

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 959 State and Local Government Relations with Cuba or Syria

**SPONSOR(S):** Government Operations Subcommittee; Bileca and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1144

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	15 Y, 0 N, As CS	Meadows	Williamson
2) Judiciary Committee	17 Y, 0 N	Cary	Havlicak
3) State Affairs Committee	16 Y, 0 N, As CS	Meadows	Hamby

### SUMMARY ANALYSIS

The State Board of Administration (SBA or "board") is established by Article IV, s. 4(e) of the Florida Constitution, and is composed of the Governor as Chair, the Chief Financial Officer as Treasurer, and the Attorney General as Secretary. The board derives its powers to oversee state funds from Art. XII, Sec. 9 of the Florida Constitution.

The bill prohibits the SBA from serving as a fiduciary with respect to voting on a proxy resolution that advocates for expanded United States trade with Cuba or Syria. In addition, the SBA cannot vote in favor of a proxy resolution that would expand United States trade with Cuba or Syria. The bill requires the SBA to report on its activities in its Annual Proxy Voting Report.

The bill creates a prohibition against contracting with companies that have business operations in Cuba or Syria. It prohibits a company with business operations in Cuba or Syria from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of \$1 million or more.

The bill also provides that a contract with an agency or local government, after July 1, 2012, must include a provision allowing for termination if the company is found to have submitted a false certification or has been engaged in business operations in Cuba or Syria.

The bill requires the Department of Management Services to submit a written notice apprising the United States Attorney General of the inclusion of companies with business operations in Cuba or Syria within the provisions of s. 287.135, F.S.

The bill does not appear to create a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Current Situation**

###### State Board of Administration

The State Board of Administration ("SBA" or "board") is established by Article IV, Sec. 4(e) of the Florida Constitution, and is composed of the Governor as Chair, the Chief Financial Officer as Treasurer, and the Attorney General as Secretary. The board members are commonly referred to as "Trustees." The board derives its powers to oversee state funds from Art. XII, Sec. 9 of the Florida Constitution.

The SBA has responsibility for managing investments for the Florida Retirement System (FRS) Pension Plan and for administering the FRS Investment Plan, which represent approximately \$125.1 billion, or 85%, of the \$147.5 billion in assets managed by the SBA, as of November 30, 2011.<sup>1</sup> The SBA also manages 33 other investment portfolios, with combined assets of \$21.7 billion<sup>2</sup>, including the Florida Hurricane Catastrophe Fund, the Florida Lottery Fund, the Florida Pre-Paid College Plan, and various debt-service accounts for state bond issues.

###### State Sponsors of Terrorism

Countries that are determined by the United States Secretary of State to have repeatedly provided support for acts of international terrorism are designated as "State Sponsors of Terrorism" and are subject to sanctions under the Export Administration Act,<sup>3</sup> the Arms Export Control Act,<sup>4</sup> and the Foreign Assistance Act.<sup>5</sup> The four main categories of sanctions resulting from designations under these acts are: restrictions on U.S. foreign assistance, a ban on defense exports and sales, certain controls over exports of dual use items, and miscellaneous financial and other restrictions.<sup>6</sup> Some of the miscellaneous restrictions include opposition to loans by the World Bank and other financial institutions, removal of diplomatic immunity to allow victims of terrorism to file civil lawsuits, denial of tax credits to companies and individuals for income earned in named countries, authority to prohibit U.S. citizens from engaging in transactions without a Treasury Department license, and prohibition of Department of Defense contracts above \$100,000 with companies controlled by terrorist-list states.<sup>7</sup>

The four countries currently designated by the U.S. Secretary of State as "State Sponsors of Terrorism" are Cuba, Iran, Sudan, and Syria.<sup>8</sup>

###### Divestiture from Cuba

Current law prohibits the SBA from investing in stocks, securities, or other obligations of any institution or company domiciled in the United States that does business of any kind with Cuba, in violation of federal law.<sup>9</sup> In addition, the SBA is prohibited from investing in any company domiciled outside of the United States if the President of the United States has applied sanctions against the country in which that company is domiciled.<sup>10</sup>

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<sup>1</sup> See State Board of Administration of Florida, *Monthly Performance Report to the Trustees*, November 30, 2011, issued December 31, 2011, at 7 (on file with the Government Operations Subcommittee).

<sup>2</sup> *Id.*

<sup>3</sup> See Section 6(j), U.S. Export Administration Act.

<sup>4</sup> See Section 40, U.S. Arms Export Control Act.

<sup>5</sup> See Section 620A, U.S. Foreign Assistance Act.

<sup>6</sup> U.S. Department of State website, <http://www.state.gov/s/ct/index.htm>, Office of Coordinator for Counterterrorism, State Sponsors of Terrorism, last viewed on February 22, 2012.

<sup>7</sup> U.S. Department of State website, <http://www.state.gov/j/ct/c14151.htm>, Country Reports on Terrorism, last viewed on February 22, 2012.

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

<sup>9</sup> Section 215.471, F.S.

