED Act" to aid enforcement efforts between law enforcement agencies and the private sector on traceback issues, and required the FCC to issue rules "for the registration of a single consortium that conducts private-led efforts to trace back the origin of suspected unlawful robocalls." In July 2020, the FCC designated the USTelecom-led Industry Traceback Group (ITG) as the Official Consortium for coordinating industry-led efforts to trace back the origin of suspected unlawful robocalls.[31]

According to the ITG's first annual report, in 2019, over 100 companies participated in over 1,000 ITG traceback investigations, implicating more than 10 million illegal robocalls and resulting in more than 20 subpoenas and/or civil investigative demands from federal and state enforcement agencies.[32]

The ITG reported in a letter[33] to the FCC on November 13, 2020 that about 100 providers have failed to cooperate with the ITG, including less than 30 that are based in the United States. The ITG encouraged the FCC to bring aggressive enforcement against robocallers and voice service providers that routinely refuse to participate in the traceback process.[34]

In their Fourth Report and Order on Advanced Methods to Target and Eliminate Unlawful Robocalls[35] released December 30, 2020, the FCC required "all voice service providers to respond to traceback requests from the Commission, civil and criminal law enforcement and the Consortium."

Constitutionality of Do Not Call Registries

Do Not Call registries have been subject to numerous state and federal lawsuits challenging their constitutionality. These suits have failed and the National Registry upheld. The Courts have found that the Do Not Call Registry is a reasonable restriction on commercial speech and that the FTC is authorized to promulgate rules for the registry. The court stated, "the do-not-call registry prohibits only

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[31] USTelecom The Boradband Association, FCC Names USTelecom's Industry Traceback Group as Official Robocall Traceback Consortium, https://www.ustelecom.org/fcc-names-ustelecoms-industry-traceback-group-as-official-robocall-traceback-consortium/ (last visited Mar. 15, 2021).

[32] InsideArm, *The Latest Developments in the World of Call Delivery*, https://www.insidearm.com/news/00047073-latest-developments-world-call-delivery/ (last visited Mar. 15, 2021).

[33] USTelecom, Enforcement Bureau Requests Information on the Status of Private-Led Traceback Efforts of Suspected Unlawful Robocalls, EB Docket No. 20-195, Nov. 13, 2020, https://docs.fcc.gov/public/attachments/DOC-368957A2.pdf (last visited Mar. 15, 2021).

[34] InsideArm, *The Latest Developments in the World of Call Delivery*, https://www.insidearm.com/news/00047073-latest-developments-world-call-delivery/ (last visited Mar. 15, 2021).

[35] FCC, Fourth Report and Order, Dec. 29, 2020, https://docs.fcc.gov/public/attachments/FCC-20-187A1.pdf (last visited Mar. 15, 2021).

telemarketing calls aimed at consumers who have affirmatively indicated that they do not want to receive such calls and for whom such calls would constitute and invasion of privacy." Thus, the government may have a role in restricting the ability of a telemarketer to reach a household via telephone and because the government left the ultimate decision of whether or not to be placed on the registry up to the individual, the government itself did not restrict the First Amendment rights of the solicitor.[36]

Claims of preemption have also been unsuccessful. The TCPA's non-preemption clause[37], often referred to as the savings clause, has been relied upon by Courts to uphold state's Do Not Call Registries. The clause reads in part: "Nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulation on, or which prohibits …." The clause indicates specific types of actions that a state may prohibit or place more restrictive regulations on, such as sending unsolicited advertisements via fax, regulation of the use of automatic dialing systems and prerecorded messages, and the making of telephone solicitations.[38]

The TPCA is silent on the states' ability to place regulations that are more stringent than the TCPA requirements for interstate calls.[39] However, at least one Court has held that state regulations and prohibitions of telemarketing can cross state lines.[40]

Caller ID and "Spoofing"

"Spoofing" is the practice of altering or manipulating the caller ID information that is received in conjunction with a telephone call. In the past, caller ID services were not commonplace and spoofing required special equipment or a relatively high degree of technical sophistication. However, advances in technology, such as the proliferation of cellular phones, cell phone applications, and the widespread availability of Voice over Internet Protocol (VoIP) allows anyone to inexpensively spoof their caller ID using the services of a third-party spoofing provider.[41] For example, one such spoofing provider allows a consumer to download an app on their smartphone, purchase credits towards call time, and simply input the number that they want displayed on the receiving end in order to place an untraceable, spoofed call.[42]

In response to the growing practice of spoofing, Congress amended the TCPA to add the Truth in Caller ID Act of 2009. Under the Act, and FCC rules, any person or entity is prohibited from transmitting false or misleading caller ID information "with the intent to defraud, cause harm, or wrongly obtain anything of value", and carries a penalty of up to $10,000 for each violation.[43] However, spoofing is not illegal when no harm is intended or caused, or if the caller has legitimate reasons to hide their information, such as law enforcement agencies working on cases, victims of domestic abuse or doctors who wish to discuss private medical matters.[44]

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[36] *Mainstream Marketing Services Inc v. Federal Trade Commission*, 358 F.3d 1228 (10th Cir. 2004).
[37] 47 U.S.C. § 227(f)(1).
[38] National Association of Attorneys General, *Do Not Call: The History of Do Not Call and How Telemarketing Has Evolved*, NAGTRI Journal, Vol. 1 No. 4.
[39] 47 U.S.C. s. 227 (f)(1).
[40] *See Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041 at 1044-45 (7th Cir. 2013) and *Patriotic Veterans, Inc. v. State of Indiana*, No. 16-2059 (7th Cir. 2017)("Preventing automated messages to persons who don't want their peace and quiet disturbed is a valid time, place, and manner restriction.").
[41] *See* FCC 11-100, *Rules and Regulations Implementing the Truth in Caller ID Act of 2009*, WC Docket No. 11-39, (June 22, 2011), at 9116, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-100A1_Rcd.pdf.
[42] Paul Szoldra, *It's surprisingly easy for a hacker to call anyone from your personal phone number,* BUSINESS INSIDER (March 3, 2016), http://www.businessinsider.com/phone-number-spoofing-2016-2.
[43] 47 U.S.C. § 227 (e).
[44] FCC, *Spoofing and Caller ID*, https://www.fcc.gov/consumers/guides/spoofing-and-caller-id (last visited 1/2/2018).

