



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill potentially introduces a broad set of technical requirements for internal and external governmental activities provided electronically. The bill increases rulemaking authority for the Department of Management Services.

#### B. EFFECT OF PROPOSED CHANGES:

##### Background

Section 508 of the Rehabilitation Act of 1973<sup>1</sup> is part of the larger Americans with Disabilities Act. Section 508 requires federal agencies to ensure that their procurement of information technology takes into account the needs of all end users, including disabled persons, by providing detailed requirements for websites and computer programs.<sup>2</sup> Providing such requirements enhances the ability of federal employees with disabilities to have access to and use of information and data that is comparable to that provided to others. Under Section 508, "comparable access" is not required if it would impose an "undue burden" on the agency.<sup>3</sup>

##### Current Application of Federal Standards

A threshold question exists: To what extent are state agencies and their contractors already required to comply with Section 508 technical requirements? The Information Technology Technical Assistance and Training Center (ITTATC)<sup>4</sup> has stated that

[The] Section 508 law applies only to federal agencies and departments. The standards, however, are available for anyone to incorporate in whole or in part. Thus, for example, state law may require state entities to comply with the standards. A non-federal entity such as a university or a city, county, or state government that receives federal monies needs to comply with Section 504 (of the Rehabilitation Act)<sup>5</sup> requirements to provide reasonable accommodations for people with disabilities; however, Section 504 does not require accommodations to be provided through conformance with Section 508 accessibility standards. Adherence to Section 508 requirements can be used as a way of meeting Section 504 obligations....<sup>6</sup>

On its MyFlorida.com portal, the State of Florida has adopted a formal statement on website accessibility for persons with disabilities (the "Accessibility Statement"). The statement reads in part:

Section 504 states that "no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under" any program or activity that either receives Federal financial assistance or is conducted by any Executive agency.

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<sup>1</sup> Section 508 is codified at 29 U.S.C. s. 794d. See generally <http://www.section508.gov>.

<sup>2</sup> The technical standards are contained in Subpart B of Section 508, available online here: <http://www.section508.gov/index.cfm?FuseAction=Content&ID=12>.

<sup>3</sup> 29 U.S.C. s. 794d(a)(1)(A).

<sup>4</sup> ITTATC is funded by the National Institute on Disability and Rehabilitation Research (NIDRR). It is charged with providing accessibility training and technical assistance related to Section 508 of the Rehabilitation Act and Section 255 of the Telecommunications Act. More information about the organization is available at its website: <http://www.ittatc.org/>.

<sup>5</sup> 29 U.S.C. s. 794(a)

<sup>6</sup> From ITTATC Frequently Asked Questions, online here: [http://www.ittatc.org/technical/experts/answers.php?qa\\_id=23](http://www.ittatc.org/technical/experts/answers.php?qa_id=23).

Section 508 now establishes requirements for electronic and information technology developed, maintained, procured, or used by the Federal government. Section 508 requires Federal electronic and information technology to be accessible to people with disabilities, including employees and members of the public. [...] While these standards currently apply to federal government, it is the direct responsibility of Florida state government agencies and their web designers and developers to become familiar with these accessibility guidelines and to apply these principles in designing and creating any official State of Florida web site.<sup>7</sup>

Although it does not carry the weight of law, the Accessibility Statement indicates that agencies aspire to comply with the technical requirements of Section 508. Further, as the statement points out, under the status quo Section 504 already applies to certain state agency activities. Section 504 requires reasonable accommodation (which is often satisfied by the Section 508 standards),<sup>8</sup> if such activities are part of “any program or activity receiving Federal financial assistance.” “Program or activity” is defined as:

all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

[...]

any part of which is extended Federal financial assistance.<sup>9</sup>

In determining whether the Act applies, a determination is necessary as to whether the state program or project at issue qualifies as a “program or activity” under Section 504. To the extent that the agency program, whether provided directly by state employees or through contractors, receives federal funding, it may be that the program already requires “reasonable accommodation,” which is often provided by complying with the technical provisions of Section 508. If a private contractor is involved, materials and services provided by the contractor must comply. The federal law does not reach ‘inside’ the contractor’s business, to mandate compliant systems in the private entity’s internal operating environment.<sup>10</sup>

### Proposed Changes

The bill requires that state agency contractors comply with Section 508. The bill also requires that each contract entered into between an agency and a private contractor must contain a statement that the private contractor comply with the provisions of Section 508. It is not clear if the state legislation is intended to ‘reach inside’ the contractor’s operations. The bill does provide that failure by a private contractor to comply with such provisions is considered a breach of the contract and constitutes grounds for revocation of the contract.

