

Memorandum

Date: September 14, 2004

To: Financial Impact Estimating Conference

From: Howard E. Adams
Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.,
and
Victoria L. Weber
Hopping, Green & Sams, P.A.
Representing Below-Named Parties

Re: Financial Impact—Sales Tax Amendments, Extending Sales Tax to Services;
Granting of Exemptions to Sales Tax by the Legislature.

The Florida Association of Realtors, Florida Institute of Certified Public Accountants, Florida Retail Federation, Inc., the National Federation of Independent Businesses, Inc.(Florida), Florida Chamber of Commerce, Florida Minerals and Chemistry Council, Inc., Florida Fruit and Vegetable Association, Inc., Florida Farm Bureau Federation, Inc., Florida Cattlemen's Association, Inc., Florida Association of Broadcasters, Florida Manufacturer's Association, Florida Nursery Growers & Landscape Association, Sunshine State Milk Producers, Inc., and the Printing Association of Florida (hereafter referred to as the Businesses) are challenging the Sales Tax Amendments and their placement on the ballot.

These businesses are concerned that the Amendments do not adequately explain to voters that the amendments themselves, absent further legislative action, would impose new taxes upon services and goods that are currently not taxed by Florida law. The amendments will be challenged on that ground as well as others that are not relevant to the work of the Financial Impact Estimating Conference (hereafter referred to as FIEC). It is imperative that the Financial Impact Statement being prepared by the FIEC clearly and unambiguously put voters on notice of the full and probable range of impacts, which would result if the amendments were adopted by the people. This memorandum is offered to assist the FIEC in meeting the statutory command that it provide "a clear and unambiguous financial impact statement" of "the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative." See, Section 100.371, Fla. Statutes (2005).

The businesses listed above are concerned with the amendments entitled, "Legislative Determination that Sales Tax Exemptions Serve a Public Purpose" ("Exemption Repeal Amendment"), and "Extending Existing Sales Tax to Non-Taxed Services" (Services Tax Amendment"). The Businesses express no opinion at this time as to the financial statement on the associated amendment entitled "Initiative Directing Manner by Which Sales Tax Exemption are Granted" (Single Subject Amendment). This appears to have minimal fiscal impact.

The Exemption Repeal Amendment and the Services Tax Amendment purport to be self-executing. Absent legislative action, the amendments—not speculative future legislative action—would result in imposition of new taxes. The voter is entitled under the law to know of this "probable" financial impact of the two amendments. In particular, the voters should be informed of the "increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative." Article XI, Section 5, Florida Constitution, and Section 101.371(6) (a), Florida Statutes, (2005).

While it is appreciated that the Legislature can intervene to prevent the potential \$80.997 billion tax increase¹, it must be recognized that the amendments, without more, would have that impact. Thus, any speculation by the FIEC as to whether the Legislature will act to mitigate the impact of the amendments is improper. The impact of the amendments, is an \$80.997 billion tax increase. The potential for the Legislature to intervene can be addressed by exercising the option available under the statute of "setting forth a range of potential impacts." FIEC should not ignore the potential impact by calling it "indeterminate" because legislative action is speculative. While the range of potential impacts is admittedly quite wide, it is not indeterminate, as explained below.

Pursuant to the constitution and statute, FIEC must review, analyze, and estimate the financial impact of amendments to the state constitution. In its charge, the legislature has directed that FIEC "shall complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative." Section 100.371(6) (a), Florida Statutes, (2005), emphasis added. These amendments, if no action is taken by the legislature, will result in the repeal of all exemptions and exclusions, (except those enumerated), and a commensurate increase in sales tax revenues. Absent any action by the legislature, there will be new revenues which should be revealed to the voters in the text of the financial impact statements. These taxes are not speculative and can be determined. These taxes can be readily identified through previous research and information formulated by several of the members of this group. The Revenue