In 2008, Florida passed its own anti-spoofing legislation, The Florida Caller ID Anti-Spoofing Act (2008).[45] The Act prohibits **any person** from:

- making a call with knowledge that false information was entered into a telephone caller ID system with the intent to deceive, defraud, or mislead the call's recipient; and
- entering false information into a telephone caller ID system "with the intent to deceive, defraud, or mislead" the call's recipient.

However, a U.S. District Court in Miami found that Florida's Caller ID Anti-Spoofing Act (2008) violated the Commerce Clause of the United State Constitution because it had the effect of controlling spoofing practices that took place entirely outside of the state, wherein individuals or companies could not ascertain what telephone numbers are subject to Florida law, and would have to subject all of their call practices to Florida law to avoid liability.[46]

The Commerce Clause of the U.S. Constitution bars state laws that control conduct outside the state's boundaries, regardless of whether the Legislature intended the law's extraterritorial reach.[47] Similarly, in 2011, a federal court in Mississippi struck Mississippi's anti-spoofing law, which was substantially similar to Florida's.[48]

Spam Robocalls

According to the American Association of Retired Persons (AARP), robocalls have become an epidemic. YouMail, a company that provides call-blocking and call-management services, estimates that there were 58.5 billion robocalls in the U.S. in 2019 and that 44 percent of them were placed by scammers.[49]

A February 2021 survey found that 46 percent of Americans reported receiving spam phone calls on their cell phone every day, and another 24 percent receiving them multiple times per week.[50]

Scammers often use caller ID spoofing to mask their true location and make it appear the call is from a legitimate or local number to raise the odds of the called party to answer. What follows is a robotic voice on the other end claiming to represent a utility, a name-brand company or a government agency (Social Security and the Internal Revenue Service are popular poses). It might offer a free cruise, cheap health insurance or a low-interest loan. Answering and/or engaging with the call can lead to a live scammer, indicating they have hit on a "live" number, and they will call it repeatedly.[51]

It is important to note that many robocalls are legal. The Federal Communications Commission (FCC) allows them for some informational or noncommercial purposes, such as polling, political campaigning and outreach by nonprofit groups.

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[45] s. 817.487, F.S. (2008).
[46] *TelTech Systems, Inc. v. McCollum*, No. 08-61664-CIV-MARTINEZ-BROWN (S.D. Fla. Filed Oct. 16, 2008).
[47] *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989).
[48] *TelTech Systems, Inc. v. Barbour*, 866 F.Supp.2d 571 (S.D. Miss 2011), *aff'd sub nom Teltech Systems, Inc. v. Bryant*, 702 F. 2d 232 (5th Cir. 2012).
[49] American Association of Retired Persons, Robocalls, https://www.aarp.org/money/scams-fraud/info-2019/robocalls.html?CMP=KNC-DSO-Adobe-Google-FRD-Ongoing-Robocalls-NonBrand-Exact-Robocalls&gclid=EAIaIQobChMIlvmq_4Sr7wIVFYvICh2RAwjqEAAYAiAAEgJD4vD_BwE&gclsrc=aw.ds (last visited Mar. 12, 2021).
[50] Simon van Zuylen-Wood, *How robo-callers outwitted the government and completely wrecked the Do Not Call list*, THE WASHINGTON POST (Jan. 11, 2018), https://www.washingtonpost.com/lifestyle/magazine/how-robo-call-moguls-outwitted-the-government-and-completely-wrecked-the-do-not-call-list/2018/01/09/52c769b6-df7a-11e7-bbd0-9dfb2e37492a_story.html?utm_term=.8a6e6ea55f32.
[51] American Association of Retired Persons, Robocalls, https://www.aarp.org/money/scams-fraud/info-2019/robocalls.html?CMP=KNC-DSO-Adobe-Google-FRD-Ongoing-Robocalls-NonBrand-Exact-Robocalls&gclid=EAIaIQobChMIlvmq_4Sr7wIVFYvICh2RAwjqEAAYAiAAEgJD4vD_BwE&gclsrc=aw.ds (last visited Mar. 12, 2021).

Advances in technology have magnified fundamental flaws in the American phone system enabling unrelenting robocalls from untraceable origins. As a result, it is incredibly profitable to use spam calls to drive business whether the caller is a scammer or an actual business using telemarketing to increase sales.[52]

The TCPA prohibits a telemarketer from using an automatic telephone dialing system (ATDS) to place a call or send a text message to a cell phone without the recipient's "prior express consent."[53] The type of consent depends on the nature of the call or text. Consent generally can be revoked by any reasonable method. However, some courts recently have considered whether revocation may be restricted in circumstances where the consent is included on a bilateral agreement.[54]

Consent and Revocation

There are two types of prior consent provided under the TCPA. Prior express consent is required to place autodialed, non-solicitation calls or texts to a cell phone. Prior express written consent, a heightened form of consent, must be evidenced by a written agreement signed by the call recipient and is required in order to place autodialed telemarketing/advertising calls or texts to a cell phone. The written agreement must include a clear and conspicuous disclosure informing the consumer signing that (1) by signing the agreement, the consumer is authorizing autodialed telemarketing or advertising calls or texts, and (2) the consumer is not required to sign the agreement as a condition of purchasing any property, goods, or services.[55]

Prior express consent: can be written or verbal. Voluntarily providing one's cellular number also constitutes prior express consent where:

- The individual gives "prior express consent" to be called or texted at the number provided;
- The individual has provided their number to the party calling or texting them; and
- There is some relation between the communications and the reason for which an individual provided their number.[56]

Prior express written consent: is required for calls or texts to cell phones that introduce an advertisement,[57] or constitute "telemarketing"[58] and are sent using an ATDS. The TCPA's advertising prong merely requires introducing at the most basic level the commercial availability of a service. In similar fashion, telemarketing occurs when the context of a text or call indicates that it was initiated and transmitted to a person for promoting property, goods, or services. Neither the TCPA nor its implementing regulations require an explicit mention of a good, product, or service where the implication of an improper purpose is clear from the context.[59]

Revocation of consent: is controlled by the consenting party, and may be communicated orally or in writing by any reasonable means. However, where consent is contractually provided, as in credit

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[52] Simon van Zuylen-Wood, *How robo-callers outwitted the government and completely wrecked the Do Not Call list*, THE WASHINGTON POST (Jan. 11, 2018), https://www.washingtonpost.com/lifestyle/magazine/how-robo-call-moguls-outwitted-the-government-and-completely-wrecked-the-do-not-call-list/2018/01/09/52c769b6-df7a-11e7-bbd0-9dfb2e37492a_story.html?utm_term=.8a6e6ea55f32.

