

## SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: April 20, 1998 Revised: \_\_\_\_\_

Subject: Professions, Occupations, and Businesses; Penalties

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Wilson</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>WM</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

### I. Summary:

This bill prohibits any state agency that collects taxes or regulates the activities of any profession, occupation, or business from enforcing a rule applicable to the collection of those taxes, until the individual violating the rule is informed of the regulation and given a reasonable time to comply. The enforcement prohibition does not apply to a felony violation. In addition, the bill allows an individual to use a state agency's failure to uniformly enforce a rule as a defense to a minor violation and precludes an agency from taking enforcement action if it has known of a minor violation for more than a year and failed to act. The bill provides specified exemptions for certain state revenues and professions.

This bill creates two undesignated sections of the Florida Statutes.

### II. Present Situation:

Chapter 20, F.S., relating to the organization of state government, defines an agency as, depending on the context, an official, officer, commission, authority, council, committee, department, division, bureau, board, section, or other unit or entity of government.

Chapter 120, F.S., relates to administrative procedures to be followed by public agencies in adopting rules or taking administrative actions. Included in the definition of agency is each state officer and each state department or departmental unit, commission, or board, although not all state agencies or all state-level activities are subject to its provisions<sup>1</sup>. Most state agencies

<sup>1</sup>Section 120.52 (15), F.S., describes six items which do not constitute rules; s. 120.63, F.S., describes the procedures and criteria used by the Administration Commission for exemption from the act; and Section 120.80, F.S., lists fourteen institutional exemptions afforded state agencies in the conduct of designated business affairs.

exercise administrative responsibilities relating to the regulation of various professions, occupations, or businesses, including the Department of Agriculture and Consumer Services, the Department of Banking and Finance, the Department of Business and Professional Regulation, the Department of Children and Family Services, the Department of Community Affairs, the Department of Education, the Department of Environmental Protection, the Department of Health, the Department of Insurance, the Department of Law Enforcement, the Department of State, and the Department of Transportation. The Department of Revenue is the primary agency responsible for collecting taxes imposed by the Legislature (although the Department of Business and Professional Regulation also has significant tax collection responsibilities in the areas of parimutuel wagering and alcohol and tobacco sales).

Generally, agencies are empowered to adopt rules to implement the laws enacted by the Legislature. In addition, agencies may take administrative actions against violators of the statutes and rules, as authorized by the Legislature in statute. The conduct of agency rulemaking and administrative actions for violations of statutes or rules is guided by ch. 120, F.S., as well as by constitutional principles of due process. Notice of rulemaking is published in the *Florida Administrative Weekly*. According to the Joint Administrative Procedures Committee, there are currently approximately 25,000 rules in the *Florida Administrative Code*.

The Administrative Procedures Act was substantially revised during the 1996 legislative session. Generally, the amendments to the act were intended to limit agency discretion in rulemaking and require specific statutory authority for the adoption of a rule. Section 120.542, F.S., authorizes agencies to permit waiver and variance of rules (the section specifically does not permit variance or waiver of a statute) under certain circumstances. The rules may be varied or waived when a person demonstrates that the purpose of the rule or the underlying statute has been met by other means or when application of the rule would create substantial hardship or unfairness.

In addition, s. 120.695, F.S., requires an agency to issue a notice of noncompliance, rather than pursuing fines and penalties, for a minor violation on the first offense. A minor violation is defined as one that does not result in economic or physical harm or adversely affect the public health, safety, or welfare. A notice of noncompliance must identify the specific rule that is being violated, provide information on how to comply with the rule, and specify a reasonable time for the violator to comply.

Specific statutes authorize agencies to impose certain penalties for violations of those statutes or related rules, but agencies may take only such actions as are specifically authorized by the Legislature. Section 120.536, F.S., requires each agency rule to emanate from a specific enabling statute and not from a general grant of rulemaking authority. Administrative agencies may not themselves impose criminal sanctions. Agencies must refer criminal actions to the appropriate state attorney or the Department of Legal Affairs, which prosecute such actions through the criminal courts in accordance with principles of constitutional due process and the Rules of Criminal Procedure.

Although statutes of limitations exist in the law for criminal and civil actions (Ch. 775, F.S. and Ch. 95, F.S., respectively), there is currently no general statute of limitations for administrative actions. Courts have held that the common law doctrine of laches (an equitable doctrine disallowing a claim if there is undue delay in asserting it) does not apply to agency administrative actions. (*Farzad v. Department of Professional Regulation, Board of Medical Examiners*, 443 So.2d 373 (Fla. 1st DCA 1983). Generally, case law holds that ignorance of the law is no defense against prosecution for a violation. (*Moncrief v. State, Comm’r of Ins.*, 415 So.d. 785 (Fla. 1st DCA 1982).