¹ The total is derived by taking the total of all exemptions to the sales tax and subtracting exemption line items, numbered 4, 16, 17, 18, 19, 20, 21, 95, 96, 97, 156, 157, 159, 173, 195, 198, 201, and 202. This represents a total of \$61.142 billion. The subtracted items are line items for food, prescription drugs, residential rent, electricity and heating fuels exempt from review by the amendment. The total also encompasses all asterisk provisions of the 2005 Handbook including the sale for resale, tangible personal property and agricultural products for resale exemptions. The services amendment totals \$19.855 Billion and includes all services outlined in the NAICS code including the health services component. The separate amendment on services does not exclude health care services from review. The grand total of both amendments is a potential tax increase of \$80.997 Billion if no exemptions for goods or services are reenacted under either amendment.

Estimating Conference analyzing the fiscal impact analysis of legislation looks at current law using current administrative practices and thus makes its estimates. Here, the current text of the amendment and its impacts should it pass must be utilized to form the estimate of the increase in revenues.

In order to estimate the financial impact, the Amendments themselves must be reviewed and the full range of impact given importance. Each amendment will be reviewed in turn.

A. Exemption Repeal Amendment

This Amendment provides for a review by the legislature prior to July 1, 2008 and prior to the first day of July every tenth year thereafter, of "all exemptions from the sales tax existing on or created subsequent to the effective date of this amendment."

The amendment itself excludes from that review, the current exemptions for food, prescription drugs, health services (actually an exclusion), residential rent, electricity and heating fuel. The amendment then provides that if an exemption is not reenacted in legislation adopted by the legislature as serving a public purpose, then that exemption will be eliminated.

Many items which were never taxed would be taxed under this Amendment. No provision is made to exclude from the reach of the Amendment, items purchased for resale, tangible personal property for resale or other items not presently within the exemption dollar total in the Tax Handbook analysis. Given these assumptions, the fiscal impact should be a range from \$0 to \$61.142 Billion. This figure is detailed in footnote one as provided. The "elimination" of those exemptions has a substantial fiscal impact and should be included. Assuming the Legislature does act and reenacts all the exemptions and exclusions then the amendment has no fiscal impact. There could easily be expressed a range of actions, which would inform the voter of the possible range of fiscal impacts.

In estimating fiscal impacts, the FIEC can rely on no better tax information than that prepared by several members of the FIEC. This is published annually in the Florida Tax Handbook, jointly published by the Florida House, Florida Senate, the Florida Department of Revenue and the Office of Economic and Demographic Research. This publication details the sales taxes and exemptions. The FIEC can rely on these figures and is urged to use these figures for a range of possibilities depending upon the actions of the legislature in retaining or allowing certain exemptions to be eliminated should this item reach the ballot. *See, Florida Tax Handbook Including Fiscal Impact of Potential Changes, published by Florida House and Senate et al., pages 107 - 120, 2005 edition (attached hereto as appendix A).*

That potential impact, while huge in its scope, is obviously dependent upon the actions taken by the Florida Legislature. Should the legislature take no action to reenact exemptions, then all exemptions would be eliminated and \$61.142 billion in taxes would be imposed. Should the legislature reenact all the exemptions or any part of the exemptions, then the fiscal impact would vary along the range anywhere from \$0 to \$61.142 billion. The amendment could potentially collect almost three times the current

amount collected under the sales tax and would have a similar impact on local options sales taxes used at the local level. Because of the seriousness of this impact and because legislative review could be brief or non-existent, it is critical that the financial impact statement to be placed on the ballot "clearly and unambiguously" inform the voters of the range of possible impacts for the amendment.

What is critical here and cannot be countenanced is the failure of the amendment itself to acknowledge that the imposition of these taxes by "elimination" of the exemptions would be what raises the significant amounts of revenue. The businesses wish to emphasize that the FIEC should utilize the words "new tax revenues" in placing its explanation on the ballot. The amendment euphemistically tries to avoid such controversial words by stating that all exemptions not reenacted will be "eliminated." That "elimination" has the force and effect of raising taxes. In order to fully inform the public, the businesses believe that the ballot summary and the financial information statement to be prepared for public review should be more detailed and include references to increased revenues so that the public is not misled or fooled by the effect of the amendment.

