

Evaluate the Implementation of the Smoking Ban

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Background

A. The Constitutional Amendment

On November 5, 2002, the voters of Florida adopted constitutional Amendment 6 to prohibit tobacco smoking in enclosed indoor workplaces. Codified as art. X, section 20 of the Florida Constitution, the amendment defines an “enclosed indoor workplace,” in part, as “any place where one or more persons engages in work, and which place is predominantly or totally bounded on all sides and above by physical barriers...without regard to whether work is occurring at any given time.” It defines “work” as “any person's providing any employment or employment-type service for or at the request of another individual or individuals or any public or private entity, whether for compensation or not, whether full or part-time, whether legally or not.” The constitutional amendment provides limited exceptions for private residences “whenever they are not being used commercially to provide child care, adult care, or health care, or any combination thereof,” retail tobacco shops, designated smoking guest rooms at hotels and other public lodging establishments, and stand-alone bars.

The constitutional amendment directs the Legislature to implement the “amendment in a manner consistent with its broad purpose and stated terms.” The constitutional amendment requires that the implementing legislation have an effective date of no later than July 1, 2003. The amendment requires that the implementing legislation must also provide civil penalties for violations; provide for administrative enforcement; and require and authorize agency rules for implementation and enforcement. It further provides that the Legislature may enact legislation more restrictive of tobacco smoking than that provided in the State Constitution.

B. Florida’s Clean Indoor Air Act

The Legislature implemented Amendment 6 by enacting ch. 2003-398, L.O.F., effective July 1, 2003, which amended pt. II of ch. 386, F.S., and created a new s. 561.695, F.S., of the Beverage Law. Part II of ch. 386, F.S., constitutes the Florida Clean Indoor Air Act (the “act”). The act, as amended, implements the constitutional amendment’s prohibition. Specifically, s. 386.204, F.S., prohibits smoking in an enclosed indoor workplace, unless the act provides an exception. The act adopts and implements the amendment’s definitions and adopts the amendment’s exceptions for private residences whenever not being used for certain commercial purposes¹, stand-alone bars,² designated smoking rooms in

¹ Section 386.2045(1), F.S. . *See also* definition of the term “private residence” in s. 386.203(1), F.S.

hotels and other public lodging establishments,³ and retail tobacco shops, including businesses that manufacture, import or distribute tobacco products and tobacco loose leaf dealers.⁴

Section 386.2045(5), F.S., provides an exception for tobacco smoking to the extent that tobacco smoking is an integral part of a smoking cessation program approved by the Department of Health, or medical or scientific research conducted in the program. Section 386.2045(6), F.S., permits the designation of a smoking room in an in-transit lounge in a customs area of an airport. Section 386.205, F.S., provides requirements for the designation and restrictions for these designated smoking rooms.

Section 386.203(5), F.S., defines the term “enclosed indoor workplace” to provide that the term does not include any facility owned or leased by a membership association, including veteran’s groups, that is used exclusively for noncommercial activities performed by the members and guests of the association, including social gatherings, meetings, dining, and dances; if no person or persons are engaged in work as the term is defined in the act. This definition would exclude such facilities from the tobacco smoking prohibition.

Section 386.207, F.S., provides for enforcement of the act by the Department of Health (DOH) and the Department of Business and Professional Regulation (DBPR) within each department’s specific areas of regulatory authority. Sections 386.207(1) and 386.2125, F.S., grant rulemaking authority to the DOH and the DBPR and require that the departments consult with the State Fire Marshal during the rulemaking process.

Section 386.207(3), F.S., provides penalties for violations of the act by proprietors or persons in charge of an enclosed indoor workplace.⁵ The penalty for a first violation is a fine of not less than \$250 and not more than \$750. The act provides fines for subsequent violations in the amount of not less than \$500 and not more than \$2,000. Penalties for individuals who violate the act are provided in s. 386.208, F.S., which provides penalties in the amount of not more than \$100 for a first violation and not more than \$500 for a subsequent violation. The penalty range for an individual violation is identical to the penalties for violations of the act before the implementation of the constitutional smoking prohibition.

² Section 386.2045(4), F.S. *See also* definition of the term “stand-alone bar” in s. 386.203(11), F.S.

³ Section 386.2045(3), F.S. *See also* definition of the term “designated guest smoking room” in s. 386.203(4), F.S.

⁴ Section 386.2045(2), F.S. *See also* definition of the term “retail tobacco shop” in s. 386.203(8), F.S.

⁵ The applicable penalties for violations by designated stand-alone bars are set forth in s. 561.695(8), F.S.

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C. Stand-Alone Bar Provisions

Section 561.695, F.S., implements the exception for stand-alone bars. The constitutional amendment established three requirements for stand-alone bars. First, a stand-alone bar must be “devoted during any time⁶ of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises.” Second, the serving of food, if any, must be “merely incidental” to the consumption of any alcoholic beverages. Third, the business must not be “located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue.”

The constitutional amendment does not define the term “merely incidental.” Section 561.695(5), F.S., defines “merely incidental” to limit a stand-alone bar from deriving more than 10 percent of its gross revenue from the sale of food. Section 561.695(5)(b), F.S., prohibits stand-alone bars from serving free food, but a stand-alone bar may serve customary bar snacks without charge.

The constitutional amendment also does not define what is meant by “predominately” serving alcoholic beverages. The implementing legislation, ch. 2003-398, L.O.F., did not define how much alcoholic beverage service would satisfy the predominant service of alcoholic beverages requirement.

In order to permit tobacco smoking in its business location, a stand-alone bar must receive a designation as a stand-alone bar from the Division of Alcoholic Beverages and Tobacco (DABT or division), within the DBPR. To qualify for a stand-alone bar designation, an establishment must have an active alcoholic beverage license permitting consumption on the premises and must notify the division of its intent to allow smoking.⁷ There is no fee for this designation.

Every third year after the initial designation, a stand-alone bar that serves food, other than pre-packaged items, must file a procedures report prepared by a Certified Public Accountant with the DABT attesting to the percentage of food sales on or before the annual license renewal.⁸ Section 561.695(8), F.S., provides

⁶ The constitutional amendment uses the term at “any time” of operation. It is unclear whether the term means at all times of operation, as the representatives for Smoke-Free maintain, or whether the term means that at some time the establishment must be utilized predominantly to serve alcoholic beverages.

⁷ An applicant for the stand-alone bar designation must file DBPR form DBPR ABT-6039, “Notification of Election to Permit Tobacco Smoking in the Licensed Premises,” with the Division of Alcoholic Beverages and Tobacco.

⁸ Section 561.695(6), F.S.

specific penalties for violations by stand-alone bars that range from a warning for a first violation to revocation of the ability to allow smoking on the premises for a fourth violation. Section 561.695(8), F.S., grants the DABT the authority to adopt rules governing the designation process, criteria for qualification, required recordkeeping, auditing, and other rules necessary for the effective enforcement and administration of the act.

Methodology

Staff reviewed the constitutional amendment, the act, and the rules and proposed rules of the DOH and DBPR. Staff met with representatives from the DBPR and the DOH. Staff also met or conducted telephone interviews with representatives for various affected business and other interested parties, including representatives for Smoke-Free For Health, Inc. (Smoke-Free) and the Tri-agency Coalition on Smoking and Health,⁹ and representatives for the restaurant, stand-alone bar, airport, and pari-mutuel industries. Staff reviewed current laws and agency rules and proposed rules, and other information sources.