[53] 47 U.S.C. § 227(b)(1)(A)(iii).

[54] The National Law Review, Consent and Revocation Under the TCPA, https://www.natlawreview.com/print/article/consent-and-revocation-under-tcpa (last visited Mar. 4, 2021).

[55] *Id.*

[56] Federal Communications Commission, Rules & Regulations Implementing the TCP Act of 1991 et al., 30 FCC Rcd at 7991–92.

[57] 47 C.F.R. § 64.1200(f)(1), defines an "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services," and "telemarketing" is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."

[58] 47 C.F.R. § 64.1200(f)(12).

[59] The National Law Review, Consent and Revocation Under the TCPA, https://www.natlawreview.com/print/article/consent-and-revocation-under-tcpa (last visited Mar. 4, 2021).

agreements for example, the parties can bargain to require mutuality or particular revocation methods. Recently, a number of courts have addressed whether a consumer may unilaterally revoke consent when it is a term in a bargained-for contract.[60]

In 2017, the Second Circuit Court of Appeals held that a consumer may not unilaterally revoke consent in a bargained-for, bilateral contract.[61] The court based its decision in "black-letter" contract law, referring to a fundamental aspect of contractual relationships that one party cannot alter or revoke a term of a bilateral agreement without the other party's consent. The court found that a consumer, having consented to be contacted via an auto-dialer, could not unilaterally revoke consent without the caller's permission. Notably, the court distinguished case law from the Third and Eleventh Circuits, where consumers retained their ability to revoke consent because it was given in credit applications, rather than as part of a bilateral contract.[62]

In 2018, the Middle District of Florida held that consent provided by contract cannot be unilaterally revoked.[63] The court noted that no provision in the TCPA indicates that contractually-granted consent can be unilaterally revoked where it would contradict black-letter law. The court held that a consumer who has consented to auto-dialed communication in a contract for services cannot later revoke such consent.[64]

Some courts have rejected the argument that consent is irrevocable.

In 2018, the Middle District of Tennessee adopted the general rule that consumer consent may be revoked at any time by "any reasonable means."[65] The court held that consumers retain the ability to revoke their prior consent despite having a bilateral agreement with the caller.

Another ruling held that the court should have relied upon binding Eleventh Circuit precedent allowing for revocation of consent in the absence of a contractual restriction on the means by which a consumer may revoke consent.[66]

While consent can and most often occurs between the sender and recipient, courts have also recognized that consent can be communicated through intermediaries. An intermediary can convey consent but cannot provide consent for the recipient.[67]

In December, 2020, the U.S. Supreme Court heard oral arguments in a landmark case that will determine whether consumers can sue a company for using an ATDS to text or call the consumers at a phone number saved in the company's system. At issue is the meaning of the TCPA's prohibition on using an ATDS to transmit communications to cell phones. The question before the Supreme Court is "whether the definition of ATDS in the TCPA encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not use a random or sequential number generator."[68]

Noah Duguid originally sued Facebook for violating the TCPA by sending unsolicited login notifications to his cell phone via text message. Facebook's legal team argues that an ATDS, under the law, only

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[60] *Id.*
[61] *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 53 (2d Cir. 2017).
[62] The National Law Review, Consent and Revocation Under the TCPA, https://www.natlawreview.com/print/article/consent-and-revocation-under-tcpa (last visited Mar. 4, 2021).
[63] *Medley v. Dish Network, LLC*, Case No. 8:16-cv-2534-T-36TBM, 2018 WL 4092120, at *10 (M.D. Fla. Aug. 27, 2018).
[64] The National Law Review, Consent and Revocation Under the TCPA, https://www.natlawreview.com/print/article/consent-and-revocation-under-tcpa (last visited Mar. 4, 2021).
[65] *Ammons v. Ally Fin., Inc.*, Case No. 3:17-cv-00505, 2018 WL 3134619, at *15 (M.D. Tenn. June 27, 2018),
[66] *Few v. Receivables Performance Mgmt.*, Case No. 1:17-CV-2038-KOB, 2018 WL 5923765 at *1 (N.D. Ala. Nov. 13, 2018)
[67] The National Law Review, Consent and Revocation Under the TCPA, https://www.natlawreview.com/print/article/consent-and-revocation-under-tcpa (last visited Mar. 4, 2021).
[68] *Facebook, Inc., Petitioner vs. Noah Duguid*, et al., U.S., No. 19-511.

calls numbers randomly or sequentially, and as a result their use of a machine to automatically contact phone numbers through a dialing system does not technically count as an ATDS because they are calling from a list. Duguid's argument is the law specifically stipulates consent, which necessitates a list, and as a result, the system is still an ATDS.[69]

Currently, the TCPA rules require telemarketers to:

- Obtain prior express written consent from consumers before robocalling them;
- No longer allow telemarketers to use an "established business relationship" to avoid getting consent from consumers when their home phones; and
- Require telemarketers to provide an automated, interactive "opt-out" mechanism during each robocall so consumers can immediately tell the telemarketer to stop calling.[70]

The TCPA includes a private right of action that carries substantial potential penalties.[71] A caller who places a call to a cell phone without consent using an ATDS is subject to an automatic $500 statutory penalty per call. The penalty to $1,500 per call if the court finds that the defendant willfully or knowingly committed the violation.[72]

The Florida telephone solicitation law prohibits telephonic sales calls that use an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed.[73]

However, the law allows the use of an automated telephone dialing system with live messages if:

- The calls are made or messages given solely in response to calls initiated by the persons to whom the automatic calls or live messages are directed;
- The telephone numbers selected for automatic dialing have been screened to exclude any telephone subscriber who is included on the department's then-current "no sales solicitation calls" listing or any unlisted telephone number; or
- The calls concern goods or services that have been previously ordered or purchased.[74]

Express written consent does not appear to be addressed in the Florida Telemarketing Act.