Finally, the amendments may or may not give ample time for the Florida legislature to review all exemptions on a timely basis nor to pass legislation on a timely basis. Some 300 individual pieces of legislation with proposed findings of public purpose and economic impact must be passed. These requirements could result in simple failure of the legislature to act because of time constraints or preoccupation with other matters.

Accordingly, the Businesses submit the following statement for consideration by the FIEC for consideration and placement on the ballot.

This amendment repeals existing exemptions from the sales tax, but allows the legislature to reenact and continue the exemptions with a finding that each serves a public purpose. The maximum, new tax revenues that could be generated under the amendment from the existing exemptions that are automatically repealed total \$61.142 billion. The financial impact ranges from \$0 to \$61.142 billion depending on legislative action under the review process to retain or create exemptions.

The Businesses hereby submit that this brief explanation would provide information necessary for the average voter to make a determination of whether or not to vote for such an amendment.

B. Services Tax Amendment

This amendment on its face provides that the legislature, except for employee salaries and benefits, will review prior to July 1, 2008 each "service rendered for compensation that is not taxed under the existing sales tax". The legislature must then enact exemptions or the service will be subject to the existing sales tax effective January 1, 2009. The amendment then requires use of the NAICS codes as published by the Census Bureau to be utilized in the review of each single service for exemption from taxation.

Again, the best source of information to determine the fiscal impact of taxing services is the Florida Tax Handbook. There, beginning on page 117 and continuing thru page 120,

of the 2005 edition, the Handbook details the services excluded from the present sales tax and gives an estimate of the total amount of revenue raised if the sales tax were applied to these services. That amount is \$19.855 Billion. Should the legislature take no action to exempt services, then all services would be taxed and \$19.855 billion in taxes would be imposed. Should the legislature reenact all or any part of the current exclusions, then the potential fiscal impact would vary along the range from \$0 to \$19.855 billion.

This amendment, if passed by the people, would have the effect of creating new taxes and generating new revenue both for local governments and for state government. To clearly inform the voting public, a statement must be made that new revenues would be imposed and additional revenue collected by the state and local governments upon the failure of the legislature to act. To do anything less, would not accurately inform the voters of the substantial fiscal impact the amendment would have. The Amendment in fact would result in the collection of nearly the same amount of sales tax currently collected and would have a similar impact on local options sales taxes used at the local level. Because of the seriousness of this impact and because legislative review could be brief or non-existent, it is critical that the financial impact statement to be placed on the ballot "clearly and unambiguously" inform the voters of the range of potential impacts and the possibility that substantial taxes could be raised by the amendment.

Finally, as with the other amendment this one may or may not give ample time for the Florida legislature to review all exclusions on a timely basis nor to continue exclusions on a timely basis. Some 150 individual pieces of legislation with proposed findings of public purpose and economic impact must be passed. These requirements could result in simple failure of the legislature to act because of time constraints or preoccupation with other matters.

Accordingly, the Businesses submit the following statement for consideration by the FIEC for consideration and placement on the ballot.

This amendment subjects all services rendered for compensation, except salaries and benefits, to review under the existing sales tax. The legislature may exempt services from taxation if the exemption serves a public purpose. The maximum tax revenues created by the amendment from the automatic repeal of current exclusions for services total \$19.855 billion. The financial impact ranges from \$0 to \$19.855 billion depending on legislative action under the review process to retain or create exemptions.

The Businesses hereby submit that this brief explanation would provide information necessary for the average voter to make a determination of whether or not to vote for such an amendment. Please contact us, if you have any questions regarding this matter or if we can be of further assistance.