⁹ Smoke Free For Health, Inc. is a coalition of public health organizations that provided the principal funding and services in support of the constitutional amendment to ban smoking in enclosed indoor workplaces. The coalition is composed of American Cancer Society, Florida Division; American Lung Association of Florida, Inc.; and America Heart Association, Florida/Puerto Rico Affiliate. The Tri-agency Coalition on Smoking and Health is a lobbying group composed of the same public health organizations.

Findings

I. Department of Business and Professional Regulation

A. Rulemaking

The DBPR has not completed its rulemaking process to implement the act. The DABT and the Division of Hotels and Restaurants are the principal agencies within the DBPR that are responsible for the enforcement of the act. After adopting its initial emergency rules,¹⁰ the DBPR initiated rulemaking for rules 61A-7.001 through 61A.7.015 on September 29, 2003.¹¹ These proposed rules pertained to the implementation of the stand-alone bar exception, and established a methodology for determining the percentages of food and alcoholic beverages sold in a purported stand-alone bar, record keeping requirements, penalty guidelines, and investigative and enforcement procedures.

1. Challenged Rules

Bowling Centers of Florida, Inc., (Bowling Centers), an association representing bowling establishments in Florida, challenged the department's proposed rules 61A-7.003, 61A-7.007, 61A-7.008, and 61A-7.009 as an invalid exercise of delegated legislative authority before the Division of Administrative Hearing (DOAH). On March 26, 2004, the Administrative Law Judge (ALJ) issued a final order granting Bowling Centers' challenge of proposed rules 61A-7.007, 61A-7.008, and 61A-7.009 and holding that the DBPR had exceeded its grant of rulemaking authority, that the rules enlarge, modify, or contravene the specific provisions of law implemented, and are arbitrary.¹² The Final Order dismissed the challenge of rule 61A-7.003, which in effect upheld the validity of the rule.

The invalidated rules related to the methods for calculating the percentage of gross alcohol and food sales revenue in a designated stand-alone bar. Proposed rule 61A-7.007 provided the formula for determining the required percentage of gross food sales. The formula divided gross food revenue, which includes revenue from non-alcoholic beverages, by gross total sales revenue in any consecutive six month period. Proposed rule 61A-7.008 provided the formula for determining the

¹⁰ See Emergency Rule 61AER03-1 as noticed in Florida Administrative Weekly, Volume 29, no. 26, June 27, 2003.

¹¹ Proposed Rules 61A-7.001 through 61A.7.015 as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.

¹² *Bowling Center's of Florida, Inc., v. Dept. of Business and Professional Regulation*, DOAH Case No. 03-4776RP, dated March 26, 2004.

percentage of gross alcohol sales revenue. It divided gross alcohol sales revenue by gross total sales revenue in any consecutive six month period.

Proposed rule 7.009 provided the method for determining whether an establishment is predominantly dedicated to the serving of alcoholic beverages. Under this rule's method, if the percentage of its gross alcohol sales revenue was greater than that of its gross food sales revenue, the establishment was dedicated predominantly to the serving of alcoholic beverages. Neither the act nor the constitutional amendment define the meaning of the term "predominantly or totally dedicated to the serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof" in the definition of stand-alone bar.¹³ Proposed rule 61A-7.009 defined the term "predominantly or totally" as requiring a greater percentage of alcoholic beverages sales than food sales. The department's invalidated rule did not consider revenue from the sale of services or merchandise other than food and alcoholic beverages. For example, a bowling establishment could derive over 70 percent of its revenue from the use of its lanes and the rental of bowling shoes, but derive 20 percent of its revenue from the service of alcoholic beverages and 10 percent from the service of food.¹⁴ Under the department's invalidated rule, such an establishment would be predominantly or totally dedicated to the service of alcoholic beverages.

The department's proposed rule 61A-7.003 prescribes 25 types of alcoholic beverage licensed premises that cannot be designated as a stand-alone bar because the licensees are dedicated predominantly to activities other than the service of alcoholic beverages. These exempted licenses are known as special licenses because they are exceptions to the limitation in s. 561.20, F.S., which limits the number of alcoholic beverage licenses that permit the sale of beer, wine and liquor that may be issued per county. Licenses issued under s. 561.20, F.S., are known as quota licenses. They are limited per county on the basis of the county's population. The licenses that are not qualified for the stand-alone bar designation per the proposed rule include special restaurant licenses (SRX),¹⁵ special bowling

¹³ See s. 386.203(11), F.S.

¹⁴ The Proposed Final Order submitted to the ALJ by the Bowling Centers Association of Florida, Inc., presented a similar scenario by stating, "[i]f a stand-alone bar derived 97 percent of its gross revenues from pool tables and minuscule 2 percent from alcoholic beverage sales and 1 percent from food sales, it would, under the proposed rule 61A-7.009, be 'deemed predominantly dedicated' to serving alcoholic beverages."

¹⁵ Section 561.20(2)(a)4., F.S., is an exception for restaurants to the number of alcoholic beverages licenses that may be issued in a county that permit the sale of beer, wine, and liquor. Section 561.20(2)(a)4., F.S., establishes square footage requirements and provides that a restaurant must discontinue the service of alcoholic beverages if it discontinues food service, and requires that a restaurant maintain food sales of at least 51 percent of its gross revenue.

licenses (SBX),¹⁶ special golf clubs licenses,¹⁷ and special dog or horse track, and Jai Alai fronton licenses.¹⁸ Bowling Centers also challenged this rule because it argued that there was no consistent correlation, with the exception of the SRX license, between the special licenses and the qualifications for a stand-alone bar designation. They argue that all other factors being equal a bowling establishment with a quota license or a beer and wine license could receive the designation as a stand-alone but an establishment with an SBX license could not. An SBX licensee may be unable to obtain a quota license either because it could not afford one, or because one is not available due to their limited number per county. The Administrative Law Judge dismissed the rule challenge and upheld the proposed rule 61A-7.003 because these special licenses are issued according to the nature of the businesses, which business natures are inconsistent with a stand-alone bar designation.¹⁹ The decision was appealed to the Second District Court of Appeals, which affirmed the JLA's decision in a *per curiam* opinion.²⁰

2. Rules Not Challenged

Proposed rule 61A-7.001 defines terms used in the act and proposed rules. These definitions incorporate the definitions in the act. The rule also defines some terms that are not defined in the constitutional amendment or the act. Section 561.695(3), F.S., prohibits designated stand-alone bars from providing free food to patrons, but it permits them to serve customary bar snacks. The rule defines the term "customary bar snacks" to mean "popcorn and any ready to eat food item, commercially prepared and packaged off the premises, served without additions or preparations, that is not a potentially hazardous food."²¹

¹⁶ Section 561.20(2)(c), F.S., is another exception to the limitation on the number of alcoholic beverages licenses that permit the sale of beer, wine, and liquor that may be issued in a county. To qualify for this special license a bowling establishment must have at least twelve lanes. This license does not limit the gross amount of alcoholic beverage sales. It does not preclude a bowling establishment from holding any other type of beverage license, including a quota license.

¹⁷ Section 561.20(7)(b), F.S., pertaining to a special alcoholic beverage license for golf clubs is another exception to the limitation on the number of full alcoholic beverages licenses that may be issued in a county. This license does not limit the percentage of gross sales of alcoholic beverage.

