POLICY COUNCIL
FRIDAY, APRIL 9, 2010
8:45 A.M. – 10:45 A.M.
MORRIS HALL

MEETING PACKET

Larry Cretul
Speaker

Rep. Marcelo Llorente
Chair

Council Meeting Notice

HOUSE OF REPRESENTATIVES

Policy Council

Start Date and Time: Friday, April 09, 2010 08:45 am

End Date and Time: Friday, April 09, 2010 10:45 am

Location: Morris Hall (17 HOB)
Duration: 2.00 hrs

Consideration of the following bill(s):

CS/HB 31 Public Education by PreK-12 Policy Committee, Drake, Evers
CS/HM 191 Ecumenical Patriarchate by Rules & Calendar Council, Nehr
HJR 495 Terms of State Senators, State Representatives, and Elected County and Municipal Officers by Troutman
CS/HM 553 Fishery Conservation and Management by General Government Policy Council, Coley, Workman
CS/HB 787 Child Abduction Prevention by Public Safety & Domestic Security Policy Committee, Rouson
CS/HB 845 Reverse Mortgage Loans by Insurance, Business & Financial Affairs Policy Committee, Legg
CS/HB 1075 Office of Supplier Diversity of the Department of Management Services by Governmental Affairs Policy Committee, Braynon
CS/HB 1197 Probate of an Estate by Finance & Tax Council, McBurney
CS/HB 1277 Sellers of Travel by Insurance, Business & Financial Affairs Policy Committee, Rivera
HM 1609 Terrorist Trials in Civilian Courtrooms by Fresen

NOTICE FINALIZED on 04/07/2010 16:25 by Glatfelter.Sukie

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 31 Public Education
SPONSOR(S): PreK-12 Policy Committee
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	PreK-12 Policy Committee	10 Y, 3 N, As CS	Paulson	Ahearn
1)	Civil Justice & Courts Policy Committee	10 Y, 3 N	De La Paz	De La Paz
2)	Policy Council		Liepshutz	Ciccone
3)	Education Policy Council			
4)				
5)				

SUMMARY ANALYSIS

The Committee Substitute for House Bill 31 prohibits district school boards, administrative personnel, and instructional personnel from discouraging or inhibiting the delivery of an inspirational message at a noncompulsory high school activity, including, but not limited to, a student assembly, a sports event, or other noncompulsory school-related activity, if the participating students request and initiate the delivery of such inspirational message.

The bill also prohibits district school boards, administrative personnel, and instructional personnel from taking affirmative action including, but not limited to, the entry into any agreement, that infringes or waives the rights or freedoms afforded to instructional personnel, school staff, or students by the First Amendment to the United States Constitution, in the absence of the express written consent of any individual whose constitutional rights would be impacted by such infringement or waiver.

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

The bill takes effect July 1, 2010.

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 Federal Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, requires local educational agencies to certify to the state educational agency that no policy of the local educational agency prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools.[1] Florida requires the Department of Education to annually distribute the guidelines on "Religious Expression in Public Schools" published by the United States Department of Education to all district school board members, district school superintendents, school principals, and teachers.[2]

Two First Amendment clauses, the Free Exercise Clause and the Establishment Clause, protect religious freedom. Together, they permit neither bias favoring nor bias disfavoring religion.[3] The Free Exercise Clause prohibits federal and state government from placing any restraint on an individual's exercise of religion.[4] The Establishment Clause guarantees that a government may not coerce anyone to support or participate in religion or its exercise.[5]

In *Santa Fe Independent School District v. Doe*, the United States Supreme Court ruled that the school district's policy permitting student-led, student-initiated prayer authorized by student election violated the Establishment Clause. In the case, the Court ruled that the prayers did not amount to private speech, and that the school district policy of allowing such prayers was impermissibly coercive.[6]

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[1] 20 U.S.C. § 7904.

[2] Section 1002.205, F.S. These guidelines include, for example, that students may pray in a nondisruptive manner when not engaged in school activities or instruction and that schools may neither organize prayer at graduation nor organize religious baccalaureate ceremonies.

[3] The pertinent clauses of the First Amendment of the United States Constitution read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Although the First Amendment only restricts legislative action by Congress, these two clauses have been incorporated into the Fourteenth Amendment's guarantee of due process and are therefore applicable to state action. *See School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 215 (1968).

[4] *Id., 222-223.*

[5] *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

[6] The Court ruled that because the speech was authorized by government policy and was delivered on government property at government-sponsored, school-related events, and because the student delivering the speech was elected by a majority of the student body (effectively silencing any minority views), it could not be considered private speech. The Court also ruled that schools could not force students to make the decision between attending these events and avoiding potentially offensive religious rituals. *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302-304, 311-312 (2000).