Effect of the Bill

The bill removes the provisions of telephone solicitation law that prohibit telephonic sales calls that use an automated system for the selection or dialing of telephone numbers, removes the related exceptions, and instead, provides the following measures addressing telephone solicitations.

The bill prohibits telephonic sales calls that involve an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called without the prior express written consent of the called party.

The bill defines "called party" as a person who is the regular user of the telephone number that is delivered a telephonic sales call.

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[69] Business Insider, *THE ANNOYANCE ENGINE: Spam robocalls became profitable scams by exploiting the phone system, but you can stop them* (Mar. 3, 2021), https://www.businessinsider.com/why-so-many-spam-robocalls-how-to-stop-them-2021-3?amp (last visited Mar. 7, 2021).

[70] Federal Communications Commission, FCC Actions on Robocalls, Telemarketing, https://www.fcc.gov/general/telemarketing-and-robocalls (last visited Mar. 4, 2021).

[71] 47 U.S.C. §227(b)(3).

[72] Id. at §227(b)(3)(B)-(C).

[73] S. 501.059(8), F.S.

[74] *Id.*

The bill defines "express written consent" as an agreement bearing the electronic or digital signature of a called party that states the telephone number to which the called party authorizes a telephonic sales call to be delivered and clearly authorizes a person to make or knowingly allow a telephonic sales call to be made using an automated system for selecting or dialing telephone numbers, playing a recorded message when a connection is completed to a telephone number called, transmitting a text message, or transmitting a prerecorded voicemail.

The bill specifies that express written consent must include a clear and conspicuous disclosure informing the called party that:

- By executing the agreement, the called party authorizes a person to make or knowingly allow a telephonic sales call to be made using an automated system for selecting or dialing telephone numbers, playing a recorded message when a connection is completed to a telephone number called, transmitting a text message, or transmitting a prerecorded voicemail.
- The called party is not required to sign the agreement or consent to enter into such an agreement as a condition of purchasing any property, goods, or services.

The bill authorizes a called party aggrieved by a violation of this subsection to bring an action to:

- Enjoin such violation; and
- Recover actual damages or $500, whichever is greater.

If the court finds that the defendant willfully or knowingly violated these provisions, the bill authorizes the court to, in its discretion, increase the amount of the award up to three times the amount available.

The bill provides a rebuttable presumption that any telephonic sales call made to a Florida area code is considered to be made to a resident of this state or to a person who is in this state at the time of the telephonic sales call.

B. SECTION DIRECTORY:

Section 1: Amends s. 501.059, F.S., relating to telephone solicitation.

Section 2: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a negative fiscal impact on legitimate telemarketers to the extent they will be in violation of the new restrictions.

The bill may protect consumers from unwanted and fraudulent telephone solicitations.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

The bill appears to create a heightened form of consent that would prohibit automated calls without express written consent of the called party. The way the bill is currently drafted could make it more difficult for consumers to revoke their consent. The sponsor has agreed to an amendment indicating how the called party can withdraw consent to alleviate this problem.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

A bill to be entitled

An act relating to telephone solicitation; amending s. 501.059, F.S.; prohibiting certain telephonic sales calls without the prior express written consent of the called party; providing definitions; providing requirements for consent agreements; providing civil remedies; providing a rebuttable presumption for telephonic sales calls made to specified area codes; removing provisions authorizing the use of certain automated telephone dialing systems; revising provisions for the award of attorney fees and costs; providing an effective date.

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

Section 1. Subsections (8) and (10) of section 501.059, Florida Statutes, are amended to read:

501.059 Telephone solicitation.—

(8)(a) A ~~No~~ person may not ~~shall~~ make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called without the prior express written consent of the called party.

(b) As used in this subsection, the term:

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

1. "Called party" means a person who is the regular user of the telephone number that is delivered a telephonic sales call.

2. "Express written consent" means an agreement bearing the electronic or digital signature of a called party that states the telephone number to which the called party authorizes a telephonic sales call to be delivered and clearly authorizes a person to make or knowingly allow a telephonic sales call to be made using an automated system for selecting or dialing telephone numbers, playing a recorded message when a connection is completed to a telephone number called, transmitting a text message, or transmitting a prerecorded voicemail.

(c) The express written consent must include a clear and conspicuous disclosure informing the called party that:

1. By executing the agreement, the called party authorizes a person to make or knowingly allow a telephonic sales call to be made using an automated system for selecting or dialing telephone numbers, playing a recorded message when a connection is completed to a telephone number called, transmitting a text message, or transmitting a prerecorded voicemail.

2. The called party is not required to sign the agreement or consent to enter into such an agreement as a condition of purchasing any property, goods, or services.

(d)1. A called party aggrieved by a violation of this subsection may bring an action to:

a. Enjoin such violation.

b. Recover actual damages or $500, whichever is greater.

2. If the court finds that the defendant willfully or knowingly violated this section, the court may, in its discretion, increase the amount of the award to an amount equal to not more than three times the amount available under this subsection.

(e) There is a rebuttable presumption that any telephonic sales call made to a Florida area code is made to a resident of this state or to a person who is in this state at the time of the telephonic sales call ~~Nothing herein prohibits the use of an automated telephone dialing system with live messages if the calls are made or messages given solely in response to calls initiated by the persons to whom the automatic calls or live messages are directed or if the telephone numbers selected for automatic dialing have been screened to exclude any telephone subscriber who is included on the department's then-current "no sales solicitation calls" listing or any unlisted telephone number, or if the calls made concern goods or services that have been previously ordered or purchased~~.

(f) ~~(e)~~ It shall be unlawful for any person who makes a telephonic sales call or causes a telephonic sales call to be made to fail to transmit or cause not to be transmitted the originating telephone number and, when made available by the telephone solicitor's carrier, the name of the telephone

solicitor to any caller identification service in use by a recipient of a telephonic sales call. However, it shall not be a violation to substitute, for the name and telephone number used in or billed for making the call, the name of the seller on behalf of which a telephonic sales call is placed and the seller's customer service telephone number, which is answered during regular business hours. If a telephone number is made available through a caller identification service as a result of a telephonic sales call, the solicitor must ensure that telephone number is capable of receiving telephone calls and must connect the original call recipient, upon calling such number, to the telephone solicitor or to the seller on behalf of which a telephonic sales call was placed. For purposes of this section, the term "caller identification service" means a service that allows a telephone subscriber to have the telephone number and, where available, the name of the calling party transmitted contemporaneously with the telephone call and displayed on a device in or connected to the subscriber's telephone.