¹⁸ Section 565.02(5), F.S., provides that a caterer at a facility may obtain a license to sell liquor at a racetrack or Jai Alai fronton. The alcoholic beverages are allowed to be served only ten days before to ten days after approved racing or Jai Alai dates. This license does not limit the percentage of gross sales of alcoholic beverage.

¹⁹ Bowling Centers has appealed the ALJ's final order to the Second District Court of Appeals. Smoke Free For Health, Inc., has filed an brief of Amicus Curiae.

²⁰ *Bowling Centers Association v. Dept. of Business and Professional Regulation*, No. 2D04-1789 (Fla. 2nd DCA), per curiam opinion filed on December 3, 2004.

²¹ Proposed rule 61A-7.001(1) as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.

The proposed rule establishes two classifications for the stand-alone bar designation. The classifications are “stand-alone smoking (ss),” in which the stand-alone bar’s food service is limited to nonperishable snack food items, and “stand-alone smoking with food (ssf),” in which the stand-alone bar’s on-premises food service is limited to ten percent of its gross revenue.

Proposed rule 61A-7.001 defines the term “noncommercial activity.” The act limits the activities that may be performed in membership association facilities to noncommercial activities.²² The rule defines “noncommercial activities” to mean “social gatherings, which encompass activities in compliance with s. 849.0931, Florida Statutes, [bingo] meetings, dining, dances, and the services performed in furtherance of these activities which can only be conducted by members, whether compensated or not.” The DBPR’s proposed rule would permit membership associations to pay their members for services conducted in furtherance of noncommercial activities, including bingo.

Proposed rule 61A-7.002²³ establishes the criteria for a stand-alone bar designation. The rule provides that the premises must meet the definition of stand-alone bar in s. 386.203(11), F.S., and requires that the license submit a “notice of election” to the division. The “notice of election” may be submitted through the division’s internet page, by mail, or in person to the division.

The department’s rules also set forth the record keeping and reporting requirements for stand-alone bars. Proposed rule 61A-7.004²⁴ requires that a designated stand-alone bar must file an annual certification that no more than 10 percent of its total gross revenue is derived from the sale of food for consumption on the licensed premises.

Proposed rule 61A-7.005²⁵ establishes the requirements for the triennial renewal reports required by s. 561.695(6), F.S., which requires that stand-alone bars must file an agreed upon procedures report prepared by a Certified Public Accountant (CPA). The proposed rules do not define the term “procedures report.” Moreover, s. 561.695(6), F.S., uses the term “agreed upon procedures report,” but it too does not define the term. Proposed rule 61A-7.005 requires that the report must provide the actual percentage of food sales for consumption on the premises for the preceding 36-month period from the renewal date, the actual annual percentage

²² See discussion below regarding membership associations and bingo.

²³ Proposed rule 61A-7.002 as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.

²⁴ Proposed rule 61A-7.002 as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.

²⁵ Proposed rule 61A-7.005 as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.

for each of the three years, the year total, and the total gross sales revenue from food consumption for each year and the total during that period. The proposed rule does not require that a CPA attest, in the agreed upon procedures report, that the establishment has maintained all of the records required by the rule, nor must the CPA attest to the accuracy and completeness of the records used to make the report. The Florida Institute of Certified Public Accountants (FICPA) has expressed the concern that to requiring that CPA's attest to the accuracy and completeness of the records would be extremely costly for business.

3. New Proposed Rules

Proposed rule 61A-7.007,²⁶ which sets forth the formula for determining the required percentage of gross food sales revenue,²⁷ requires that compliance with the 10 percent food limitation must be demonstrated for any consecutive two month period. The invalidated earlier rule required a six-month period of compliance. The constitutional amendment and the act do not specify the period of time during which the incidental sale of food percentage must be calculated. According to the department, it selected a two-month compliance period because such a period is easier and more practical to report and calculate. Smoke-Free argues that a two-month period violates the intent of the constitutional amendment. They reason that the amendment and the act require that the stand-alone requirements must be maintained "during any time of operation."²⁸ Smoke-Free recommends that stand-alone bars must be required to maintain and demonstrate the required food sales revenue percentage on a daily basis. Otherwise, they argue, businesses can intermittently sell large amounts of food during special event while maintaining their stand-alone bar designation. The Florida Restaurant Association expressed a similar concern but recommended a one-month reporting period. Currently, restaurants holding a special restaurant alcoholic beverage license under s. 561.20(2)(a)4., F.S., which requires that a restaurant maintain food sales of at least 51 percent, are required to report every two months.²⁹

²⁶ See proposed rule 61A-7.007 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.

²⁷ The rule states that the formula is the gross food sales revenue for consumption on the premises (including non-alcoholic beverages), divided by the gross total sales revenue for any consecutive two month period.

²⁸ Smoke-Free's argument is based on the term "during any time of operation" in the definition of the stand-alone bar in s. 386.203(11), F.S., and subsection (c)(8) of art. X, section 20. Fla. Const.

²⁹ See s. 561.20(2)(a)4., F.S., and rule 61A-3.0141, F.A.C. Section 561.20(2)(a)4., F.S., is an exception for restaurants to the number of alcoholic beverages licenses that may be issued in a county that permit the sale of beer, wine, liquor. Section 561.20(1)(a)4., F.S., establishes square footage requirements and provides that a restaurant must discontinue the service of alcoholic beverages if it discontinues food service.

Proposed rule 61A-7.008 provides the formula for determining the percentage of gross alcohol sales revenue.³⁰ This rule also uses a consecutive two-month reporting period. It divides gross revenue from the sale of alcoholic beverages for consumption on the premises by gross total sales revenue.

The department's current proposed rule 61A-7.009³¹ provides the formula to determine whether an establishment is predominantly dedicated to serving alcoholic beverages for consumption on the premises. The rule requires that the division compare the percentage of gross alcohol sales revenue established pursuant to rule 61A-7.008 with the following categories of revenue:

- the percentage of gross food sales revenue from the sale of food the licensee sells for consumption on premises;
- the percentage of gross food sales revenue from the sale of food the licensee sells for consumption off premises;
- the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption off the premises; and
- the percentage of gross revenue from any source not included in the food and alcohol categories above.

Under the proposed rule, if the percentage of gross revenue derived from sales of alcoholic beverages sold for consumption on premises is greater than that of the gross food sales revenue from any of the above categories, then the licensee would be deemed to be predominantly or totally dedicated to the service of alcoholic beverages. Although the rule establishes two categories of sales that do not include food sales revenue, the department's rule does not include those categories in the analyses and only compares the gross alcoholic beverage revenue to the two categories that pertain to gross food revenue.

Several statutes define the term "predominantly." For example, s. 212.031(1)(a)13., F.S., which provides a tax exemption from sales and use taxes on real property used or occupied "predominantly" for space flight business purposes, defines predominantly to mean that more than 50 percent of the property is used for the space flight business. Section 212.097(1)(a), F.S., which provides a tax credit to a business engaged predominantly in activities provided by business in specified standard industrial classifications if the business is located in a high crime area. This provision defines predominantly to mean that more than 50 percent of the business' activities are generated by the specified activities. The definition of "enclosed indoor workplace" in s. 386.203(5), F.S., defines predominantly bounded on all sides as meaning more than 50 percent covered.

³⁰ See proposed rule 61A-7.008 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.

³¹ See proposed rule 61A-7.009 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.

