

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB EDCA 10-02 Florida Infrastructure Fund Partnership
SPONSOR(S): Economic Development & Community Affairs Policy Council
TIED BILLS: **IDEN./SIM. BILLS:**

| | REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|--------------|---|--------|---------|----------------|
| Orig. Comm.: | Economic Development & Community Affairs Policy Council | | Tecler | Tinker |
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SUMMARY ANALYSIS

The bill creates the Florida Infrastructure Fund Partnership (“Partnership”), a contingent tax credit program designed to leverage investment and private funding for state infrastructure projects. The Partnership is authorized to raise \$350 million in private funds for direct investment in infrastructure projects, including water or wastewater systems, communication systems, power systems, transportation systems, renewable energy systems, ancillary or support systems, or other strategic infrastructure needs. Tax credits are available for redemption no earlier than 2023 and are used only as a guarantee on an investment partner’s principal investment. The Florida Opportunity Fund would serve as the general partner of the program. A separate entity, the Florida Infrastructure Investment Trust would administer the tax credit program.

The Revenue Estimating Conference adopted an annualized negative indeterminate impact. This bill exposes the state to contingent tax credits ranging from \$0 to \$350 million, beginning in 2023 at the earliest.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

The Florida Opportunity Fund

The Florida Opportunity Fund, Inc. ("Fund") was created by the Florida Legislature in 2007 to mobilize and increase venture capital available to Florida businesses. Sections 288.9621 - 288.9625 F.S., collectively referred to as the Florida Capital Formation Act, provided for the authorization of the entity. Initially, the Fund was set up as a "fund-of-funds" program that emphasized investment in seed capital and early stage venture capital funds. However in 2009, the Florida Legislature expanded the Fund's mandate under the Florida Capital Formation Act to create direct investment programs that invest in individual businesses and infrastructure projects. The fund may not use its original appropriation of \$29.5 million to make direct investments but may raise private capital or utilize other public funding sources. In 2010, the Fund launched a direct investment program with the Florida Energy and Climate Commission, a state entity within the Executive Office of the Governor. The progress of direct investments must be included in the fund's annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

The Fund is organized as a private, not-for-profit corporation under Chapter 617, F.S., and administered by Enterprise Florida. Enterprise Florida selects a five-person appointment committee, which selects a board of directors for the Fund. The board then selects a Florida Opportunity Fund investment manager. Currently, the Fund is managed by Florida First Partners, a joint venture between the Credit Suisse Customized Fund Investment Group ("CFIG") and Florida-based MILCOM Venture Partners ("MVP"). CFIG serves various client types including the states of Indiana and Oregon, endowments, family offices, and high net worth individuals. MVP is a venture capital firm focused on the intersection of the commercial and defense markets. MVP manages two venture capital funds: MILCOM Technologies, a seed-stage investment fund; and OnPointTechnologies, an early-stage venture capital fund.

Infrastructure Funding in Florida

Infrastructure may be defined as the physical structures or facilities a society utilize to facilitate the operation of its economy. Permanent assets, such as infrastructure, are a precondition to modern transportation, communication, and commerce. Infrastructure encompasses a wide range of assets, such as port facilities, water and wastewater systems, transportation systems and communication

systems. Due to the large size and cost, and often monopolistic characteristics of these assets, infrastructure projects have historically been financed, built, owned and operated by state and local governments. Today, public entities solicit grants, borrow capital or issue bonds to pay for public infrastructure projects.

Contingent Tax Programs

Contingent tax credits help to raise money for state-affiliated venture capital initiatives without immediately impacting state revenues. Contingent tax credit programs are statutory state guarantees established to incentivize venture capital investment into state target industries. Seven states, Arkansas, Iowa, Michigan, Ohio, Oklahoma, South Carolina and Utah, have adopted programs authorizing the issuance of tax credits to investors in state-sponsored fund of funds. However, there are not any states that have created infrastructure funding programs similar to the one proposed in this bill.