### **III. Effect of Proposed Changes:**

The committee substitute prohibits any state agency that knows of a person committing a violation of a rule relating to the payment of taxes or to the regulation of a profession, occupation, or business, from bringing a civil, criminal, or administrative enforcement proceeding until the agency informs the person of the rule’s requirements and provides a reasonable time to comply. This prohibition does not apply if the violation constitutes a felony, if the violator had actual or constructive knowledge of the regulatory requirements, if it would jeopardize the obtaining or retention of a federal environmental program or if the agency determined that it would constitute a detriment to public health, safety, and welfare.

The committee substitute also provides that, in a proceeding to impose a penalty for a violation of a rule, the violator may use a pattern of nonenforcement of the rule by the agency as a defense. In addition, if an agency that collects taxes or enforces rules knows that a person is committing a minor violation of a rule and fails to provide notice of the rule requirements to the violator within a year, then the agency is “estopped” (i.e., precluded) from enforcing the rule. This provision also does not apply if the violator had actual prior knowledge of the rule requirements.

CS/SB 632 does not apply to taxes, fees, penalties, surcharges, or interest imposed by law or to any rules affecting the practice of any state-licensed profession or occupation.

The bill is effective upon becoming a law.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None. The bill applies only to state-agency enforcement actions.

#### **B. Public Records/Open Meetings Issues:**

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

In *Morey's Lounge v. Department of Business and Professional Regulation*, 673 So.2d 538 (Fla. 4th DCA, 1996), the appellate court ruled in an agency enforcement action of beverage laws that “. . . ignorance of the law is no defense.” In *Reason v. Motorola, Inc.*, 432 So.2d 644 (Fla. 1st DCA, 1983) another appellate court held that “ignorance of the law is not an excuse and does not constitute good cause for failure to comply with the law.” In *Florida Bar v. Dubow*, 636 So.2d 1287 (Fla. 1994) another court held that “[w]e are all charged with knowledge of existing laws . . . .”

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

According to the Department of Revenue, the bill could have a negative impact on the collection of taxes since violators would know that, when caught for the first time for a minor violation of a rule imposing taxes, they could not be penalized for the nonpayment unless the agency could establish that they knew of the requirement to pay the tax.

Individuals who commit a minor violation of a rule that could be enforced by a state agency will benefit from being absolved from penalty for the first nonpayment of the tax or violation of the rule, unless the agency can prove that the violator had actual prior knowledge of the rule.

C. Government Sector Impact:

The bill could impose an additional cost on state agencies, which would be required to provide notice to individuals who had failed to pay taxes or committed a minor violation of a rule. The bill does not specify how the notice is to be provided. In order to prove that the appropriate notice has been given, agencies may need to provide the required notice in writing to each violator. Some mechanism for proving receipt of the notice also will be required, which will increase expenses to the agency. For many agencies, the costs associated with a regulatory program are funded by fees paid by the regulated individuals or entities.

An interesting permutation of the revised enforcement change is presented with condominium and mobile home law. Under ch. 718, F.S., the Bureau of Condominiums distributes a newsletter in which it informs recipients of the nature of the F.S. affecting their ownership interests. That newsletter may constitute notice under this bill effectively reducing its apparent impact to a nullity. Chapter 723, F.S., permits the DBPR to recoup improper rent increases imposed by park operators upon mobile home tenants. The bill may impair that recoupment process since it would be the park operator who may be able to maintain that there was no actual notification or “there was a pattern to enforce the regulation with respect to substantially the same violation committed by others.”

Several state agencies responded to a January 28, 1998, questionnaire soliciting information on the impact of the bill in its original filed version on their regulatory operations. Several agencies indicated significant disruptions in workload and operations; the following agencies supplied more specific information on its financial impact:

Department of Banking and Finance: \$ 215,000  
Department of Revenue: \$ 2,028,019 to \$ 3,166,551

#### **VI. Technical Deficiencies:**

The bill does not define what constitutes a reasonable time for compliance after the agency notifies a violator of a rule. This ambiguity could lead to litigation, if an agency attempts to prosecute a violator who has not complied after the agency provides the required notice of the rule.

#### **VII. Related Issues:**

Proving that an individual had prior knowledge of a rule before beginning an enforcement action will pose a difficult evidentiary burden on state agencies. The practical effect of the requirement is that most violators will be allowed to commit one violation for which the agency must provide notice of requirements of the rule. Therefore, most violators will not be prosecuted unless they fail to comply with the rule after the requisite notice is given or commit a second similar violation after such notice.

Section 120.695, F.S., provides that it is legislative policy that agency enforcement actions for violations of minor rule violations are to be accompanied by a notice of noncompliance as a first agency action. Only the regulation of teachers and law enforcement personnel is exempted from this policy statement.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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