However, in *Chandler v. Siegelman*, (*Chandler II*) the United States Court of Appeals for the Eleventh Circuit ruled that students are allowed to take part in group prayers at school functions. The court reviewed a lower court's injunction against the enforcement of an Alabama statute permitting student-initiated prayer at school-related events. Finding that the injunction wrongly assumed that any religious speech in schools is attributable to the State, the appellate court held that the injunction was overbroad and found that as long as the speech was truly student-initiated and not the product of school policy which encourages it, the speech is private and protected.[7]

In *Adler v. Duval County School Board*, the United States Court of Appeals for the Eleventh Circuit upheld a lower court's ruling that the school board's policy of permitting a graduating student, elected by the graduating class, to deliver an unrestricted message at graduation ceremonies did not violate the Establishment Clause on its face. The court ruled that the primary factor in distinguishing state speech from private speech is the element of state control over the content of the message.[8]

In *Holloman ex rel. Holloman v. Harland*, the United States Court of Appeals for the Eleventh Circuit revisited its previous ruling in *Chandler II* after an Alabama public school student brought action against a teacher for soliciting prayer requests and conducting a daily "silent moment of prayer." The court reversed a lower court's decision in favor of the teacher and ruled that simply because the idea initially came from a student, this type of prayer could not be considered "student-initiated" (and therefore constitutionally protected) if the school "encouraged, facilitated, or in any way conducted the prayer."[9]

Effect of Proposed Changes

The Committee Substitute for House Bill 31 prohibits district school boards, administrative personnel,[10] and instructional personnel[11] from discouraging or inhibiting the delivery of an inspirational message at a noncompulsory high school activity, including, but not limited to, a student assembly, a sports event, or other noncompulsory school-related activity, if the participating students request and initiate the delivery of such inspirational message.

The bill prohibits district school boards and administrative and instructional personnel from discouraging or inhibiting the delivery of an inspirational message; however, it does not authorize, encourage, or facilitate such delivery in any way.

The bill also protects an individual's constitutional rights by prohibiting district school boards, administrative personnel, and instructional personnel from taking affirmative action including, but not limited to, the entry into any agreement, that infringes or waives the rights or freedoms afforded to instructional personnel, school staff, or students by the First Amendment to the United States Constitution, in the absence of the express written consent of any individual whose constitutional rights would be impacted by such infringement or waiver.

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[7] *Chandler v. Siegelman*, 230 F.3d 1313, 1316-1317 (11th Cir., Ala., 2001); cert. denied 533 U.S. 916 (2001).
[8] *Adler v. Duval County School Board*, 250 F.3d 1330, 1341 (11th Cir., Fla., 2001); cert. denied 534 U.S. 1065 (2001).
[9] *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1287 (11th Cir., Ala., 2004).
[10] s. 1012.01(3), F.S. ("'Administrative personnel' includes K-12 personnel who perform management activities such as developing broad policies for the school district and executing those policies through the direction of personnel at all levels within the district. Administrative personnel are generally high-level, responsible personnel who have been assigned the responsibilities of systemwide or schoolwide functions, such as district school superintendents, assistant superintendents, deputy superintendents, school principals, assistant principals, career center directors, and others who perform management activities. Broad classifications of K-12 administrative personnel are as follows: . . . *[d]istrict-based instructional administrators . . . [d]istrict-based noninstructional administrators* . . . [and] *[s]chool administrators* . . . .").
[11] s. 1012.01(2), F.S. ("'Instructional personnel' means any K-12 staff member whose function includes the provision of direct instructional services to students. Instructional personnel also includes K-12 personnel whose functions provide direct support in the learning process of students. Included in the classification of instructional personnel are the following K-12 personnel: . . . *[c]lassroom teachers . . . [s]tudent personnel services . . . [l]ibrarians/media specialists . . . [o]ther instructional staff* . . . [and] *[e]ducation paraprofessionals* . . . .").

B. SECTION DIRECTORY:

Section 1: Creates s. 1003.4505, F.S., relating to delivery of inspirational message.

Section 2: Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

   The bill does not appear to have a fiscal impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require a city or county to expend funds or take any action requiring the expenditure of funds. The bill does not appear to reduce the authority that municipalities or counties have to raise revenues in the aggregate. The bill does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 17, 2010, the PreK-12 Policy Committee adopted two amendments to the Proposed Committee Substitute for House Bill 31 (PCS) and reported the bill favorably with two amendments. The differences between the PCS and the Committee Substitute for House Bill 31 (CS) are as follows:

- The PCS included "a prayer or an invocation" as examples of an inspirational message. The CS deletes those references.

- The PCS included a provision requiring students to select a student representative to deliver the message. The CS deletes this provision.

The bill was reported favorably as a Committee Substitute. The analysis reflects the Committee Substitute.

