

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 7, 1995 Revised: 4/11/95 _____

SUBJECT: Prohibitions on Enforcement of Regulation
by Governmental Agencies

<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1. <u>Munroe</u>	<u>Wilson</u>	1. <u>GO</u>	<u>Fav/1 amendment</u>
2. _____	_____	2. <u>JU</u>	_____
3. _____	_____	3. <u>WM</u>	_____
4. _____	_____	4. _____	_____

I. SUMMARY:

The bill establishes limitations on the enforcement activities of the state or state agencies that have regulatory jurisdiction over professions, occupations, and businesses. The bill provides defenses for enforcement actions under specified circumstances for persons not in compliance with applicable regulations for professions, occupations, or businesses.

This bill creates several provisions of law which have not been designated in the Florida Statutes.

II. PRESENT SITUATION:

Various state agencies are responsible for regulation of the activities of professions, occupations, or businesses. State agencies are authorized by statute to impose a mix of administrative, civil, and criminal sanctions to regulate the conduct of persons and entities to protect the public. The right to practice a recognized profession or to engage in business is not an absolute or unqualified right. It is one that is subject to the police power of the state. The United States Supreme Court has long recognized a state's inherent authority to enact legislation to protect the health, safety, and welfare of its citizens. California Reduction Co. v. Kansas, 199 U.S. 306 (1905). The state has an interest in the protection of the public and as a result the state may invoke its police powers by enacting legislation to control various activities performed by persons and entities engaged in the practice of professions, occupations, or businesses. The Legislature enacts laws which authorize governmental agencies to take actions to ensure that persons engaging in the practice of professions, occupations, and businesses have adequate knowledge and competence and provide a forum for citizens to redress the commission of incompetent, fraudulent, and dishonest acts.

Chapter 120, F.S., the Administrative Procedures Act (APA), sets forth uniform procedures that state executive agencies must follow in adopting rules and in making decision that affect a person's substantial interests. The act ensures that persons substantially affected by proposed agency rules or actions receive notice and an opportunity to be heard. The APA also ensures that any rules or actions adopted by a state agency are not an invalid exercise of legislatively delegated authority. The APA provides for judicial review of final agency action.

Criminal penalties that are nonspecific as to the acts prohibited or required are likely to be void for vagueness or for overbreadth. The due process clause of the Florida Constitution and the United States Constitution prohibit a statute from forbidding or requiring the doing of an act in terms so vague that persons of common understanding must necessarily guess at its meaning and differ as to its penalties. Brock v. Hardie, 154 So. 690 (Fla. 1934). A statute is overbroad if its proscriptive language embraces not only acts properly and legally punishable, but others which are constitutionally protected or outside the police power of the state to regulate.

III. EFFECT OF PROPOSED CHANGES:

The bill prohibits any state agency that regulates the activities of any profession, occupation, or business from initiating a criminal, civil, or administrative proceeding against a person to impose a penalty for the violation of a regulation or to compel compliance with the regulation until the agency first informs the person of the requirements of the regulation and then gives the person a reasonable time to comply. The bill's prohibition does not apply if the violation constitutes a felony or if the violator had prior actual knowledge of the regulation's requirements. The bill establishes a defense in an enforcement proceeding by the state or state agency if the state or state agency has a pattern of failure to enforce the regulation with respect to substantially the same violation committed by others. If the state agency had actual or constructive knowledge of the violation for more than 1 year and failed to give the violator notice of the requirements of the regulation, the agency is stopped from enforcing the regulation against the person unless the person had prior actual knowledge of the regulation's requirements within the 1-year period. The bill takes effect upon becoming a law.

IV. CONSTITUTIONAL ISSUES:

A. Municipality/County Mandates Restrictions:

The bill refers to the "state" or "a state agency" that regulates the activities of any professions, occupation, or business, it is unclear on whether the bill's limitations of enforcement also apply to local governments which impose regulation on professions, occupations, or businesses and revenue generated from such activities. Article VII, Section 18 of the Florida Constitution applies to any law: requiring cities or counties to spend funds or to take action requiring expenditure; reducing the authority of cities or counties to raise revenues in the aggregate as such authority existed on February 1, 1989; and reducing the percentage of a state tax shared with cities and counties as an aggregate on February 1, 1989.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Section 24(a) of Article I of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Section 19(f) of the Florida Constitution.

V. ECONOMIC IMPACT AND FISCAL NOTE:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

It can be argued that regulation of professions, occupations, and businesses imposes economic and social costs: by limiting competition by restricting entry into an occupation or business; and by controlling activities of persons and businesses subject to the regulation. Legitimate businesses and licensed professionals who comply with applicable business or professional regulation will incur the costs of the regulation while the bill allows other persons or businesses to engage in the practice of the profession or business without meeting any requirements mandated by statutes as long as the person may assert a lack of prior knowledge of the applicable regulation. For instance, this would allow both licensed and unlicensed persons to engage in the practice of a profession and commit incompetent acts without complying with applicable practice standards. Analogously, the bill allows persons to operate businesses without complying applicable regulations. Consumers of the services and products of professions, occupations, and businesses will incur additional costs to find competent and honest professionals and businesses and to redress any injury or harm that does not constitute a felony they incur as a result of their doing business with a professional or business.

C. Government Sector Impact:

The bill will have a significant and indeterminate fiscal impact on the state and state agencies that are required to enforce criminal and civil statutes and administrative remedies to protect consumers from unsound and dishonest business practices and the incompetent practices by professionals which do not constitute a felony.

VI. TECHNICAL DEFICIENCIES:

None.

VII. RELATED ISSUES:

The bill imposes limitations on the enforcement of regulation by any state agency that regulates the activities of any profession, occupation, or business from initiating a criminal, civil, or administrative proceeding against a person until the agency first informs the person of the requirements of the regulation and then gives the person a reasonable amount of time to comply. The bill provides that if the agency had actual or constructive knowledge of the violation for more than 1 year and failed to give the violator notice of the requirements of the regulation within the 1-year period the agency is stopped from enforcing the regulation against the person unless the person had prior knowledge of the regulation's requirements during the 1-year period. In effect, the bill imposes a time limit on the commencement of enforcement of investigations of alleged regulatory violations. The case law indicates that the existing statute of limitations

applicable to civil actions or the parallel concept in equity, the doctrine of laches, are inapplicable to administrative proceedings. These defenses may not serve to bar proceedings conducted by the sovereign to protect the public. Farzad v. Department of Professional Regulation, Board of Medical Examiners 443 So.2d 373 (Fla. 1st DCA 1983).

VIII. AMENDMENTS:

#1 by Governmental Reform and Oversight:

With some exceptions, requires each agency with regulatory jurisdiction over professions, occupations, and businesses, to issue a notice of noncompliance as a response to a violation of any rule the violation of which would be a minor violation. Provides legislative intent and defines the term “minor violation” for purposes of the act. Requires an agency to review all of its rules for designation of minor violations appropriate for the issuance of a notice of a minor violation and requires each agency to report to the Governor or the Governor and the Cabinet. Requires all rules of the Department of Business and Professional Regulation and its boards to become effective on January 1, or July 1 of each year following the adoption of the rule, with some specified exceptions. (WITH TITLE AMENDMENT)

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