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<sup>7</sup> Available online here: <http://www.myflorida.com/myflorida/accessibility.html>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at subsection (b).

<sup>10</sup> “The rule was not intended to automatically apply to a contractor’s internal workplaces. For example, EIT [Electronic and Information Technology] neither used nor accessed by Federal employees or members of the public is not subject to the Access Board’s standards (contractor employees in their professional capacity are not members of the public for purposes of section 508).” *Final FAR Rule For Implementing Section 508 of the Rehab Act Electronic and Information Technology Accessibility for Persons with Disabilities*, as published in the Federal Register April 25, 2001. Available online here:

<http://www.section508.gov/index.cfm?FuseAction=Content&ID=13>.

The bill requires that each state agency comply with the provisions of Section 508 when directly conducting any agency activities relating to access and use of electronic information and technology.

The bill provides authorization for the department to adopt any rules necessary to administer, implement, and enforce the bill.

C. SECTION DIRECTORY:

Section 1 creates s. 287.1346, F.S., requiring state agencies and contractors to comply with Section 508 of the Rehabilitation Act of 1973.

Section 2 provides an effective date of July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

The bill may have a significant though indeterminate effect on agency information technology projects. Depending on the scope of compliance (see discussion in II.D. below), the bill may require significant additional costs to re-program or otherwise modify existing websites and programs to comply with Section 508 technical requirements.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

The bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have the effect of directing state dollars to private contractors offering computer consulting advice on ADA compliance issues, whether as a direct part of a new agency project, or as a third-party consultant on a project between an agency and a prime contractor.

D. FISCAL COMMENTS:

The Department of Management Services' Enterprise Information Technology Services (EITS) program has stated that paragraph 2 of the newly created statute may be extremely broad, and warns that the bill's broad scope will have a dramatic fiscal effect, as there are few legacy systems, if any, that currently meet the Section 508 technical requirements.<sup>11</sup> The proposed statute requires compliance "when conducting any agency activities related to access and use of electronic information and technology." The EITS division suggests that the scope of compliance be narrowed, perhaps to only include those applications which "face outward" to the public, and exempt those applications used internally by agency employees.<sup>12</sup>

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<sup>11</sup> *HB169 Substantive Bill Analysis*, Department of Management Services, November 22, 2005.

<sup>12</sup> *Id.*

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This 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:

None.

#### B. RULE-MAKING AUTHORITY:

As the current grant of rulemaking authority is drafted, it could be interpreted as too broad. The legislation simply grants authority to “adopt any rules necessary” to carry out the statute’s intent. Further discussion of this issue is included below as part of a larger discussion of the bill’s scope.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

##### Unclear Application

As drafted, the legislation requires both contractors and state agencies to “comply with Section 508 of the Rehabilitation Act of 1973.” It may be more accurate to direct the agencies and contractors to comply with the specific technical requirements contained in Section 508. Section 508 itself speaks directly to federal agencies. An argument can be made that directing a state agency or private contractor to “comply with Section 508,” does not actually require the agency or contractor to obey a mandate aimed expressly at federal agencies. The state agency could argue that, as it is not a federal agency, Section 508 does not require it to do anything. A more explicit direction from the Legislature directing state agencies to comply with the technical requirements contained in Section 508 removes this argument.

This problem of “vague application” also exists at the implementation level, as explained below.

“Most procurements are coming out with a blanket paragraph that says ‘Comply with Section 508.’ Then we don’t know specifically what [standards] we have to comply with.” [said Monica Dussman, corporate Section 508 coordinator for systems integrator Science Applications International Corp. of San Diego...]

But some agencies aren’t writing their solicitations correctly, causing difficulties for vendors.... The regulation requires that the agency identify in the procurement document the specific accessibility standards that apply to the purchase.

Requiring bidders to certify blanket compliance with the accessibility standards is an attempt to shift the burden for compliance onto the vendor, said Michael Mason, a Washington attorney who advises ITAA on Section 508. The procurement rule states the government buyer must identify specific standards that apply to the project and conduct market research to find accessible products.<sup>13</sup>

##### Rulemaking

Given the federal experiences discussed above, it may be advisable to provide more detailed instruction to the agencies regarding the specific standards to be implemented. Currently, the bill

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<sup>13</sup> *Washington Technology* magazine, May 20, 2002. Available here:  
[http://www.washingtontechnology.com/news/17\\_4/federal/18272-1.html](http://www.washingtontechnology.com/news/17_4/federal/18272-1.html).

provides the Department of Management Services with a general grant of rulemaking authority. The bill could more specifically grant authority for DMS to identify those specific technical standards that should apply to various types of online programs or projects operated by state agencies. As the current grant of rulemaking authority is drafted, it could be interpreted as too broad. On the other hand, if the statutory mandate is to comply with all of the technical standards in Section 508 for all state projects without exception, it may be that no rulemaking is necessary at all.