A bill to be entitled

An act relating to public education; creating s. 1003.4505, F.S.; prohibiting district school boards, administrative personnel, and instructional personnel from discouraging or inhibiting student delivery of an inspirational message at a noncompulsory high school activity; prohibiting district school boards, administrative personnel, and instructional personnel from taking affirmative action that infringes or waives the rights or freedoms afforded by the First Amendment to the United States Constitution; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 1003.4505, Florida Statutes, is created to read:

1003.4505 Delivery of inspirational message.—

(1) District school boards, administrative personnel, and instructional personnel are prohibited from discouraging or inhibiting the delivery of an inspirational message at a noncompulsory high school activity, including, but not limited to, a student assembly, a sports event, or other noncompulsory school-related activity, if the participating students request and initiate the delivery of such inspirational message.

(2) District school boards, administrative personnel, and instructional personnel are prohibited from taking affirmative action, including, but not limited to, the entry into any agreement, that infringes or waives the rights or freedoms

afforded to instructional personnel, school staff, or students by the First Amendment to the United States Constitution, in the absence of the express written consent of any individual whose constitutional rights would be impacted by such infringement or waiver.

Section 2. This act shall take effect July 1, 2010.

Amendment No. 1

COUNCIL/COMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Policy Council

Representative(s) Drake offered the following:

Amendment (with title amendment)

Remove lines 17-33 and insert:

1003.4505 Protection of School Speech.--

District school boards, administrative personnel, and instructional personnel are prohibited from taking affirmative action, including, but not limited to, the entry into any agreement, that infringes or waives the rights or freedoms afforded to instructional personnel, school staff, or students by the First Amendment to the United States Constitution, in the absence of the express written consent of any individual whose constitutional rights would be impacted by such infringement or waiver.

Amendment No. 1

T I T L E A M E N D M E N T

Remove lines 3-7 and insert:

1003.4505, F.S.; prohibiting district school boards,

CS/HM 191

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HM 191 Ecumenical Patriarchate
SPONSOR(S): Rules & Calendar Council; Nehr and others
TIED BILLS: **IDEN./SIM. BILLS:** SM 314

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Rules & Calendar Council	11 Y, 0 N, As CS	Hassell	Birtman
2)	Policy Council		Liepshutz MM	Ciccone
3)				
4)				
5)				

SUMMARY ANALYSIS

House Memorial 191 urges the U.S. Congress to encourage the government of Turkey to end policies negatively affecting the Ecumenical Patriarchate, which is the spiritual center of the Eastern Orthodox Christian Church and is located in Istanbul. In particular, the memorial urges Congress to encourage the Turkish government to:

- Uphold and safeguard religious and human rights without compromise;
- Cease its discrimination against the Ecumenical Patriarchate;
- Grant the Ecumenical Patriarch appropriate international recognition, ecclesiastical succession, and the right to train clergy of all nationalities; and
- Respect the property rights and human rights of the Ecumenical Patriarchate.

The memorial provides for copies of it to be submitted to the President of the United States, the President of the U.S. Senate, the Speaker of the U.S. House of Representatives, and each member of the state's congressional delegation.

The memorial does not have a fiscal impact on state or local government.

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

Ecumenical Patriarchate in Turkey

Turkey's constitution establishes the country as a secular state. The U.S. Department of State reports that the constitution contains provisions specifying religious freedom but also contains provisions governing the country's secularism which can operate to restrict religious freedom.[1] The government imposes restrictions on Islamic and other religious groups, including restrictions on Islamic religious expression in governmental offices and state-run institutions, on the grounds of maintaining a secular state. In addition, the department reports that members of religious minorities experience difficulties in worshipping, registering with the government, and training followers.[2]

Muslims comprise the largest percentage of the Turkish population, with official estimates citing 99 percent. According to the U.S. Department of State, however, the actual population of Muslims in Turkey is slightly lower, because its government recognizes three minority religious communities – Greek Orthodox Christians, Armenian Orthodox Christians, and Jews – and counts other non-Muslim communities as Muslim.[3]

The Turkish government's recognition of the special legal status of the three religious minorities does not extend to the leadership organs of those minorities. Therefore, for example, the "Armenian and Ecumenical Greek Orthodox Patriarchates continued to seek legal recognition of their status as patriarchates rather than foundations."[4]

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[1] U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, *Turkey: International Religious Freedom Report 2009* (Oct. 26, 2009), http://www.state.gov/g/drl/rls/irf/2009/130299.htm (last visited March 16, 2010). *See also* Niyazi Oktem, *International Law and Religion Symposium Article: Religion in Turkey*, 2002 B.Y.U. L. REV. 371 (2002).

[2] U.S. Dep't of State, *supra* note 1.

[3] U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, *Turkey: International Religious Freedom Report 2004*, http://www.state.gov/g/drl/rls/irf/2004/35489.htm (last visited March 16, 2010).