There are two other possible interpretations of the term “predominantly or totally dedicated” to the service of alcoholic beverages. The department’s rule could require that the location’s revenue from the service of alcoholic beverages must constitute 51 percent or more of the premises’ gross revenue. Alternatively, Smoke-Free recommends another interpretation. It recommends that the department’s rule should require that a stand-alone bar can only sell food and alcoholic beverages and that it cannot derive revenue from any other merchandise or service. Smoke-Free argues that this approach would be easier to enforce because it simplifies the record keeping and accounting calculations that the department’s current proposed rule would require.

Proposed rule 61A-7.006³² requires that each designated stand-alone bar must maintain separately documented records of all purchases of food, all gross retail sales of alcoholic beverages for consumption on the licensed premises, all gross retail sales of alcohol for consumption off the licensed premises, all gross retail sales of food for consumption on the premises, all gross retail sales of food for consumption off the premises, and gross revenue from all other sales. The proposed rule permits designated stand-alone bars to use Department of Revenue sales tax returns as an acceptable record of total monthly sales revenue.

4. CPA Concerns

FICPA has expressed the concerns regarding the proposed rules. According to the FICPA, proposed rule 61A-7.005 should define the term “procedures report.” According to FICPA, in an agreed-upon procedures engagement or report, a CPA does not render an opinion regarding the sufficiency of the records provided by the client, including the accuracy and completeness of the records. In the context of the proposed rules, the CPA could only certify that the records provided by the stand-alone bar to the CPA reflect a stated percentage of gross food sales. In an agreed upon procedures report, the CPA would not attest to the completeness or accuracy of the records provided. FICPA recommends that the department’s proposed rule should be amended to define the term “procedures report” in a manner consistent with how the term “agreed upon procedures engagement” is defined by the American Institute of Certified Public Accountants Statement on Standards for Attestation Engagements.

According to FICPA, a CPA could be disciplined by the board for a violation of professional standards if, in the course of preparing an agreed upon procedures report, the CPA observes irregularities in the client’s records, e.g., that the client is intentionally withholding records from the CPA, or the CPA determines that the client may have committed fraud or other malfeasance, e.g., tax evasion.

³² See proposed rule 61A-7.006 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.

Moreover, FICPA asserts that the department should clarify whether a CPA may be disciplined by the board if he or she fails to report fraud or other malfeasance that may be observed by the CPA in the process of preparing the report.

According to FICPA, the division's rules are not sufficiently clear regarding the specific records a stand-alone bar is required to maintain under the rules. According to FICPA, the division's rules do not require that the CPA document the findings in the report. According to FICPA, CPA standards of professional conduct require greater specificity regarding the form in which the records must be kept, e.g., can the CPA rely upon records maintained in an electronic format. The rules also need greater specificity regarding the steps or procedures that a CPA must take to address any apparent lack of internal controls that can result in unreliable records.

Without an adequate resolution of these matters, FICPA believes that a CPA's performance of an agreed upon procedures report would most likely be a violation of professional standards, and, consequently, FICPA would be compelled to advise its CPA members to refrain from performing the service for stand-alone bars. FICPA further asserts that the determination of a stand-alone bar's compliance with the requirements of the act is a function that should more appropriately be performed by the department's own inspectors and auditors.

According to the department, the proposed rules have been presented to the Board of Accountancy (board).³³ The department further notes that its rules remain in the adoption process, and that it intends to consider any concerns and recommendations of the board or the FICPA.

B. Enforcement

The DBPR's disciplinary authority for smoking violations is exercised through the stand-alone-bar smoking designation, which designation is a license.³⁴ Persons may make smoking complaints through the toll-free telephone number for the DBPR's Customer Contact Center.³⁵ Since the smoking ban took effect on July 1, 2003, the department has received a steadily decreasing number of complaints each month. For July, August, and September 2003, the department received 283, 116, and 208 complaints, respectively. For May, June, and July 2004, the

³³ The Board of Accountancy regulates the practice of public accountancy pursuant to ch. 473, F.S.

³⁴ See s. 120.52 (9), F.S., which defines the term license in the administrative law context to mean "a franchise, permit, certification, registration, charter, or similar form of authorization required by law, but it does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act."

³⁵ The toll-free telephone number for the DBPR's Customer Contact Center is 850-487-1395.

department received 41, 43, and 39 complaints respectively. The department has had a total of 36 administrative cases related to smoking violations. It has levied fines in 24 of those cases. The fines have ranged in amount from \$100 to \$750.

The Office of Program Policy Analysis and Government Accountability (OPPAGA) recently completed a justification review of the DABT.³⁶ The OPPAGA determined that most businesses complied with the smoking ban and that 50 percent of the department's investigations of smoking complaints revealed no violations of the act. Forty-two percent of the complaint investigations resulted in a warning, while only 2 percent of cases resulted in the initiation of an administrative action. However, OPPAGA also determined that the department did not investigate all complaints in a reasonable timeframe. OPPAGA determined that as of May 20, 2004, 19 percent of complaint cases had been uninvestigated for between four and six months, and another 21 percent of complaint cases had been uninvestigated from between four and five months. The OPPAGA recommended that the DABT shift its resources to districts where timeliness is most problematic in order to investigate complaints within an acceptable timeframe. OPPAGA recommended that the DABT investigate all complaints within 45 days. In response to the OPPAGA findings and recommendations, the DABT has revised its smoking complaint policy to require an investigation within 14 days and, if possible, a resolution within 30 days.

After more than a year of enforcement, it is still too early to tell whether the statutory disciplinary scheme for stand-alone bars is sufficient to deter violations. However, based on staff's discussions with various stake-holders and the department, it appears that there is widespread compliance with the ban. To the extent that a business opts to intentionally violate the ban, it is not clear that there is any level of discipline that would deter intentional and flagrant violations of the act.

It is clear that the department can sanction a licensee for violations of the act if the licensee personally violates the act by smoking on the licensed premises. Section 386.204, F.S., provides that a person may not smoke in an enclosed indoor workplace. Section 386.204, F.S., is the substantive smoking prohibition. Section 386.207(3), F.S., requires that the DBPR or the DOH, upon notification of observed violations of the act, issue to the proprietor or other person in charge of the enclosed indoor workplace a notice to comply with the act. Section 386.207(3), F.S., provides fines for subsequent violations of the act.