#### Retroactive Application

Additional direction may be needed with regards to existing agency programs and contracts and the potential retroactivity of the requirements contained in this bill. If current contracts require re-negotiation, vendors may attempt to increase prices in excess of the true cost of compliance, as they already have their “nose under the tent” and may not be required to go through a competitive procurement process. Alternatively, all affected projects would need to be re-procured – a potentially expensive undertaking.

#### Current Default Procedures

The bill provides that failure by a private contractor to comply with Section 508 “shall be considered a breach of the contract and constitutes grounds for revocation of the contract.” It may be more consistent with chapter 287, F.S., and rule 60A-1.003, F.A.C., to state that failure to comply will constitute an instance of “contract default.” This language would conform to the current vendor management mechanisms contained in chapter 287, F.S. and the due process provisions of the Administrative Procedure Act.<sup>14</sup>

#### Scope of Application

The bill directs agencies to comply with Section 508 “when conducting any agency activities relating to access and use of electronic information and technology.” This phrase may create unintentional conflicts, as Section 508 itself defines the scope of agency actions covered by the federal provision. By attempting to restate the scope at the state level, there may be unintended consequences. To the extent that the legislation attempts to “piggyback” the federal requirements, it may be advisable to allow the federal law to define the breadth of the law’s application. In the alternative, the bill could more explicitly define the scope of application, and “piggyback” only the technical standards. Another option to control the scope at the state level would be to re-create any desired technical standards in the Florida Statutes, and not attempt to rely on federal legislation at all.

#### State Agencies – Practices

It is unclear how several ancillary federal concepts are to be incorporated into state agency practices. Without additional detail, it is unclear whether or not the legislation intends to incorporate federal rulings (past and future) regarding the “undue burden” exemption or other ‘loopholes’ found in the federal law.<sup>15</sup> The “undue burden” test has been summarized as “significant difficulty or expense to the program or component for which the product is being developed, procured, maintained, or used. [This] interpretation of undue burden is consistent with case law, the [ADA] and Section 504...”<sup>16</sup> In determining whether a particular commodity or service would impose an undue burden, a federal agency must consider “all resources available to its program or component for which the supply or service is being acquired.”<sup>17</sup> Federal agencies are required to request a waiver of Section 508 compliance.<sup>18</sup> No provision is made in this legislation for such waiver, nor is an agency identified as the recipient and approving agency for such waiver requests.

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<sup>14</sup> Ch. 120, F.S.

<sup>15</sup> For example, the Clinger-Cohen Act of 1996 exempts certain security systems from Section 508.

<sup>16</sup> *Section 508 Enforcement /Complaint Processing Under Section 508*, a presentation by Ms. Jean Mahoney, Office for Civil Rights, U.S. Department of Agriculture, available online (in MS Powerpoint) here:

[http://www.ocio.usda.gov/508/doc/ocr625\\_wo\\_graphics.ppt](http://www.ocio.usda.gov/508/doc/ocr625_wo_graphics.ppt).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

Section 508 also does not apply to federal agencies making “micropurchases,” defined under federal law as purchases under \$2,500.<sup>19</sup> It is not clear whether or not similar or identical thresholds will apply to the state, which has a separate set of threshold amounts for various purchases.<sup>20</sup>

Under Section 508, private individuals have a cause of action against the federal agency.<sup>21</sup> This federal waiver of immunity does not speak to state actions (or inactions). The federal law cannot waive sovereign immunity for state actions. In order to provide a private right of action for failure to comply with the requirements, an additional state waiver of immunity would be required and right of action instituted.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

Not applicable.

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<sup>19</sup> Codified in the Office of Federal Procurement Policy Act, 41 U.S.C. s. 428(f).

<sup>20</sup> See generally s. 287.017, F.S., providing five financial thresholds, and 60A-1.012, F.A.C., providing for modification of such thresholds by rule.

<sup>21</sup> See 29 U.S.C. s. 794a(a)(2), *et seq.*