[4] U.S. Dep't of State, *supra* note 1. The status as a foundation rather than a patriarchate affects property rights. A 1974 court ruling limited the ability of minority foundations to acquire property, and the state took control of property acquired after 1936. Law changes effective in 2008 enabled minority foundations to acquire property but did not authorize them to reclaim state-expropriated property. *Id.*

Located in Istanbul, Turkey, the Ecumenical Patriarchate is the spiritual center of the Orthodox Christian Church. The Ecumenical Patriarch is the church's highest authority and spiritual leader of Orthodox Christians worldwide.[5] Ecumenical Patriarch Bartholomew assumed that spiritual leadership position in November 1991.[6] However, the Turkish government does not recognize his ecumenical status, "acknowledging him only as the head of the country's Greek Orthodox community."[7]

Although there are an estimated 300 million Orthodox Christians worldwide, there are fewer than 3,000 Greek Orthodox Christians in Turkey.[8] Particular policies of the government of Turkey are cited as negatively affecting the Ecumenical Patriarchate. For example, in 1971, Turkey nationalized private institutions of higher learning, leading to the closure of the Patriarchate's Halki seminary on the Island of Heybeli. The government has not permitted the reopening of the school, "effectively prevent[ing] the Patriarchate from training clergymen and potential successors to the position of Ecumenical Patriarch."[9]

In addition, Turkey also requires that the Ecumenical Patriarch and the Ecumenical Patriarchate's leadership staff be Turkish citizens. Further, the governor of Istanbul may reject candidates for the position of Ecumenical Patriarch as well as the ultimate choice by the electors.[10] Noting the decline in the population of Greek Orthodox Christians in Turkey, authors on the subject have reported that these policies affect the operational viability of the Ecumenical Patriarchate by limiting the pool of potential successors to the position of Ecumenical Patriarch.[11]

U.S. Government Policy and Action by States

The U.S. Department of State summarizes the policy of the United States regarding religious freedom in Turkey as follows:

> The U.S. Government discusses religious freedom with the Government and state institutions as part of its overall policy to promote human rights. The U.S. Ambassador and other diplomatic officials, including staff of the consulate general in Istanbul and the consulate in Adana, maintained close relations with the Muslim majority and other religious groups. The Ambassador and other officials also continued to urge the Government to permit the reopening of the Halki seminary on Heybeli Island.
>
> On April 6, 2009, President Obama addressed Parliament and emphasized the U.S. interest in seeing Halki seminary reopened in recognition of the importance of religious freedom. On April 7, President Obama met with leaders of religious communities, including the Ecumenical Patriarch, Chief Rabbi, Armenian Archbishop, Syrian Orthodox Metropolitan, and Mufti of Istanbul.
>
> The Ambassador regularly discussed government policy regarding Islam and other religious groups as well as specific cases of religious discrimination and other topics concerning religious freedom in private meetings with cabinet members. The Ambassador met with Diyanet President Ali Bardakoglu on January 8, 2009, to discuss the work of the Diyanet.[12] Other embassy and consulate officers held similar meetings

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[5] Maria Burnett, Maria Pulzetti, and Sean Young, *Turkey's Compliance with Its Obligations to the Ecumenical Patriarchate and Orthodox Christian Minority*, a paper prepared at the request of the Greek Orthodox Archdiocese of America, 1 (December 11, 2004), *available at* http://www.ellopos.net/politics/yalelawstudy.pdf (on file with the House Rules & Calendar Council).

[6] Ecumenical Patriarchate of Constantinople, *Who is Ecumenical Patriarch Bartholomew?*, http://patriarchate.org/patriarch/narrative (last visited March 16, 2010). Istanbul was formerly known as Constantinople.

[7] U.S. Dep't of State, *supra* note 1.

[8] There are also an estimated 65,000 Armenian Orthodox Christians in Turkey. U.S. Dep't of State, *supra* note 3.

[9] Joanna Balaskas, *The International Legal Personality of the Eastern Orthodox Ecumenical Patriarchate of Constantinople*, 2 HOFSTRA L. & POL'Y SYMP. 135, 145-46 (1997).

[10] *Id.* at 146; Maria Burnett et al., *supra* note 5.

[11] *Id.*

[12] The Diyanet is Turkey's Directorate/Presidency of Religious Affairs. U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, *International Religious Freedom Report 2005*, http://www.state.gov/g/drl/rls/irf/2005/51586.htm (last visited March 16, 2010).

with government officials. Diplomats from the Embassy and consulates met regularly with representatives of various religious groups. These meetings covered a range of topics, including problems faced by non-Muslim groups and the debate over the role of Islam in the country.