However, a recent DOAH decision has raised concerns regarding whether the DBPR has sufficient authority to sanction the proprietor or other person in charge

³⁶ *Justification Review, Division of Alcoholic Beverages and Tobacco Should Improve Primary Functions and Accountability System*, Report No. 04-56, August 2004, OPPAGA, Florida Legislature.

of an enclosed indoor workplace with a violation of the act if a person other than the proprietor or other person in charge of the location is smoking. In *DBPR v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.*,³⁷ the DBPR attempted to discipline Old Cutler Oyster Co., an alcoholic beverage licensee in Miami, for permitting several patrons to smoke in the licensed premises in violation of s. 386.204, F.S. The licensee did not hold a stand-alone bar designation under s. 561.695, F.S. The ALJ held that there is no statutory requirement that a proprietor or other person in charge of an enclosed indoor workplace must take any specific action when he or she observes a patron (or other non-employee) smoking in the enclosed indoor workplace. The ALJ also questioned whether the civil penalties in s. 386.207(3), F.S., which may be assessed against “the person” who fails to comply with a previously issued “notice to comply,” apply to corporate or other non-human juridical entities. The ALJ held that, in the context of s. 386.207(3), F.S., the term “person” appears to be limited to an individual human being.³⁸

Old Cutler Oyster Co., Inc., does not address the issue of whether the division can sanction an alcoholic beverage licensee under the division’s disciplinary authority in s. 561.29, F.S., which authorizes discipline of alcoholic beverage licensees for violations of any law in this state or permits another person on the licensed premises to violate the laws of this state or the United States,³⁹ and for maintaining a nuisance on the licensed premises.⁴⁰ Although the licensee in *Old Cutler Oyster Co., Inc.*, is an alcoholic beverage licensee, the division did not seek to discipline the licensee pursuant to s. 561.29, F.S. The division has previously utilized s. 561.29, F.S., to successfully sanction alcoholic beverage licensees for violations of state law performed by patrons and other non-employees on the licensed premises.⁴¹ In order to sanction a licensee for the conduct of a patron or

³⁷ See Recommended Order in *Dept. Business and Professional Regulation v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.*, DOAH Case No. 2003-071145, Recommended Order issued September 24, 2004.

³⁸ The Recommended Order does not reference the rule of statutory construction in s. 1.01, F.S., which provides that, where the context permits, the term person “includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.”

³⁹ Section 561.29(a), (b), and (e), F.S.

⁴⁰ Section 561.29(c), F.S.

⁴¹ Regarding s. 561.29, F.S., an alcoholic beverage licensee is not an absolute insurer against violations on the licensed premises by patrons or employees, but where the licensee fails to exercise reasonable care or diligence in supervising or maintaining surveillance over the licensed premises, and violations occur in a flagrant, persistent and recurring manner then the licensee may be held culpable. See *Pauline v. Lee*, 147 So.2d 359 (Fla. 2nd DCA 1962); *G & B of Jacksonville, Inc. v. Department of Business Regulation*, 366 So.2d 877 (Fla. 1st DCA 1978); *Woodbury v. State Beverage Department*, 219 So.2d 47 (Fla. 1st DCA 1969); *Taylor v. State Beverage Department*,

other non-employee the division would have to show that the licensee failed to exercise reasonable care or diligence in supervising or maintaining surveillance over the licensed premises, and that the violations occurred in a flagrant, persistent, and recurring manner such that the licensee knew or should have known that the state law violation was occurring. The licensee's failure to act could then be shown as evidence that the license either fostered condoned or otherwise negligently permitted others to violate state law on the licensed premises.⁴²

The DOAH decision in *Old Cutler Oyster Co., Inc.*, is also relevant to the DOH's enforcement of the act. It creates uncertainty regarding the extent to which the DOH can sanction proprietors and persons in charge of an enclosed indoor workplace for smoking violations by patrons or other non-employees.

II. Department of Health

The DOH enforces the smoking prohibition in all workplaces that do not specifically fall within the jurisdiction of the DBPR, i.e., any workplace that does not have an alcoholic beverage license, or is not a public food service establishment or public lodging establishment.⁴³ The DOH has the primary enforcement responsibility for the act's exceptions for smoking cessation programs, or medical and scientific research.⁴⁴

A. Rulemaking

On August 16, 2004, the DOH adopted the rules implementing the act.⁴⁵ The DOH's rules establish procedures to be followed by the department when responding to and investigating complaints from the public,⁴⁶ procedures for on-site inspection of enclosed indoor workplaces,⁴⁷ and procedures for responding to

194 So.2d 321 (Fla. 2d DCA) *cert. den.*, 201 So.2d 464 (Fla. 1967); *Golden Dolphin #2, Inc. v. Division of Alcoholic Beverages and Tobacco*, 403 So.2d 1372 (Fla. 5th DCA 1981); *Jones v. Division of Alcoholic Beverages and Tobacco*, 448 So.2d 1109 (Fla. 1st DCA 1984); *Pic N' Save v. Division of Alcoholic Beverages and Tobacco*, 601 So.2d 245 (Fla. 1st DCA 1992); and *Ganter v. Department of Insurance*, 620 So.2d 202 (Fla. 1st DCA 1993).

⁴² *Id.*

⁴³ Section 509.013(5), F.S., defines the term "public food service establishment," and s. 509.013(4), F.S., defines the term "public lodging establishment."

⁴⁴ See s. 386.2045(5), F.S.

⁴⁵ Chapter 64E-25, F.A.C.

⁴⁶ Rule 64E-25.001, F.A.C.

⁴⁷ Rule 64E-25.002, F.A.C.

complaints.⁴⁸ The DOH rules establish minimum standards for assessing fines.⁴⁹ As limited by the act, the fines range from \$250 for a first offense to \$1,000 for a third offense. The rules also establish minimum standards for designation as a smoking cessation program.⁵⁰

The act does not require that the DOH approve, or otherwise regulate, any scientific or medical research that utilizes tobacco smoking within an enclosed indoor workplace. Accordingly, the DOH's rules do not establish regulations for tobacco smoking activities that are integral to scientific or medical research, except that the department's rule requires signage in compliance with s. 386.206(4), F.S.⁵¹

B. Enforcement

The DOH has established a toll-free telephone number for persons to report violations and make inquiries regarding the smoking ban.⁵² During the first year of the act, the DOH received and processed 781 smoking related complaints. According to the DOH, the number of monthly smoking related complaints and inquiries has been decreasing since the act's effective date on July 1, 2003. For example, the department received 204 smoking related complaints for July 2003, and only 25 complaints were reported for June 2004.

The DOH responds to each complaint by sending a letter of non-compliance to each business that is the subject of a smoking complaint. The DOH's rules require that the proprietor or other person in charge that receives the complaint must respond to the letter of non-compliance within 21 days of receiving the letter of non-compliance.⁵³ If the person fails to respond to the letter of non-compliance within the 21 day period, the department makes a request for the local county health department to send an inspector to the business location. The department also sends an on-site inspection request to the local county health department if there is a second complaint for the location. For the period of July 1, 2003,

⁴⁸ Rule 64E-25.003, F.A.C.

⁴⁹ Rule 64E-25.004, F.A.C.

⁵⁰ Rule 64E-25.005, F.A.C. *See also*, discussion *infra* regarding the implementation of the exception for smoking-cessation programs, medical or scientific research.

⁵¹ *See* rule 64E-25.002(3), F.A.C.

⁵² The DOH's toll-free telephone number for reporting violations the making inquiries is 1-800-337-3742. The public may also file complaints via email at Tobaccocomplaint@doh.state.fl.us, or mail a complaint to the Division of Health Awareness and Tobacco, 4052 Bald Cypress Way, Bin C23, Tallahassee, FL 32399-1743.

⁵³ *See* rule 64E-25.003(2)(c), F.A.C.

through June 30, 2004, the department requested 69 on-site inspections.⁵⁴ Thirteen of the inspections found continued violations. With the recent adoption of its rules, the department intends to proceed with the administrative process to fine these alleged violators.

III. Implementation of the Exceptions

A. Stand-Alone Bars

The extent to which the reporting requirements and food service limitations in the act and in s. 561.695, F.S., have affected stand-alone bars remains partially unresolved because the DBPR has not completed the rule making processes.⁵⁵ A recent study conducted by the University of Florida (UF) to assess the economic impact of the act on Florida's leisure and hospitality industry found no significant negative affect on that industry.⁵⁶ The study found a statistically insignificant increase in sales by taverns, night clubs, bars, and liquor stores after the smoking ban took effect. The study also did not find evidence of any migration of dining from restaurants to taverns and bars where smoking is permitted because the sales data used from all eating and drink establishments as a whole could not detect such a migration.