(g) ~~(d)~~ It shall be unlawful for any person who makes a telephonic sales call or causes a telephonic sales call to be made to intentionally alter the voice of the caller in an attempt to disguise or conceal the identity of the caller in order to defraud, confuse, or financially or otherwise injure the recipient of a telephonic sales call or in order to obtain

personal information from the recipient of a telephonic sales call which may be used in a fraudulent or unlawful manner.

(10)(a) In any civil litigation resulting from a ~~transaction involving a~~ violation of this section, the prevailing plaintiff ~~party~~, after judgment in the trial court and exhaustion of all appeals, if any, shall receive his or her reasonable attorney ~~attorney's~~ fees and costs from the nonprevailing defendant ~~party~~.

(b) The attorney for the prevailing plaintiff ~~party~~ shall submit a sworn affidavit of his or her time spent on the case and his or her costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(c) The trial judge shall award the prevailing plaintiff ~~party~~ the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.

(d) Any award of attorney ~~attorney's~~ fees or costs shall become a part of the judgment and subject to execution as the law allows.

(e) In any civil litigation initiated by the department or the Department of Legal Affairs, the court may award to the prevailing plaintiff ~~party~~ reasonable attorney ~~attorney's~~ fees and costs if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the

losing party.

Section 2. This act shall take effect July 1, 2021.

REGULATORY REFORM SUBCOMMITTEE

HB 1307 by Rep. Beltran
Telephone Solicitation

AMENDMENT SUMMARY
March 17, 2021

Amendment 1 by Rep. Beltran (Strike-all amendment):
The strike-all amendment differs from the original bill in the following ways:

- Revises the definition for "express written consent" to clarify that a consent agreement is a written consent agreement that may include the handwritten signature of the called party.
- Authorizes a called party to revoke express written consent through any reasonable means clearly expressing a desire to receive no further calls, texts, or messages.
- Removes the cause of action and related penalties for violations.
- Specifies that use of an automated telephone dialing system is not prohibited if the calls or messages are made in response to calls originally initiated by the persons to whom the calls or messages are directed.
    - Clarifies that this does not authorize **repeated** calls in response to a call made by a called party.
- Specifies that the use of an automated telephone dialing system is authorized if the calls concern the order, purchase, or delivery of goods or services that have previously been ordered by the called party.
    - Clarifies that this does not authorize telephonic sales calls made solely because the called party conducted business with the person initiating the call.
- Removes the provision that only allows prevailing plaintiffs to receive attorney fees and costs from nonprevailing defendants.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

Committee/Subcommittee hearing bill: Regulatory Reform Subcommittee

Representative Beltran offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Subsection (8) of section 501.059, Florida Statutes, is amended to read:

501.059 Telephone solicitation.—

(8)(a) A ~~No~~ person may not ~~shall~~ make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called without the prior express written consent of the called party.

(b) As used in this subsection, the term:

1. "Called party" means a person who is the regular user of the telephone number that is delivered a telephonic sales call.

2. "Express written consent" means a written consent agreement bearing the handwritten, electronic, or digital signature of a called party that states the telephone number to which the called party authorizes a telephonic sales call to be delivered and clearly authorizes a person to make or knowingly allow a telephonic sales call to be made using an automated system for selecting or dialing telephone numbers, playing a recorded message when a connection is completed to a telephone number called, transmitting a text message, or transmitting a prerecorded voicemail. A called party may revoke express written consent through any reasonable means clearly expressing a desire to receive no further calls, texts, or messages.

(c) The express written consent must include a clear and conspicuous disclosure informing the called party that:

1. By executing the agreement, the called party authorizes a person to make or knowingly allow a telephonic sales call to be made using an automated system for selecting or dialing telephone numbers, playing a recorded message when a connection is completed to a telephone number called, transmitting a text message, or transmitting a prerecorded voicemail.

2. The called party is not required to sign the agreement or consent to enter into such an agreement as a condition of

purchasing any property, goods, or services.

(d) There is a rebuttable presumption that any telephonic sales call made to a Florida area code is made to a resident of this state or to a person who is in this state at the time of the telephonic sales call.

(e) This subsection does not prohibit ~~Nothing herein prohibits~~ the use of an automated telephone dialing system with live messages if the calls are made or messages are given solely in response to calls originally initiated by the persons to whom the automatic calls or live messages are directed. This paragraph does not authorize repeated calls in response to a call made by a called party to the person who originally initiated a telephonic sales call to the called party.

(f) This subsection does not prohibit the use of an automated telephone dialing system ~~or if the telephone numbers selected for automatic dialing have been screened to exclude any telephone subscriber who is included on the department's then-current "no sales solicitation calls" listing or any unlisted telephone number, or~~ if the calls made concern goods or services that have been previously ordered or purchased by the called party and concern the order, purchase, or delivery of, or payment for, such goods or services. This paragraph does not authorize telephonic sales calls to a called party solely because the called party has previously conducted business with the person initiating the telephonic sales call.

(g) ~~(c)~~ It is ~~shall be~~ unlawful for any person who makes a telephonic sales call or causes a telephonic sales call to be made to fail to transmit or cause not to be transmitted the originating telephone number and, when made available by the telephone solicitor's carrier, the name of the telephone solicitor to any caller identification service in use by a recipient of a telephonic sales call. However, it is ~~shall~~ not ~~be~~ a violation to substitute, for the name and telephone number used in or billed for making the call, the name of the seller on behalf of which a telephonic sales call is placed and the seller's customer service telephone number, which is answered during regular business hours. If a telephone number is made available through a caller identification service as a result of a telephonic sales call, the solicitor must ensure that telephone number is capable of receiving telephone calls and must connect the original call recipient, upon calling such number, to the telephone solicitor or to the seller on behalf of which a telephonic sales call was placed. For purposes of this section, the term "caller identification service" means a service that allows a telephone subscriber to have the telephone number and, where available, the name of the calling party transmitted contemporaneously with the telephone call and displayed on a device in or connected to the subscriber's telephone.