The consulate general in Istanbul provided security training for minority religious communities as a part of its overall security strategy.[13]

According to the Order of Saint Andrew the Apostle, Archons of the Ecumenical Patriarchate, 25 states have passed measures similar to the one that is the subject of this bill analysis, asking the U.S. Congress to encourage Turkey to end practices that negatively affect the Ecumenical Patriarchate.[14]

Effect of Proposed Changes

This House Memorial expresses the Legislature's desire for the U.S. Congress to encourage the government of Turkey to revise policies negatively affecting the Ecumenical Patriarchate, which is located in Istanbul and is the spiritual center of the Eastern Orthodox Christian Church. In particular, the memorial urges Congress to encourage the Turkish government to:

- Uphold and safeguard religious and human rights without compromise;
- Cease its discrimination against the Ecumenical Patriarchate;
- Grant the Ecumenical Patriarch appropriate international recognition, ecclesiastical succession, and the right to train clergy of all nationalities; and
- Respect the property rights and human rights of the Ecumenical Patriarchate.

The memorial provides for copies of it to be submitted to the President of the United States, the President of the U.S. Senate, the Speaker of the U.S. House of Representatives, and each member of the state's congressional delegation.

Both houses of the Florida Legislature must pass a memorial, but a memorial is not subject to gubernatorial approval or veto and upon its passage is sent directly to the specified congressional officials.[15]

B. SECTION DIRECTORY:

Not applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

[13] U.S. Dep't of State, *supra* note 1.

[14] Open letter to members of the Florida Legislature from the Order of Saint Andrew the Apostle, Jan. 16, 2010, indicating 24 states have passed similar legislation (on file with the House Rules & Calendar Council). Since the letter's date, the Order has posted an additional state, New Mexico, on its official website, http://www.archons.org/resolution/ (last visited March 29, 2010).

[15] The Florida House, *Guidelines for Bill Drafting*, 20 (2009).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The memorial does not 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.

3. Other:

Generally the federal government exercises dominion over foreign affairs of the United States. Section 10 of article I of the U.S. Constitution specifically prohibits states from engaging in certain foreign affairs activities. Further, the federal government can preempt conflicting state laws through the enactment of a federal law or treaty, and federal courts can "preempt state laws that improperly affect foreign affairs."[16] However, because this House Memorial is simply an expression of state intent rather than a proposed enactment of state law, it does not implicate the issue of preemption and state latitude to affect foreign affairs.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 23, 2010, the Rules & Calendar Council adopted two amendments to the House Memorial. The amendments:

- Correct the month of the Conference on Peace and Tolerance II from October to November. The Conference was held November 7-9, 2005.
- Reflect that the Religious Freedom Mission to the European Union by the Archons of the Ecumenical Patriarchate took place from January 26 – February 7, 2010.

The Memorial was reported favorably as a Council Substitute. The analysis reflects the Council Substitute.

[16] Celeste Borei Pozo, *Foreign Affairs Power Doctrine Wanted Dead or Alive: Reconciling One Hundred Years of Preemption Cases*, 41 VAL. U. L. REV. 591, 591-92 (2006).

House Memorial

A memorial to the Congress of the United States, urging Congress to encourage the Government of Turkey to grant the Ecumenical Patriarch appropriate international recognition, ecclesiastical succession, and the right to train clergy of all nationalities and to respect the property rights and human rights of the Ecumenical Patriarchate.

WHEREAS, the Ecumenical Patriarchate, located in Istanbul, Turkey, is the Sacred See that presides in a spirit of brotherhood over a communion of self-governing churches of the Orthodox Christian world, and

WHEREAS, the See is led by Ecumenical Patriarch Bartholomew, who is the 269th in direct succession to the Apostle Andrew and holds titular primacy as primus inter pares, meaning "first among equals," in the community of Orthodox churches worldwide, and

WHEREAS, in 1994, Ecumenical Patriarch Bartholomew, along with leaders of the Appeal of Conscience Foundation, cosponsored the Conference on Peace and Tolerance, which brought together Christian, Jewish, and Muslim religious leaders for an interfaith dialogue to help end the Balkan conflict and the ethnic conflict in the Caucasus region, and

WHEREAS, in 1997, the Congress of the United States awarded Ecumenical Patriarch Bartholomew the Congressional Gold Medal, and

WHEREAS, following the terrorist attacks on our nation on September 11, 2001, Ecumenical Patriarch Bartholomew gathered a group of international religious leaders to produce the first joint statement with Muslim leaders that condemned those attacks as "antireligious," and

WHEREAS, in November 2005, the Ecumenical Patriarch, along with Christian, Jewish, and Muslim leaders, cosponsored the Conference on Peace and Tolerance II to further promote peace and stability in southeastern Europe, the Caucasus region, and Central Asia via religious leaders' interfaith dialogue, understanding, and action, and