EFFECTS OF PROPOSED CHANGES

Florida Infrastructure Fund Partnership

The bill creates s. 288.9627, F.S., which authorizes The Florida Opportunity Fund (“Fund”) to facilitate the creation of the Florida Infrastructure Fund Partnership (“Partnership”). The bill provides that the Partnership is organized and operated under ch. 620, F.S., as a private, for-profit, limited or limited liability partnership and is not an instrumentality of the state.

The Fund is authorized to loan no more than \$350,000 to the Partnership for use in paying initial expenses incurred in the organization of the partnership and the solicitation of investment partners (or “partners”). Further, the Fund, as general partner, is responsible for managing the business affairs of the Partnership, including, but not limited to:

- The engagement of its investment manager(s) to assist with the management of the Partnership.
- Soliciting and negotiating the terms, contracting, and receiving of investment capital.
- Receiving investment returns, paying investment partners, approving investment, and providing financial and strategic returns.

The bill authorizes the Partnership to make direct investments in Florida-based infrastructure projects that foster economic development and meet a critical infrastructure need of the state. Infrastructure projects eligible for investment include systems and facilities related to water and wastewater, power, transportation, communications and renewable energy.¹ Capital for such investments must be raised by the Partnership through “commitment agreements” with investment partners approved by the Fund’s board.² The bill provides for the issuance of certificates for future contingent tax credits to guaranty the return of investment capital from the Partnership to the Partnership’s investment partners.³ Contingent tax credits would only be used to guarantee the principal investment to the partners, but not any profit.

¹ The bill defines “Infrastructure project” to mean a capital project in the state for a facility or other infrastructure need of the state, a county, or a municipality with respect to any of the following: water or wastewater systems, communication system, power system, transportation system, renewable energy system, ancillary or support system for any of these types of projects, or other strategic infrastructure of the state, the county or municipality.

² The bill defines “commitment agreement” to mean a contract between the partnership and an investment partner under which the partner commits to providing a specified amount of investment capital in exchange for an ownership interest in the partnership.

³ Issued by the Florida Infrastructure Investment Trust.

The bill also requires that the total principal investment payable to the Partnership and the total amount of contingent tax credits to be issued by the Department of Revenue shall not exceed \$350 million. However, if the Partnership fails to obtain investment commitments totaling at least \$75 million by December 31, 2011, then the Partnership must cancel all agreements and return investment amounts back to the investment partners.

Limits on Investments

The Partnership shall only invest in infrastructure projects:

- That fulfill a critical need of the state;
- That raised equity or debt capital from other sources. The total amount invested in such infrastructure projects must be at least twice the amount invested by the Partnership; and
- Where measures or restrictions are legally in place to ensure that no infrastructure project will be fraudulently closed.

The Partnership may not invest more than 20 percent of its total funds available for investment in any single infrastructure project.

In addition, the Partnership must make investments in infrastructure projects based on an evaluation of the following factors:

1. The written business plan for the project, including all expected revenue sources.
2. The likelihood of the project in attracting operating capital from investors, grants, or other lenders.
3. The management team for the proposed project.
4. The project's job creation potential in this state.
5. The financial resources of the company proposing the project.
6. The presence of reasonable safeguards to ensure the project provides a continuing benefit for residents of the state.
7. Other factors deemed by the partnership to be relevant to the likelihood of the success of the project and not inconsistent with this section.

In addition, the bill prohibits the Partnership and the Florida Opportunity Fund from pledging the credit or taxing power of the state or any political subdivision of the state. Obligations of the Partnership and the Fund are not obligations of the state or any political subdivision of the state. Further, the bill forbids the Partnership or the Fund from making its debts payable out of any resources except those of the Partnership or the Fund.

The bill also provides that the Partnership shall not accept any investment from or make any investment in any infrastructure project with a financial institution or company identified in s. 215.472, F.S., regarding terrorist nations or any scrutinized company as that term is defined in s. 215.473, F.S., relating to Iran and Sudan.