The extent to which the UF study accurately reflects the effect of the smoking ban on business is unclear. Although the UF study analyzed separate sales data for restaurants, lunchrooms, and catering services as one group, and taverns, night clubs, and bars as another group, the study also did not define the terms restaurant, night club, tavern, and bar. It is therefore not clear whether, for example, a business classified as a bar, night club, or tavern in the study is a stand-alone bar within the meaning of the term as used in the act. Moreover, the inclusion of catering services, which may be performed in a stand-alone bar as well as in nonsmoking restaurants, in the same group as restaurants, may attribute revenue from stand-alone bars to the restaurant group. Consequently, the study provides evidence that the smoking ban has not negatively affected the leisure and hospitality industry as a whole, but the study cannot be relied on to definitively conclude that the ban has not adversely affected specific segments of the restaurant or bar industry. The study analyzes the effect of the ban as a whole restaurants, taverns, taverns, etc., but does not reflect what percentage of these businesses have been negatively affected by the ban. The study does not reflect

⁵⁴ As of June 30, 2004, 65 of the inspections were completed.

⁵⁵ See discussion above regarding rulemaking by the DBPR.

⁵⁶ *The Economic Impact of Florida's Smoke-Free Workplace Law*, Bureau of Economic and Business Research, Warrington College of Business Administration, University of Florida, June 25, 2004. For further information regarding this study see the discussion below regarding the economic effect of the smoking ban on restaurants.

the number of restaurants or bars that may have permanently gone out of business because of the smoking ban, and may only reflect new business that, figuratively speaking, took their place. The study's analysis is also state-wide and does not reflect whether the ban has had any disproportional regional affects. A follow-up study is being performed using more extensive data, however, it will be a national study that will analyze the economic effects of smoking banning in several jurisdictions across the United States.

There is no quantifiable evidence indicating the number of stand-alone bars that have had to scale-back or otherwise limit their food service options in response to the 10 percent food limitation. Staff has interviewed several proprietors of stand-alone bars and other representatives for such businesses and obtained anecdotal evidence regarding the typical amount of food sold in stand-alone bars before the implementation of the amendment. The persons that were interviewed have either indicated that their pre-implementation food sales were a negligible and unquantified portion of their total revenue, or advised that their food sales were in the range of 14 to 19 percent of their total revenue.

B. Designated Guest Rooms in Public Lodging Establishments

Before the adoption of the constitutional amendment and its implementation with the act, public lodging establishment were not barred from designating smoking guest rooms.⁵⁷ Consequently, the right public lodging establishment to designate smoking guest rooms was unaffected by the act.

Section 386.206, F.S., (2002), required the posting of a sign in any area that was designated as a smoking area, e.g., a sign that the guest room in a public lodging establishment was designated for smoking. Section 386.206(1), F.S., maintains this requirement. It requires that any person in charge of an enclosed indoor workplace who was required before the adoption of the amendment to post a sign under s. 386.206, F.S., to continue to conspicuously post such a sign. Section 386.206(1), F.S., expires on July 1, 2005.⁵⁸

C. Smoking-Cessation Programs, Medical or Scientific Research

⁵⁷ See pt. II of ch. 386, F.S., (2002), which provided for the designation of smoking areas in public places and did not prohibit the designation of a smoking guest rooms in a public lodging establishment.

⁵⁸ Section 386.206(5), F.S.

Rule 64E-24.005, F.A.C., requires that DOH approve any smoking cessation program that is conducted within an enclosed indoor workplace and that permits smoking during its sessions. The rule establishes requirements for DOH approval of smoking cessation programs that permit tobacco smoking as an integral part of their activities, including designating topics that must be included in the program such as setting goals and a quit smoking date. The rule requires that the smoking cessation program must be conducted in a designated area that satisfies the signage requirements in s. 386.206(4), F.S., and requires that the designated area must exhaust tobacco smoke directly to the outside and away from air intake ducts. The designated area must be maintained under negative pressure relative to the surrounding spaces in order to contain the tobacco smoke within the designated area. According to the DOH, it has not received any applications for approval of a smoking-cessation program.

D. Airports and Customs Area Smoking Rooms

Before the smoking ban airports typically permitted smoking in their restaurants, lounges, bars, and other designated smoking rooms or areas. With the implementation of the smoking ban, the airports have had to prohibit smoking in these areas. Based on staff's survey of airport managers, the affect of the smoking ban has varied from airport to airport. Most of the airport managers that responded to staff's survey reported minimal decreases in sales for the business locations affected by the ban. However, some airports noted significant revenue decreases. Miami International Airport (MIA) reported a 40 percent decrease in sales at its hotel's lobby bar, and Orlando-Sanford International Airport reported a 32 percent annual loss of revenue for its pub located in the international terminal.

None of the state's airport managers reported any difficulty in enforcing the ban. Some airports have constructed physical improvements and provided outdoor facilities to accommodate customers who wish to smoke. These facilities include curbside smoking areas for the general public, and covered smoking patios in secured airside for travelers.

To date no airport facility in Florida has utilized the exception for smoking rooms in the airport's the customs area. Airports may be unable to utilize this exception because of changes in the administration of customs areas. For example, MIA previously provided smoking rooms for passengers in the customs area in-transit lounges, but smoking rooms in MIA's in-transit lounges were discontinued when they were converted from waiting rooms to processing centers. Furthermore, no airport has utilized the retail tobacco shop exception to create a smoking area for their patrons.

E. Membership Associations

1. Enforcement

According to the DBPR, there are 1,253 alcoholic beverages licensed membership associations. Also according to the DBPR, of the 1,283 complaints that it had received as of mid-August 2004, 169 of the complaints related to membership associations. Two of the complaints led to administrative cases that resulted in the issuance of fines.⁵⁹ If the membership association does not have an alcoholic beverage license, the DOH has the primary enforcement responsibility.

2. Implementation Issues

There are several issues relevant to the exception for membership associations that remain unclear and may adversely affect the ability of certain membership associations to utilize the smoking exception for their facilities.

The act does not provide an exception for the performance of “essential services” inside membership association facilities. The act defines the term “essential services” as “those services that are essential to the maintenance of any enclosed indoor room, including, but not limited to, janitorial services, repairs, or renovations.” The act allows for the conduct of essential services in the airport customs room exemption in s. 386.2045, F.S., but does not provide for essential services in membership associations. Consequently, a membership association that may initially qualify for the exception, may lose the right to claim the exception if an essential service is performed in the facilities, e.g., if a plumber is hired to repair a drain or an electrician to install a switch.

Questions have been raised regarding whether a membership association may occasionally lease its facility to a member or non-member for special events or activities, e.g., parties, antique shows, etc. The DOH’s initial proposed rule defined the term “exclusively,” as the term is used in the act’s exemption for a membership association’s facility.⁶⁰ The proposed rule defined “exclusively” to mean that the “facility is restricted to the membership association, its members, and their guests, during the time in which the membership association is conducting a noncommercial activity.”⁶¹ The department did not adopt this rule. Concerns were raised during the rulemaking process that this rule was too broad.