WHEREAS, the Orthodox Christian Church, in existence for nearly 2,000 years, numbers approximately 300 million members worldwide, with more than 2 million members in the United States, and

WHEREAS, since 1453, the continuing presence of the Ecumenical Patriarchate in Turkey has been a living testament to the religious coexistence of Christians and Muslims, and

WHEREAS, this religious coexistence is in jeopardy because the Ecumenical Patriarchate is considered a minority religion by the Turkish government, and

WHEREAS, the Government of Turkey has limited the candidates available to hold the office of Ecumenical Patriarch to only Turkish nationals; and, out of the millions of Orthodox Christians who were living in Turkey at the turn of the 20th century, there remain as a result of the policies of the Turkish government during this period fewer than 3,000 of the Ecumenical Patriarch's flock left in that country today, and

WHEREAS, the Government of Turkey closed the Theological School on the island of Halki in 1971 and has refused to allow it to reopen, thus impeding training for Orthodox Christian clergy, and

WHEREAS, the Turkish government has confiscated nearly 94 percent of the Ecumenical Patriarchate's properties and has placed a 42 percent tax, retroactive to 1999, on the Baloukli Hospital and Home for the Aged, a charity hospital run by the Ecumenical Patriarchate, and

WHEREAS, the European Union, a group of nations with a common goal of promoting peace and the well-being of its peoples, began accession negotiations with Turkey on October 3, 2005, and

WHEREAS, the European Union defined membership criteria for accession at the Copenhagen European Council in 1993, obligating candidate countries to achieve certain levels of reform, including stability of institutions guaranteeing democracy, adherence to the rule of law, and respect for and protection of minorities and human rights, and

WHEREAS, the Turkish government's current treatment of the Ecumenical Patriarchate is inconsistent with the membership conditions and goals of the European Union, and

WHEREAS, Orthodox Christians in this state and throughout the United States stand to lose their spiritual leader because of the continued actions of the Turkish government, and

WHEREAS, the Archons of the Ecumenical Patriarchate of the Order of St. Andrew the Apostle, a group of laymen who each have been honored with a patriarchal title, or "offikion," by the

Ecumenical Patriarch for their outstanding service to the Orthodox Church, participated in a Religious Freedom Mission to the European Union in pursuit of human rights and religious freedom for the Ecumenical Patriarch from January 26 to February 7, 2010, NOW, THEREFORE

Be It Resolved by the Legislature of the State of Florida:

That the Congress of the United States is urged to encourage the Government of Turkey to:

(1) Uphold and safeguard religious and human rights without compromise.

(2) Cease its discrimination of the Ecumenical Patriarchate.

(3) Grant the Ecumenical Patriarch appropriate international recognition, ecclesiastic succession, and the right to train clergy of all nationalities.

(4) Respect the property rights and human rights of the Ecumenical Patriarchate.

BE IT FURTHER RESOLVED that copies of this memorial be dispatched to the President of the United States, to the President of the United States Senate, to the Speaker of the United States House of Representatives, and to each member of the Florida delegation to the United States Congress.

HJR 495

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 495 Terms of State Senators, State Representatives, and Elected County and Municipal Officers
SPONSOR(S): Troutman
TIED BILLS: **IDEN./SIM. BILLS:** SJR 598

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Policy Council		Varn	Ciccone
2)	Governmental Affairs Policy Committee			
3)	Rules & Calendar Council			
4)	Economic Development & Community Affairs Policy Council			
5)				

SUMMARY ANALYSIS

House Joint Resolution 495 proposes to amend the Florida Constitution to increase the length of a single term in office for a State Representative from two years to four years and a State Senator from four years to six years.

The resolution also proposes to extend the number of consecutive years in office for State Representatives and State Senators from eight years to twelve years and to impose a twelve-year consecutive term limit for county and municipal elected officials.

The resolution proposes to delete the eight-year term limitation for United States Representatives and United States Senators from Florida, which was declared unconstitutional by the United States Supreme Court in 1995.

The resolution also proposes to add a new schedule to the Constitution to implement these amendments.

This joint resolution to change terms and term limits for elected officials must be approved by a 3/5 vote of the membership of each house of the Legislature. If enacted by such a vote, the proposal will be presented to the electors of Florida during the state's next general election on November 2, 2010. Final approval requires a favorable vote from 60 percent or more of the electors of the state.

The joint resolution appears to have a fiscal impact on state government in that the Department of State, Division of Elections, estimates a non-recurring cost of approximately $65,897.28 for FY 2010-11. This cost is a result of placing the joint resolution on the ballot and publishing two notices in local newspapers, which is required by Article XI, Section 5, of the Florida Constitution.

The resolution would take effect upon approval of the voters on November 2, 2010.