Reporting Requirements

The bill requires an annual report to be issued by the Partnership concerning the Partnership's activities to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The annual report, at a minimum, must include:

- An accounting of the amount of investments raised and disbursed by the Partnership and the progress of the Partnership, including the progress of infrastructure projects that have been provided direct investment by the Partnership.
- A description of the benefits to this state resulting from the Partnership, including a list of infrastructure projects and the benefit of those projects to the state or region, the number of businesses and associated industries positively affected; the number, types, and average annual wage of jobs created or maintained, and the positive impact on Florida's economy.
- Independently audited financial statements, including statements that show receipts and expenditures during the preceding fiscal year for the operational costs of the Partnership.

The Florida Infrastructure Investment Trust

The bill also creates s. 288.9628, F.S., to establish the Florida Infrastructure Investment Trust ("Trust"), a state beneficiary public trust, to be governed by an independent board of trustees ("board"). The board would be comprised of the Chief Financial Officer; the Executive Director of the Office of Trade, Tourism, and Economic Development and the Vice Chair of Enterprise Florida, Inc., or their respective designees. The bill allows an administrative officer to act on the behalf of the Trust under the direction of the board. The bill prohibits board members and the administrative officer from receiving compensation and having a financial interest in any investment partner.

The bill authorizes the Trust to engage consultants and retain professional services, issue and sell certificates, expend funds and invest funds, and contract, bond or insure against loss. Additionally, the Trust may seek reimbursements for expenses by charging a fee of no more than .25 percent for the issuance of certificates to investment partners.

The bill authorizes the Trust to issue certificates for redeemable tax credits to partners that make equity investments in the Partnership. Certificates issued by the Trust and related tax credits shall not exceed a total aggregate of \$350 million of tax credits. Further, a certificate issued by the trust must have a specific calendar year maturity date designated by the trust of not less than twelve years after the date of issuance.

Notification

On the maturity date of the certificate, the bill provides that if an investor has not received its full principle investment, then the Partnership shall provide written notification of this circumstance to each partner.

The notification must include:

- An estimate of the fair market value of the Partnership's assets.
- The total capital investment of all partners.
- The total amount of distributions received by the partners.
- The amount of the tax credit for which the partner is entitled to be issued.

Election of Tax Credits

Upon receipt of notice from the Partnership, the bill provides each partner a one-time election to:

1. Receive a tax credit certificate equaling its net capital investment;

2. Authorize the Trust to sell the tax credits on behalf of the partner with the proceeds of the sale to be paid by the Trust to the partner; or

3. Maintain their investment in the Partnership.

The bill requires the partner to provide written notification to the Partnership and the Trust of its election within 30 days after the partner's receipt of notification from the Partnership. Failing to provide a timely notice will result in the investment partner being deemed to have elected to maintain investment in the Partnership.

Issuance of Tax Credits

In the event that a partner becomes entitled to claim a tax credit under the program, the bill provides that the partnership will certify the amount of credit, the applicable taxpayer, and the tax against which the credit can be applied to the Department of Revenue ("DOR"). The bill requires that tax credits certified with DOR may not exceed the investment partner's "net capital investment"⁴. However, the bill stipulates that the amount of tax credits claimed for a certificate in a calendar year may not exceed 25 percent of the amount for which the certificate is issued. The bill requires the partner to agree in writing to transfer its interest in the Partnership to the Florida Opportunity Fund before receiving the tax credit.

Sale of Tax Credits

The bill allows the Florida Infrastructure Investment Trust to sell certificates on behalf of investment partners. The bill authorizes the Trust sell a certificate in an amount no more than the lesser of the initial amount of the certificate issued or at an amount no greater than 107 percent above the partner's net capital investment. Further, the bill prohibits partners with tax liabilities to the state from selling such certificates. Before receiving the proceeds of the Trust's sale of tax credits, the bill requires the partner to agree in writing to transfer its interest in the Partnership to the Florida Opportunity Fund.