⁵⁹ In Sarasota County, *DABT v. Fraternal Order of Eagles*, DBPR Case No. 2003-079995, and in Highlands County, *DABT v. VFW Post 9853*, DBPR Case No. 2003-094462, resulted in stipulations for fines in the amount of \$250 and \$125, respectively.

⁶⁰ See exemption in s. 386.203(5)(c), F.S.

⁶¹ See proposed rule 64E25.006(3) as noticed in FAW, vol. 29, No. 40, October 3, 2003.

The act does not define who is a member of a membership association. The DOH initially proposed a rule that required that members have certain voting rights and rights to hold association offices.⁶² This rule was subsequently not adopted by the department. Concerns were raised regarding whether the DOH had the authority under the act to define membership for private associations, and whether defining membership in an association should be a matter best reserved for the association's articles of incorporation or other governing documents. The DOH's initial rule also defined the term "guest" to mean "a person who is not a member, who participates, at the invitation of a member, in a membership association's noncommercial activity that is not otherwise open to the public."⁶³ The department did not adopt his rule. Concerns were raised that this definition was too restrictive regarding whether the noncommercial activity may be open to the public, with and whether the participation of the public would terminate the exception and convert the facility into a workplace.

3. Bingo

Several implementation issues have been identified regarding the conduct of bingo games by membership associations. Section 849.0931, F.S., permits charitable, nonprofit, or veterans' organizations, i.e., membership associations, to conduct bingo games. Section 849.0931(11)(c), F.S., permits these associations to conduct the games on property that they lease for a period of not less than one year. In practice, many of these organizations do not conduct the games in their principal facility or association headquarters. Instead, they lease property specifically for the conduct of bingo games. These leases typically permit a leasing association to conduct up to two bingo sessions each week.⁶⁴ The leased property comes equipped with all the equipment necessary for the conduct of the games. However, only association members may conduct the games and they may not be compensated in any way for the operation of the games.⁶⁵ In addition to conducting the games, association members may also staff concession services when such services are available at the bingo facility, e.g., they sell food and drinks to the bingo players. The bingo games are open to the general public, which the membership associations consider to be their guests. According to a bingo representative, there are approximately 125 bingo facilities in Florida that are available for membership associations to lease for the conduct of bingo games. Staff has also been advised that smoking during bingo games is a common practice.

⁶² See proposed rule 64E25.006(1) as noticed in FAW, vol. 29, No. 40, October 3, 2003.

⁶³ See proposed rule 64E25.006(2) as noticed in FAW, vol. 29, No. 40, October 3, 2003.

⁶⁴ Section 849.0931(6), F.S., prohibits the conduct of bingo by a charitable, nonprofit, or veterans' organizations on more than two days per week.

⁶⁵ See s. 849.0931(6), F.S.

The extent of smoking at bingo games appears to be a minimal problem at this time. For example, during the first year of implementation the DOH reported eighty-one smoking complaints relating to bingo; all but one of those complaints were made during the first four months of implementation.

At issue is whether the conditions under which membership associations lease bingo facilities qualifies the facility for the smoking exception for facilities owned or leased by a membership association. Although the exception permits a membership association to lease its facility, the exception also limits the types of activities that may be performed in the facility to noncommercial activities. The act lists noncommercial activities as including social gatherings, meetings, dining, and dances.⁶⁶ This listing of noncommercial activities may be viewed as examples of permissible activities and not as an exclusive listing of permissible activities.⁶⁷

The DBPR's proposed rule 61A-7.001 defines the term "noncommercial activity" to include bingo within the meaning of social gatherings and would permit membership associations to pay their members for services conducted in furtherance of noncommercial activities, including bingo.⁶⁸ The applicability of this rule would be limited to facilities with alcoholic beverages licenses.⁶⁹ According to the department, although there are several alcoholic beverage licensed membership associations facilities, the department's records do not reflect whether an alcoholic beverage licensee runs bingo games or leases its facility for bingo.

Absent an alcoholic beverage license, it is unclear whether the staffing of concession services by association members, or the conduct of bingo games by association members, constitutes noncommercial activities within the meaning of the act. Smoke-Free contends these bingo facilities constitute workplaces because the members who staff the concession services, or who conduct the bingo games, are engaged in work as the term is defined in s. 386.203(2), F.S., which defines "work" as including employment-type services performed by volunteers. Alternatively, the bingo interests assert that because all of the members' services

⁶⁶ See s. 386.203(5), F.S.

⁶⁷ It is a rule of statutory interpretation that a listing of examples in a statute by use of the word "including" or "includes" is usually a term of enlargement, and not of limitation. It conveys the conclusion that there are other items includable, though not specifically enumerated by the statute. *Argosy Limited v. Hennigan*, 404 F.2d 14 (5th Cir. 1968). The word "including" is not an all-embracing definition, but connotes simply an illustrative application of the general principle. *United States v. Gertz*, 249 F.2d 662 (9th Cir. 1957); and *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100, 62 S.Ct. 1, 4, 86 L.Ed. 65 (1941).

⁶⁸ See discussion above regarding unchallenged rules of the DBPR.

⁶⁹ Although the proposed rules do not expressly limit their application to alcoholic beverages, ch. 61A, F.A.C., contains the rules of Division of Alcoholic Beverages and Tobacco.

performed in these facilities are conducted for non-profit activities, the services constitute noncommercial activities within the meaning of the act. This analysis equates noncommercial activities with non-profit activities.

IV. Impact on Other Business and Interests

A. Restaurants

1. Enforcement

The Division of Hotels and Restaurants (DH&R) within the DBPR is the agency responsible for the regulation of public food service establishments, e.g., restaurants, and the agency primarily responsible for the enforcement of the act in restaurants. If the restaurant has an alcoholic beverage license, which the vast majority do, the DH&R refers a smoking complaint to the DABT. Upon an initial complaint from the public, the department informs the alleged violator of the complaint and educates the alleged violator regarding the requirements of the act. Failure to comply or further complaints would result in an administrative action for the penalties under the act. As of October 2004, the DH&R has not initiated any administrative action against a restaurant. However, several administrative actions have been initiated by the DABT against licensed public food service establishments.

2. Economic Impact

Other than anecdotal evidence regarding specific restaurants, there is no evidence that the smoking ban has had a generally adverse affect on the restaurant industry. The recent UF study found no significant negative affect in the leisure and hospitality industry.⁷⁰ The study found that retail sales by restaurants, lunching rooms, and catering services increased by 7.37 percent since the implementation of the smoking ban.⁷¹ The study also did not find evidence of any migration of dining from restaurants to taverns and bars where smoking is permitted because the sales data used from all eating and drink establishments as a whole could not detect such a migration.

The DBPR does not maintain statistics regarding how many restaurants or bars have opened or closed as a result of the smoking ban. According to DBPR records there were 41,364 licensed food service establishments in 2003, and the department's most recent records indicate that there are 42,834 licensed food service establishments for 2004. The Florida Restaurant Association acknowledged that the industry is growing at a 2 to 5 percent annual rate.

⁷⁰ Bureau of Economic and Business Research, *supra* at n. 56. For further discussion regarding the UF study, see discussion above regarding the economic impact of the smoking ban on stand-alone bars.

⁷¹ The study does not define the term "lunching room."

Not all restaurants have been affected by the smoking ban equally. Because of the 10 percent food sales limitation, restaurants holding a special restaurant alcoholic beverage license (SRX), which requires that a restaurant maintain food sales of at least 51 percent, are necessarily disqualified from the stand-alone bar designation.