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:

BACKGROUND:

In 2005, HJR 1177 was passed by the House and Senate by the required 3/5 vote, increasing the consecutive term limits of state senators and state representatives from eight years to twelve years. The proposal was scheduled to appear on the November 2006 ballot. However, during the 2006 Legislative Session, SJR 2788 was passed by the House and Senate rescinding HJR 1177, therefore the issue was never placed before the Florida electorate in 2006.

Article III Section 15 of the Florida Constitution currently provides for terms and qualifications of legislators. The Section provides that senators are elected to four year terms, with senators from odd numbered districts in the years that are multiples of four, and the even numbered districts in the years which are not multiples of four. All House members are elected every two years.

Article VI Section 4 of the Florida Constitution currently provides that a State Representative or Senator, Lieutenant Governor, Florida Cabinet member, United States Representative or United States Senator from Florida may not have his or her name placed on the ballot if the person has served eight consecutive years in that office. In 1992, Florida voters approved term limits under the "eight is enough" proposal (citizen initiative) by a margin of 77 percent to 23 percent.

Article VI, Section 4(b), currently reads:

> No person may appear on the ballot for re-election to any of the following offices:
> (1) Florida Representative,
> (2) Florida Senator,
> (3) Florida Lieutenant governor,
> (4) Any office of the Florida Cabinet,
> (5) U.S. Representative from Florida, or
> (6) U.S. Senator from Florida

If, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

In 1995, the United States Supreme Court held that state limits on the terms of federal officials

violated the United States Constitution.[1] The provisions relating to state officials were challenged; however, the Florida Supreme Court upheld those provisions of Article VI, Section 4(b).[2]

Presently, 15 states have term limits for legislators. In all, 21 states have passed legislative term limits at one time or another; however term limits have been repealed or declared unconstitutional in six of those states. In the late 1990s, Massachusetts and Washington's State Supreme Courts held that states' legislative term limits were unconstitutional. In 2002, Oregon's Supreme Court held that legislative term limits unconstitutional, and in 2002 and 2003, respectively, the Idaho and Utah State Legislatures repealed legislative term limits. In 2004, the Wyoming State Supreme Court held that legislative term limits were unconstitutional.[3]

Currently most county and municipal elected officials in Florida are not subject to consecutive term limits. The Florida League of Cities estimates that between one-third and one-fourth of Florida cities have some form of term limits.[4] According to the Florida Association of Counties, Brevard, Broward, Clay, Duval, Hillsborough, Miami-Dade, Orange, Palm Beach, Polk, Sarasota, and Volusia counties have term limits in their charters. However, in 2002, when challenged, term limits for Duval County elected officials were found unconstitutional.[5] No county in the state has term limits for School Board members as per the Florida School Boards Association.[6]

Article XI, Section 5(e) requires that any amendment to the Florida Constitution must receive a favorable vote by at least sixty-percent of the electors voting on the measure.

PROPOSED CHANGES:

House Joint Resolution 495 proposes to amend Article III, Section 15 of the Florida Constitution to increase the current terms of State Representatives from two years to four years and State Senators from four years to six years.

House Joint Resolution 495 proposes to amend Article VI, Section 4 to increase the consecutive term limits of state legislators from eight years to twelve years, and to impose consecutive term limits of twelve years for county and municipal elected officials.

The resolution removes language from this section which was passed during the citizen's initiative in 1992, requiring term limits for members of Congress, which the United States Supreme Court determined violates the United States Constitution.

The resolution also adds a new schedule to Article XII to provide for the implementation of the amendments to Articles III and VI.

If passed by the required 3/5 membership of the House and Senate,[7] the proposed amendment will be presented to the electors of Florida at the November 2010 general election, and if approved, will apply to those officers elected in November 2010 and after.

If approved by the electorate, senators elected during the 2010 general election would be elected to terms of at least four years. The terms of senators having two years remaining in their terms may be extended by two years. The HJR requires the Legislature to divide the senate districts as evenly as

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[1] *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842 (1995).
[2] *Ray v. Mortham*, 742 So.2d 1276 (Sept. 2, 1999) (The Court found that the portions relating to state officials could be severed from the portions that were stricken as invalid in *Thornton* and held that the term limits amendment as applied to state officers was constitutional.)
[3] *Frequently Asked Questions about Term Limits*, National Conference of State Legislatures, August 27, 2008.
[4] Email from Lynn Tipton, Director of Membership Development, Florida League of Cities, January 25, 2010, on file with House Policy Council.
[5] *Cook v. City of Jacksonville*, 823, So2nd 86 (Fla. 2002)
[6] Telephone conversation with Dr. Wayne Blanton, Executive Director, Florida School Boards Association, January 25, 2010.
[7] The Florida house, *Guidelines for Bill Drafting*, (2009) page 12.

possible into three classes to maintain staggered terms. House members elected in odd-numbered districts in the 2010 general election would be elected to two-year terms. House members elected in even-numbered districts in 2010 would be elected to four-year terms. If the HJR passes in November, at the organizational session of 2010, the resolution calls for the Legislature to implement the resolution.