<sup>10</sup> *Id.*

Florida law also provides that state agencies are prohibited from investing in any financial institution or company domiciled in the United States, which directly through the domestically domiciled company or a foreign subsidiary, issues a loan, extends credit, or makes purchases or trades goods with Cuba.<sup>11</sup> State agencies also are prohibited from investing in any foreign company if the President of the United States has applied sanctions to the country in which that company is domiciled.<sup>12</sup>

#### Divestment of Securities

Divestment of securities is one method of applying economic pressures to companies, groups, or countries whose practices are not condoned by shareholders. Divestment may be used in conjunction with or in lieu of other sanctioning methods such as economic embargoes, and diplomatic and military activities. Alternatively, divestment may be used as a protective device if a particular investment carries a high level of risk to the performance of a fund.<sup>13</sup>

The State of Florida has practiced divestment four times in modern history.<sup>14</sup> From 1986 to 1993, the Legislature directed the SBA to divest from companies doing business with South Africa.<sup>15</sup> Beginning October 1, 1988, the Legislature placed restrictions on investments in any institution or company doing business in or with Northern Ireland.<sup>16</sup> From 1997 until 2001, the SBA made a decision to divest of 16 tobacco stocks due to pending litigation involving the state and those companies.<sup>17</sup> From 2007 to the present, the Legislature has directed the SBA to divest funds from companies that are actively seeking and providing certain business opportunities with Iran and Sudan.<sup>18</sup>

#### Procurement of Commodities and Services

The process for the procurement of commodities and contractual services by state agencies<sup>19</sup> provides requirements for fair and open competition among vendors, agency maintenance of written documentation that supports procurement decisions, and implementation of monitoring mechanisms.<sup>20</sup>

The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include overseeing agency implementation of the procurement process,<sup>21</sup> creating uniform agency procurement rules,<sup>22</sup> implementing the online procurement program,<sup>23</sup> and establishing state term contracts.<sup>24</sup> The agency procurement process is partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through DMS.

#### *Scrutinized Companies*

Current law prohibits state and local governments from contracting with scrutinized companies<sup>25</sup> for goods or services.<sup>26</sup> Companies on the Scrutinized Companies with Activities in Sudan List or on the

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<sup>11</sup> Section 215.472(1), F.S.

<sup>12</sup> Section 215.472(2), F.S.

<sup>13</sup> See generally Cody Ferguson, *Fallacies on Divestment, Pensions & Investments*, January 7, 2008

<http://www.pionline.com/article/20080107/PRINTSUB/241283606> (last visited February 9, 2012).

<sup>14</sup> Information provided to Government Operations Subcommittee staff on February 3, 2012, by Mr. Ron Poppell, Senior Defined Contribution Programs Officer, State Board of Administration.

<sup>15</sup> *Id.*

<sup>16</sup> Section 121.153, F.S.

<sup>17</sup> Information provided to Government Operations Subcommittee staff on February 3, 2012, by Mr. Ron Poppell, Senior Defined Contribution Programs Officer, State Board of Administration.

<sup>18</sup> See s. 215.473, F.S.

<sup>19</sup> Section 287.012(1), F.S., defines "agency" to mean "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government." The term "does not include the university and college boards of trustees or the state universities and colleges."

<sup>20</sup> See part I of chapter 287, F.S.

<sup>21</sup> See ss. 287.032 and 287.042, F.S.

<sup>22</sup> See ss. 287.032(2) and 287.042(3), (4), and (12), F.S.

<sup>23</sup> See s. 287.057(23), F.S.

<sup>24</sup> See ss. 287.042(2), 287.056, and 287.1345, F.S.

<sup>25</sup> Section 215.473(1)(t), F.S.

<sup>26</sup> See s. 287.135, F.S.

Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List are prohibited from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of \$1 million or more.<sup>27</sup> In addition, any contract with an agency or local governmental entity for goods or services of \$1 million or more, entered into or renewed on or after July 1, 2011, must contain a provision that allows for the termination of the contract, at the option of the awarding body, if the company is found to have submitted a false certification or has been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List.<sup>28</sup> Current law allows an agency or local governmental entity to make a case-by-case exception to the prohibition if certain conditions are met.<sup>29</sup>

An agency or local governmental entity must require a company that submits a bid or proposal for, or that otherwise proposes to enter into or renew, a contract with the agency or local governmental entity for goods or services of \$1 million or more to certify that the company is not a scrutinized business operation under s. 215.473, F.S.<sup>30</sup> The certification must be submitted at the time a bid or proposal is submitted or before a contract is executed or renewed.<sup>31</sup>

### **Effect of Proposed Changes**

The bill prohibits the SBA from serving as a fiduciary with respect to voting on a proxy resolution that advocates for expanded United States trade with Cuba or Syria. In addition, the SBA cannot vote in favor of a proxy that would expand United States trade with Cuba or Syria. The bill requires the SBA to report on its activities in its Annual Proxy Voting Report.