The extent to which a restaurant may be adversely affected by the smoking ban is often dependent on the restaurant's business concept. For example, some licensed food service establishments function principally as a restaurant for their lunch-time and/or dinner-time patrons but then switch to a nightclub or bar business concept in the evenings. If the business derives more than 10 percent of its gross revenue from the sale of food, the location can not qualify for the stand-alone bar designation.⁷² Representatives for the restaurant industry contend that the inability to permit smoking may place restaurants at a competitive disadvantage relative to a stand-alone bar that serves food and can permit its patrons to smoke.

B. Pool Halls and Bowling Establishments

The service of food and/or alcoholic beverages is not limited to establishments that may be strictly construed as a restaurant or bar. Pool halls and bowling establishments may also serve alcoholic beverages and/or provide food service. Whether an alcoholic beverage licensed pool hall or bowling establishment may permit indoor smoking is dependent on the meaning the term "predominantly or totally dedicated to the serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof" in the definition of stand-alone bar.⁷³ The proposed DBPR rules regarding the method for determining whether an establishment is predominantly dedicated to serving alcoholic beverage attempts to resolve this uncertainty.⁷⁴

The DBPR's proposed rule 61A-7.003 prohibits the holder of a special bowling alcoholic beverage license (SBX) from being designated as a stand-alone bar because the premises is dedicated predominately to activities other than the service of alcohol.⁷⁵ SBX licensees contend that this rule puts them at a competitive disadvantage with other bowling establishments that are similarly situated in all respects except for their type of alcoholic beverage license. An SBX

⁷² See ss. 386.201(11) and 561.695(5)(a), F.S.

⁷³ Section 386.203(11), F.S.

⁷⁴ See proposed rule 61A-7.009 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004, and discussion above regarding DBPR's proposed rules.

⁷⁵ Although this rule was upheld by the ALJ in *Bowling Center's of Florida, Inc., v. Dept. of Business and Professional Regulation*, DOAH Case no. 03-4776RP, dated March 26, 2004, the bowling establishment petitioner has appealed the ALJ's final order to the Second District Court of Appeals in *Bowling Centers Association v. Dept. of Business and Professional Regulation*, 2nd DCS Case. No. 2D04-1789.

licensee may not have a quota license because the business may not be able to afford one or because one may not be available for issuance in that county. Bowling establishments that hold a quota alcoholic beverage license issued under s. 561.20, F.S., are not disqualified from a stand-alone bar designation under the proposed rule.

Of the 24 administrative cases initiated by the department, five have related to bowling establishments, and have resulted in fines ranging from \$100 to \$250.

C. Pari-Mutuel Facilities

In connection with an interim study of the pari-mutuel industry, committee staff submitted a survey to the pari-mutuel industry that asked whether there had been any legislative changes that have affected attendance, handle, or profitability. Three of the 14 pari-mutuel facilities that responded to the survey noted that the smoking ban has negatively affected revenues and attendance.

According to the DBPR, the department has received only two smoking complaints on pari-mutuel facilities. None has resulted in administrative action, fine, or other penalty.

D. Alcoholic's Anonymous Meeting Locations

During the first year of implementation, the DOH has received regular complaints regarding smoking at Alcoholics Anonymous (AA) meetings. During the first month of implementation the DOH received 17 complaints regarding smoking at AA meetings. In subsequent months the department has received an average of two such complaints a month. According to the DOH, tobacco smoking is a common activity at many AA meetings. The meetings are usually held in commercial spaces, typically store fronts, and are staffed by unpaid volunteers who run the meetings and keep the keys to the facility.

It remains an open question whether these volunteer services constitute work within the meaning of the act. Although the act includes volunteers within the meaning of the term "work,"⁷⁶ the act also refers to work as an "employment or employment-type service." At issue is whether these volunteer services constitute an "employment or employment-type service." However, the DOH interprets the act to prohibit smoking at AA meetings.

⁷⁶ See s. 386.203(12), F.S.

E. Entertainment Industry

During the legislative process, the Florida Film and Entertainment Advisory Council⁷⁷ voted not to oppose the smoking ban or seek an exemption for movie sets. According to the Commissioner of Film and Entertainment, there is no evidence that the smoking ban has dissuaded the start of any film or entertainment production in Florida, caused any production to leave the state, or otherwise negatively affected film production in the state to any quantifiable extent.

IV. Other Implementation Issues

A. Interagency Cooperation

The DOH and the DBPR have conducted regular meetings for the purpose of coordinating their enforcement activities and to assure consistent interpretations of the amendment and the act in the implementation of the rules. For example, when complaints are made to the DOH regarding a restaurant, an alcoholic beverage licensed establishment, or a stand-alone bar, the complaints are referred to the DBPR for investigation. The departments have consulted with the Department of Agriculture and Consumer Services, whose jurisdictional responsibilities include truck-stops and grocery stores with an alcoholic beverage license or food service license, in order to further coordinate enforcement activities. As required by the act, the departments have also consulted with the State Fire Marshal during the rule development process.

B. Local Law Enforcement

According to the DBPR, certain unidentified local law enforcement agencies have expressed a reluctance to enforce the smoking ban by issuing the non-criminal citation authorized by s. 386.208, F.S., because they believe that the act does not grant local law enforcement officers sufficient jurisdiction to enforce the prohibition in s. 386.204, F.S.

⁷⁷ The Florida Film and Entertainment Advisory Council is created by s. 288.1252(1), F.S., within the Office of Tourism, Trade, and Economic Development (OTTED) of the Office of the Governor. The purpose of the council, as provided in s. 288.1225(2), F.S., is to advise the OTTED on matters related to developing, marketing, promoting, and providing service to the state's entertainment industry.

Section 386.212, F.S., which prohibits smoking within 1,000 feet of school property, specifically authorizes law enforcement officers to issue a citation to any person violating this provision. Section 386.212(2), F.S., also specifies the minimum information that a citation must contain.

However, the absence of such a specific reference elsewhere in the act does not render the act's prohibition unenforceable by local law enforcement. Staff has researched this issue and could not find sufficient legal authority for the conclusion that a local law enforcement agency may interpret the act as not granting them the authority to issue non-criminal citations for smoking violations.

Conclusions and Recommendations

Staff recommends that, the Legislature take action to clarify the following concerns in implementation the indoor tobacco smoking ban in art. X, section 20 of Florida Constitution, in ch. 386, F.S., and s. 561.695, F.S.:

- The act should be amended to clarify that local law enforcement officers have jurisdiction to enforce the smoking prohibition in s. 386.204, F.S.
- The smoking prohibition in s. 386.204, F.S., should be amended to clarify that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person, including patrons and employees, to smoke in the workplace.
- The act should be amended to clarify that, as used in the act, the term “person” has the same meaning as in the rule of statutory construction in s. 1.01, F.S.
- The Legislature should delay the implementation of the triennial renewal reports required by s. 561.695(6), F.S., by one year in order to permit affected stand-alone bars to adjust the recordkeeping and reporting requirements in the yet to be adopted rules of the Department of Business and Professional Regulation.
- The Legislature should delay taking additional action on the implementation issues that are being addressed in the proposed rules of the Department of Business and Professional Regulation until the department has completed the rulemaking process because the department and interested parties may resolve these implementation issues.