The bill stipulates that within 30 days following the Trust's sale of the tax credits, the Trust must notify the Partnership and apply to DOR for the issuance of a tax credit certificate or certificates in the name of the person or persons who purchased the credits. If the partner's tax credits have been sold by the trust to more than one person, the bill requires DOR to issue tax credit certificates to such persons in such amounts as designated by the trust in the application. Further, if the trust is unable to sell the partner's tax credits within 90 days, the bill provides the investment partner with the option to modify the election choice. The bill provides deadlines and administrative instructions for processing the application.

Tax Offset

The bill provides that tax credits issued by DOR can be used by the owner as an offset against any state taxes owed to the state under chapter 212, F.S, chapter 220, F.S., or chapter 624, F.S., i.e., sales, corporate, and premium insurance taxes. However, the owner of the tax credit may elect to claim the tax credit as a refund of taxes paid rather than applied as an offset against eligible taxes.

The bill requires Department of Revenue to provide the Trust with a written assurance that the certificates issued by the Trust will be honored by the Department. Further, the bill allows the Department of Revenue to provide information relative to tax credits to the Florida Infrastructure Fund Partnership and the Florida Infrastructure Investment Trust.

The bill provides for an effective date of July 1, 2010.

⁴ The bill defines "net capital investment" to mean an amount equal to the difference between the total investment capital actually advanced by the investment partner to the partnership and the amount of the aggregate actual distributions received by the investment partner.

B. SECTION DIRECTORY:

Section 1: Amends s. 288.9621, F.S., revising the short title.

Section 2: Amends s. 288.9622, F.S., relating to the findings and intent of the Legislature.

Section 3: Amends s. 288.9623, F.S., to provide certain definitions.

Section 4: Creates s. 288.9627, F.S., authorizing the creation of the Florida Infrastructure Fund Partnership and providing duties and limitations of the Partnership.

Section 5: Creates s. 288.9628, F.S., authorizing the creation of the Florida Infrastructure Investment Trust, establishing duties for the Trust, issuance of certificates, and applications for tax credits.

Section 6: Amends s. 213.053, F.S., to create paragraph (z) relating to confidentiality and information sharing.

Section 7: Provides for an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Revenue Estimating Conference adopted an annualized negative indeterminate impact. This bill exposes the state to contingent tax credits ranging from \$0 to \$350 million, beginning in 2023 at the earliest.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not affect local tax revenue sources; however, an infrastructure project built in a local municipality may provide an indeterminate but positive fiscal impact.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The economic impact on the private sector could be positive or negative depending on the Florida Infrastructure Fund Partnership's ability to target and fund projects with a high potential for success.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

Article VII, section 10 of the state constitution prohibits the state, any local government, or their agents from becoming a joint owner with, or stockholder of, or from giving, lending or using its taxing power or credit to aid any corporation, association, partnership or person.⁵ The supreme court recently restated its interpretation of this constitutional prohibition, construing the restriction related to the lending of credit to “not just the use of public funds but the imposition of a new financial liability and a direct or indirect obligation to pay a debt of a third party.”⁶ The bill’s provisions regarding contingent tax credits does not obligate the state in any way to the debts of the borrower owed to the borrower’s creditors. It appears that the contingent tax credits would not violate the constitutional provision described based on the court’s narrow interpretation of this provision.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

⁵ Art. VII, Section 10, Fla. Const. Pledging credit.— Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person; but this shall not prohibit laws authorizing:

(a) the investment of public trust funds;

(b) the investment of other public funds in obligations of, or insured by, the United States or any of its instrumentalities;

(c) the issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or port facilities, or (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects. If any project so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property.

(d) a municipality, county, special district, or agency of any of them, being a joint owner of, giving, or lending or using its taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities with any corporation, association, partnership or person.

⁶ *Jackson-Shaw Company v. Jacksonville Aviation Authority*, 2008 WL 5245640, p. 19 (Fla.) Dec. 18, 2008.