(h) ~~(d)~~ It shall be unlawful for any person who makes a

telephonic sales call or causes a telephonic sales call to be made to intentionally alter the voice of the caller in an attempt to disguise or conceal the identity of the caller in order to defraud, confuse, or financially or otherwise injure the recipient of a telephonic sales call or in order to obtain personal information from the recipient of a telephonic sales call which may be used in a fraudulent or unlawful manner.

Section 2. This act shall take effect July 1, 2021.

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

Remove everything before the enacting clause and insert:

A bill to be entitled

An act relating to telephone solicitation; amending s. 501.059, F.S.; prohibiting certain telephonic sales calls without the prior express written consent of the called party; providing definitions; providing requirements for consent agreements; providing a rebuttable presumption for telephonic sales calls made to specified area codes; removing provisions authorizing the use of certain automated telephone dialing systems; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 6053 Doorstep Waste Containers
SPONSOR(S): Yarborough
TIED BILLS: **IDEN./SIM. BILLS:** SB 904

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform Subcommittee		Brackett DB	Anstead
2) Commerce Committee			

SUMMARY ANALYSIS

Florida's fire prevention and control law, ch. 633, F.S., designates the state's Chief Financial Officer as the State Fire Marshal, and requires the State Fire Marshal to adopt the Florida Fire Prevention Code (Fire Code) by rule every three years. The Fire Code sets forth fire safety standards (including certain national codes) for property, and is enforced by local fire officials within each local government in the state. The Fire Code provides that a person may not place combustible waste and refuse in a building's means of egress, which includes a building's exit access corridors.

Currently, there are various providers offering doorstep waste collection services to apartment complexes throughout the state. Residents in these complexes place waste outside their front door, and the provider picks it up. An apartment complex resident's front door usually opens to a hallway, corridor, or walkway, which may be or lead to the building's exit access.

During the 2018 Legislative Session, the Legislature temporarily allowed residents in apartment buildings to place combustible waste and refuse in an exit access corridor if certain conditions were met. These statutory changes were not adopted by the State Fire Marshal in the Fire Code. Current law allows waste containers to be placed in an apartment building's exit access corridors if:

- Waste, which is in a container, is not in an exit access corridor for a single period greater than 5 hours;
- Containers do not exceed 13 gallons for apartment buildings with enclosed corridors and interior or exterior stairs, or exceed 27 gallons for apartment buildings with open air corridors and exterior stairs or balconies with exterior exit stairs;
- Containers are not in an exit access corridor for a single period greater than 12 hours for apartment buildings with enclosed corridors and interior or exterior stairs;
- Containers do not reduce the exit access corridor's width below the width required by the Fire Code;
- Containers can stand upright on their own and do not leak fluids when standing upright; and
- The apartment's management staff have written policies and procedures to ensure compliance with the above conditions.

Apartment complexes were given a phase-in period to comply with these requirements, which ended on December 31, 2020.

The provisions allowing the placement of waste and refuse containers in an exit access corridor expire on July 1, 2021.

The bill repeals the July 1, 2021 expiration date for the statutory provisions, thus allowing residents in apartment complexes to continue placing waste outside their front door for pick up by waste collection services, which may conflict with the Fire Code.

The bill is not expected to have a significant fiscal impact on state or local government.

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Florida's fire prevention and control law, ch. 633, F.S., designates the state's Chief Financial Officer as the State Fire Marshal. The State Fire Marshal, through the Division of State Fire Marshal within the Department of Financial Services (DFS), is charged with enforcing the provisions of ch. 633, F.S., and all other applicable laws relating to fire safety, and has the responsibility to minimize the loss of life and property in this state due to fire.[1] Pursuant to this authority, the State Fire Marshal regulates, trains, and certifies fire service personnel and fire safety inspectors; investigates the causes of fires; enforces arson laws; regulates the installation of fire equipment; conducts fire safety inspections of state property; and operates the Florida State Fire College.

Adoption and Interpretation of the Florida Fire Prevention Code

The State Fire Marshal also adopts by rule the Florida Fire Prevention Code (Fire Code), which contains all fire safety laws and rules that pertain to the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities, and the enforcement of such fire safety laws and rules, at ch. 69A-60, F.A.C.

The State Fire Marshal adopts a new edition of the Fire Code every three years.[2] When adopting the Fire Code the Fire Marshal is required to adopt the most current version of the national fire and life safety standards set forth by the National Fire Protection Association (NFPA) including the:

- NFPA's Fire Code (1);
- Life Safety Code (101); and
- Guide on Alternative Approaches to Life Safety (101A).[3]

The State Fire Marshal may modify the national fire safety and life safety standards as needed to accommodate the specific needs of the state.[4]

The most recent Fire Code is the 7th edition, which is referred to as the 2020 Florida Fire Prevention Code. The 7th edition of the Fire Code took effect on December 31, 2020.[5]

The State Marshal has authority to interpret the Code, and is the only authority that may issue a declaratory statement relating to the Fire Code.[6]

Fire Safety Enforcement by Local Governments

State law requires all municipalities, counties, and special districts with fire safety responsibilities to enforce the Fire Code as the minimum fire prevention code to operate uniformly among local governments and in

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[1] S. 633.104, F.S.
[2] S. 633.202, F.S.
[3] S. 633.202(2), F.S. Founded in 1896, the National Fire Protection Association delivers information and knowledge through more than 300 consensus codes and standards, research, training, education, outreach and advocacy; and by partnering with others who share an interest in furthering the mission. NFPA, *About NFPA*, http://www.nfpa.org/about-nfpa (last visited on Feb. 28, 2021).
[4] *Id.*
[5] Division of State Fire Marshal, *Florida Fire Prevention Code (FFPC)*, https://www.myfloridacfo.com/division/sfm/bfp/floridafirepreventioncodepage.htm (last visited Feb. 28, 2021).
[6] S. 633.104(6), F.S.

conjunction with the Florida Building Code.[7] These local enforcing authorities may adopt more stringent fire safety standards, subject to certain requirements in s. 633.208, F.S., but may not enact fire safety ordinances that conflict with ch. 633, F.S., or any other state law.[8]

The chiefs of local government fire service providers (or their designees) are authorized to enforce ch. 633, F.S., and rules within their respective jurisdictions as agents of those jurisdictions, not agents of the State Fire Marshal.[9] Each county, municipality, and special district with fire safety enforcement responsibilities is also required to employ or contract with a fire safety inspector (certified by the State Fire Marshal) to conduct all fire safety inspections required by law.[10]

Section 633.208(5), F.S. states "With regard to existing buildings, the Legislature recognizes that it is not always practical to apply any or all of the provisions of the Fire Code and that physical limitations may require disproportionate effort or expense with little increase in fire or life safety."