The bill creates a prohibition against contracting with companies that have business operations in Cuba or Syria. It prohibits a company with business operations in Cuba or Syria from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of \$1 million or more.

The bill requires that any contract with an agency or local governmental entity for goods or services of \$1 million or more, entered into or renewed on or after July 1, 2012, contain a provision that allows for the termination of the contract, at the option of the awarding body, if the company is found to have submitted a false certification or is found to have business operations in Cuba or Syria.

The bill allows an agency or local governmental entity to make a case-by-case exception to the prohibition of contracting with a company which has business operations in Cuba or Syria if all of the following conditions are met:

- The business operations were made before July 1, 2012;
- The business operations have not been expanded or renewed after July 1, 2012;
- The agency or local government entity determines that it is in the best interest of the state or local community to contract with the company; and
- The company has adopted, has publicized, and is implementing a formal plan to cease business operations and to refrain from engaging in any new business operations.

An agency or local governmental entity must require a company that submits a bid or proposal for, or that otherwise proposes to enter into or renew, a contract with the agency or local governmental entity for goods or services of \$1 million or more to certify that the company is not engaged in business operations in Cuba or Syria. The certification must be submitted at the time a bid or proposal is submitted or before a contract is executed or renewed.

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<sup>27</sup> Section 287.135(2), F.S.

<sup>28</sup> Section 287.135(3), F.S.

<sup>29</sup> Section 287.135(4), F.S.

<sup>30</sup> Section 287.135(5), F.S.

<sup>31</sup> *Id.*

Within 30 days after the effective date of the bill, DMS must submit a written notice apprising the Attorney General of the United States of the inclusion of companies with business operations in Cuba or Syria within the provisions of s. 287.135, F.S.

The bill provides for an effective date of July 1, 2012.

**B. SECTION DIRECTORY:**

Section 1 amends s. 215.471, F.S., relating to Divestiture by the State Board of Administration.

Section 2 amends s. 287.135, F.S., to create prohibitions against contracting with companies that have business operations in Cuba or Syria.

Section 3 provides an effective date of July 1, 2012.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

The bill does not appear to have any impact on state revenues.

**2. Expenditures:**

The bill does not appear to have any impact on state expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

The bill does not appear to have any impact on local government revenues.

**2. Expenditures:**

The bill does not appear to have any impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill has the potential to negatively impact companies who seek to expand business in Cuba or Syria if the SBA votes against that expansion by proxy vote. In addition, there may be an adverse affect on companies who have business operations in Cuba or Syria that seek to enter into a contract with state or local governments.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

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

The 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:

Under the Supremacy Clause of the United States Constitution,<sup>32</sup> where the federal government and a state government legislates on the same subject, the federal law is supreme and will, in general, have the effect of voiding the conflicting state law.<sup>33</sup> The Supremacy Clause applies when state law is inconsistent with federal law. If state law attempts to invalidate the substance of a federal law or treaty, the state law cannot stand. Similarly, state law which encourages conduct inconsistent with that required by federal law is invalid. The same result holds if state law forbids conduct that federal law allows, or interferes with the achievement of a federal objective.<sup>34</sup> However, states are generally free to legislate in areas not controlled by federal law.

Congress, however, has authorized the type of contractual restrictions included in this bill and current law contains a provision that specifically makes it inoperative if Congress ever rescinds that authority. Therefore, this bill does not appear to be in conflict with the Supremacy Clause of the U.S. Constitution.

### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 6, 2012, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment provides that the SBA will not be a fiduciary with respect to voting on a proxy resolution that would expand United States trade with Cuba or Syria. In addition, the SBA cannot vote in favor of a proxy that would expand United States trade with Cuba or Syria. The strike-all amendment requires the SBA to report on its activities in its Annual Proxy Voting Report.

The strike-all amendment removes the requirement that the SBA create a scrutinized companies list for businesses with prohibited business operations in Cuba or Syria. It also removes the requirement that the SBA divest of investments in companies who have business relationships with Cuba or Syria.

On February 22, 2012, the State Affairs Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment prohibits state and local governments from entering into a contract for goods or services of \$1 million or more with companies who have business operations in Cuba or Syria. It also requires that all contracts for goods or services of \$1 million or more entered into on or after July 1, 2012, contain a provision that allows the state or local government to terminate the contract if the company submitted a false certification or is found to have business operations in Cuba or Syria. The amendment provides certain exceptions in which a state or local government may enter into a contract with a company with business operations in Cuba or Syria.

The amendment also requires that within 30 days after the effective date of the bill, the Department of Management Services must submit a written notice apprising the Attorney General of the United States of the inclusion of companies with business operations in Cuba or Syria within the provisions of s. 287.135, F.S.

This analysis is drafted to the committee substitute as passed by the State Affairs Committee.

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<sup>32</sup> U.S. Const. art. VI, cl. 2.

<sup>33</sup> See, *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989).

<sup>34</sup> *Perez v. Campbell*, 402 U.S. 637 (1971); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).