Pursuant to s. 633.208(5), F.S., local fire officials must apply the Fire Code for existing buildings to the extent practical to ensure a reasonable degree of life safety and safety of property. The local fire officials are also required to fashion reasonable alternatives that afford an equivalent degree of life safety and safety of property.

Florida Building Code

The Florida Building Code (Building Code) is the statewide building code for all construction in the state. The Florida Building Commission (Commission), housed within the Department of Business and Professional Regulation (DBPR), implements the Building Code. The Commission reviews the International Code Council's I-Codes and the National Electric Code every three years to determine if it needs to update the Building Code.[11]

Means of Egress

A means of egress is a path available for a person to leave a building. A means of egress is made up of three parts, which includes the following:[12]

- Exit access;
- Exit; and
- Exit discharge.

The exit access is a path, such as a hallway or corridor, from any location in the building to an exit. The exit is usually a door leading outside, or in a multi-story building, an enclosed stairway. The exit discharge is a path from the exit to a space that is dedicated to public use such as a street or alley.[13]

The Fire Code provides that a building's means of egress must be a certain width determined by the number of occupants in the building and the use of the building.[14] The Fire Code further provides that a building's means of egress must be free of all obstructions or impediments in case of fire or other emergency.[15]

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[7] Ss. 633.108 and 633.208, F.S.
[8] Ss. 633.208 and 633.214(4), F.S.
[9] S. 633.118, F.S.
[10] S. 633.216(1), F.S.
[11] S. 553.73(7)(a), F.S.
[12] Section 3.3.182 of the 7th edition of the Florida Fire Prevention Code (NFPA 1, Fire Code).
[13] Section 202 of the 7th edition of the Florida Building Code (Building); Richmond ICC, *2018 Annual Conference Education Sessions, Session: 2018 IBC Essentials – Means of Egress & Fire Protection*, https://www.iccsafe.org/wp-content/uploads/2018-IBC-Essentials-%E2%80%93-Means-of-Egress-Fire-Protection.pdf (last visited Feb. 28, 2021).
[14] *See* Section 7.3.4 of the 7th edition of the Florida Fire Prevention Code (NFPA 101, Life Safety Code).
[15] Section 7.1.10.1 of the 7th edition of the Florida Fire Prevention Code (NFPA 101, Life Safety Code).

The Building Code also provides that a building's means of egress must be a certain width determined by the number of occupants in the building.[16] The Building Code provides that the *required width* of a building's means of egress must be free of all obstructions and impediments.[17]

However, the Building Code provides that maintenance of a building's means of egress must be in accordance with the Fire Code.[18] DBPR has interpreted this to mean that the Fire Code takes precedence when it comes to people placing objects, such as a trashcan, in a building's means of egress.[19]

Combustible Waste and Refuse

The Fire Code defines "combustible waste" as any combustible or loose waste material that is generated by an establishment or process and, if salvageable, is retained for scrap or reprocessing on the premises where generated or transported to a plant for processing.[20]

The Fire Code defines "combustible refuse" as a combustible or loose rubbish, litter, or waste materials generated by an occupancy that are refused, rejected, or considered worthless and are disposed of by incineration on the premises where generated or periodically transported from the premises.[21]

Combustible waste and refuse may be stored in an apartment building if the combustible waste and refuse is:[22]

- Stored in a container less than 1.5 cubic yards (302 gallons) or in an enclosed area with a 1 hour fire resistance rating and an automatic sprinkler system;
- Removed from the building once a day unless the waste and refuse is stored in a noncombustible room; and
- Not stored in the building's exit(s).

Private Doorstep Collection Providers

Currently, there are various providers offering doorstep refuse and recycling collection services to apartment complexes throughout the state. The basic business model requires the residents of an apartment building to place their waste outside of their doorstep, in a specified container approved by the provider. The doorstep refuse and recycling collection providers then come by and collect the waste at a specified time.[23]

An apartment complex resident's front door opens to a hallway, corridor, or walkway, which is usually the building's exit access and therefore part of the building's means of egress. According to DFS, apartments that contract with the doorstep refuse and recycling collection providers are violating the Fire Code by allowing residents to place combustible waste and refuse in their buildings' means of egress.[24]

In 2016, the State Fire Marshal issued declaratory statements determining that apartments may not allow residents to place waste containers outside their front doors regardless of the size of the container or if the waste is removed daily. The State Fire Marshal determined that the Fire Code prohibits apartment

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[16] Section 1005 of the 7th edition of the Florida Building Code (Building).
[17] Section 1018.1, 1020.3, and 1024.2 of the 7th edition of the Florida Building Code (Building).
[18] Section 1001.3 of the 6th edition of the Florida Building Code (Building).
[19] Email from Vicky Summerhill, Office of Legislative Affairs, Department of Business and Professional Regulation, FW: Florida Building Code questions (Mar. 4, 2021).
[20] Section 3.3.63 of the 7th edition of the Florida Fire Prevention Code (NFPA 1, Fire Code).
[21] Section 3.3.62 of the 7th edition of the Florida Fire Prevention Code (NFPA 1, Fire Code).
[22] Section 10.18.4 and 19.2.1 of the 7th edition of the Florida Fire Prevention Code (NFPA 1, Fire Code).
[23] Department of Financial Services, Agency Analysis of 2018 House Bill 529, p. 1 (Nov. 29, 2017).
[24] *Id.*

residents from placing any type of waste container outside their door because the residents are placing an obstruction in a building's means of egress and combustible waste in a building's exit.[25]

During the 2018 Legislative Session, the Legislature temporarily allowed refuse and recycling containers to be placed in exit access corridors in apartment buildings if the following conditions are met:[26]

- Waste, which is in a doorstep refuse and recycling collection container, is not placed in an exit access corridor for a single period greater than 5 hours;
- Doorstep refuse and recycling containers do not exceed 13 gallons for apartment buildings with enclosed corridors and interior or exterior stairs;
- Doorstep refuse and recycling collection containers do not exceed 27 gallons for apartment buildings with open air corridors and exterior stairs or balconies with exterior exit stairs;
- Doorstep refuse and recycling collection containers are not in an exit access corridor for a single period greater than 12 hours for apartment buildings with enclosed corridors and interior or exterior stairs;
- Doorstep refuse and recycling collection containers do not reduce the exit access corridor's width below the width required by the Fire Code;
- Doorstep refuse and recycling collection containers are able to stand upright on their own and may not leak fluids when standing upright; and
- The apartment's management staff have written policies and procedures to ensure compliance with the above conditions. Management staff must enforce the policies and must provide a copy of the policies to the authority having jurisdiction upon request.

Apartment complexes were given a phase in period to comply with these requirements. Apartments had to comply with the requirements by December 31, 2020. Local fire marshals were given authority to approve alternative containers or storage arrangements that are equivalent to these requirements.[27] However, these requirements sunset on July 1, 2021. The purpose of the sunset date was to give the various providers time to work with the State Fire Marshal to develop an amendment to the Fire Code, which is the State Fire Marshal's preferred method for amending the Fire Code.[28]

According to DFS, the State Fire Marshal adopted an amendment to the Fire Code, which took effect when the 7th edition of the Fire Code became effective on December 31, 2020, intended to allow the various doorstep refuse and recycling collection providers to keep operating.[29] The amendment provides that waste and refuse may be placed in exits, exit passageways, enclosures for stairs or ramps, corridors, elevator lobbies, or egress balconies if:[30]

- Waste, which is in a doorstep refuse and recycling collection container, is not placed in an exit access corridor for a single period greater than 5 hours;
- Doorstep refuse and recycling containers do not exceed 15 gallons;
- Doorstep refuse and recycling collection containers are not in an exit access corridor for a single period greater than 15 hours;
- Doorstep refuse and recycling collection containers do not reduce the exit access corridor's width below the width required by the Fire Code;
- Management staff have written policies and procedures to ensure compliance with the above conditions. Management staff must enforce the policies and must provide a copy of the policies to the authority having jurisdiction upon request; and

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[25] *See In the matter of: William Harrison, Fire Marshal Clermont Fire Department*, Case No.: 188696-16-DS (Fla. DFS) (June 21, 2016); *In the matter of: Steve Strong, Fire Marshal Clearwater Fire & Rescue*, Case No.: 196979-16-DS (Fla. DFS) (Dec. 23, 2016).
[26] S. 633.202(20), F.S.; *See* House Analysis of 2018 House Bill 529 (Apr. 9, 2018).
[27] *Id.*
[28] *See* The Florida Channel, 1/9/18 House Careers and Competition Subcommittee, https://thefloridachannel.org/videos/1-9-18-house-careers-competition-subcommittee/ (last visited Feb. 28, 2021).
[29] Department of Financial Services, Agency Analysis of 2021 House Bill 6053, p. 1 (Mar. 2, 2021).
[30] Sections 10.18.4.1 and 10.18.4.1.1 of the 7th edition of the Florida Fire Prevention Code (NFPA 1, Fire Code).

- Waste or refuse must be placed completely inside one or more containers with a closed lid.

After July 1, 2021, the following provisions in the amendment to the Fire Code take effect:[31]

- Containers and lids located in an area that is not protected by fire sprinklers must be **made entirely of noncombustible materials** that comply with the Fire Code.[32]
- Containers and lids located in an area that is protected by fire sprinklers does not have to made entirely of noncombustible materials that comply with the Fire Code.

Proponents of repealing the sunset date argue that the amendment to the Fire Code requires apartment complex residents and doorstep refuse and recycling collection providers to use refuse and recycling containers that are not readily available. Opponents of repealing the sunset date argue that repealing the sunset date will allow refuse and recycling containers, which do not comply with the Fire Code, to be placed in apartment access corridors.[33]

Effect of the Bill

The bill repeals the sunset date of July 1, 2021. Thus leaving the provisions in s. 633.202(20), F.S., that allow refuse and recycling containers to be lawfully placed in exit access corridors just as they have been since the adoption of the provisions in 2018.

The bill also repeals the phase in period, which provisions had to be complied with by December 31, 2020.

B. SECTION DIRECTORY:

Section 1. Amends s. 633.202, F.S., repealing a sunset date and a phase in period.

Section 2. Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

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[31] *Id.*

[32] Noncombustible materials must meet a peak rate of heat release not exceeding 150 kW/m² when tested in accordance with ASTME 1354 at an incident heat flux of 50kW/m² in the horizontal orientation. Containers and lids must be listed or have a label from an approved agency that the container or lid meets the Fire Code's requirement. *Id.*

[33] *See* The Florida Channel, 3/3/21 Senate Committee on Community Affairs, https://thefloridachannel.org/videos/3-3-21-senate-committee-on-community-affairs/ (last visited Mar. 4, 2021).

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

According to DFS, removing the sunset date and the phase in period would create a conflict between Florida Statutes and amendments to the Fire Code.

> "The proposed bill language would allow trash containers with no fire-rated requirements and located in the hallways used for egress, to obstruct the means of egress which would cause obstacles to life safety in case of emergency. All of subsection (20) needs to be repealed in accordance with the sunset provisions set forth in the law because it is in conflict with and would cause confusion with the 7th edition of the Florida Fire Prevention Code, which became effective December 31, 2020."[34]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[34] Department of Financial Services *supra* note 29.

A bill to be entitled

An act relating to doorstep waste containers; amending s. 633.202, F.S.; deleting an obsolete provision; removing the scheduled repeal of certain provisions regulating the use of containers in exit access corridors; providing an effective date.

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

Section 1. Paragraphs (d) and (e) of subsection (20) of section 633.202, Florida Statutes, are amended to read:

633.202 Florida Fire Prevention Code.—

(20)

~~(d) The authority having jurisdiction shall allow apartment occupancies a phase-in period until December 31, 2020, to comply with this subsection.~~

~~(e) This subsection is repealed on July 1, 2021.~~

Section 2. This act shall take effect July 1, 2021.

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