The proposed constitutional amendment will appear on the November 2010 ballot as follows:

CONSTUTIONAL AMENDMENTS
ARTICLE III, SECTION 15
ARTICLE VI, SECTION 4
ARTICLE XII

TERMS OF STATE SENATORS, STATE REPRESENTATIVE AND ELECTED COUNTY AND MUNICIPAL OFFICERS.-The State Constitution provides that State Senators are elected to terms of 4 years and State Representatives are elected to terms of 2 years. The State Constitution also generally limits State Senators and State Representative to serving 8 consecutive years in office. However, the State Constitution does not limit the number of consecutive years in office that may be served by a county or municipal officer.

This amendment lengthens the terms of State Senators to 6 years and the terms of State Representatives to 4 years. The amendment also generally limits State Senators, State Representatives, and elected county and municipal officers to 12 consecutive years in office. However, the amendment does not change the length of the term of any elected county of municipal office.

B. SECTION DIRECTORY:

Not applicable

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Not applicable

2. Expenditures:

   Article XI, Section. 5, of the Florida Constitution, require each proposed amendment to the Constitution be published in a newspaper of general circulation in each county two times prior to the general election. The Division of Elections estimates the cost of compliance would be approximately $65,897.28

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None

2. Expenditures:

   None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: Not applicable. This resolution 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: When challenged in 2002, the term limits provision in the Charter of Duval County was declared unconstitutional.

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

If the resolution is adopted, changing the staggered terms of Senators from four to six year terms requires the Legislature to divide the senate districts as evenly as possible into three classes. The logistics as to how this is to be done would be decided during the 2010 organizational session. In the past, the senate districts have been divided into two classes--even and odd. It should be noted that reapportionment will take effect in 2012, and it is uncertain as to how this would impact the resolution after it is implemented.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

House Joint Resolution

A joint resolution proposing amendments to Section 15 of Article III and Section 4 of Article VI and the creation of a new section in Article XII of the State Constitution to revise the term limits that apply to State Senators and State Representatives and to impose term limits on elected county and municipal officers.

Be It Resolved by the Legislature of the State of Florida:

That the following amendments to Section 15 of Article III and Section 4 of Article VI and the creation of a new Section in Article XII of the State Constitution are agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE III

LEGISLATURE

SECTION 15. Terms and qualifications of legislators.—

(a) SENATORS. Senators shall be elected for staggered terms of six ~~four~~ years. The legislature must divide the senate districts as evenly as possible into three classes~~, those from odd-numbered districts in the years the numbers of which are multiples of four and those from even-numbered districts in even-numbered years the numbers of which are not multiples of four; except, at the election next following a reapportionment, some senators shall be elected for terms of two years when necessary~~ to maintain staggered terms.

(b) REPRESENTATIVES. Members of the house of representatives shall be elected for terms of four ~~two~~ years, those from odd-numbered districts in the years the numbers of which are multiples of four and those from even-numbered districts in even-numbered years the numbers of which are not multiples of four ~~in each even-numbered year~~.

(c) QUALIFICATIONS. Each legislator shall be at least twenty-one years of age, an elector and resident of the district from which elected and shall have resided in the state for a period of two years prior to election.

(d) ASSUMING OFFICE; VACANCIES. Members of the legislature shall take office upon election. Vacancies in legislative office shall be filled only by election as provided by law.

ARTICLE VI

SUFFRAGE AND ELECTIONS

SECTION 4. Disqualifications.—

(a) A ~~No~~ person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, is not ~~shall be~~ qualified to vote or hold office until restoration of civil rights or removal of disability.

(b) A ~~No~~ person may not appear on the ballot for re-election as a senator, representative, county officer, or municipal officer if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for twelve consecutive years. ~~to any of the following offices:~~

~~(1) Florida representative,~~

~~(2) Florida senator,~~

(c)~~(3)~~ A person may not appear on the ballot for re-election as the ~~Florida~~ Lieutenant governor, or

~~(4)~~ any ~~office of the Florida~~ cabinet office~~,~~

~~(5) U.S. Representative from Florida, or~~

~~(6) U.S. Senator from Florida~~

if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

ARTICLE XII

SCHEDULE

Implementation of amendments relating to the terms of certain elected officials.—

(a) The amendments to Section 15 of Article III and Section 4 of Article VI and the creation of this section shall take effect upon approval by the electors.

(b) During the organizational session following the 2010 general election, the Legislature shall implement the amendment to subsection (a) of Section 15 of Article III by law. Under the implementing legislation, senators elected during the 2010 general election shall be elected to terms of at least four years. The terms of senators having two years remaining to their terms on the date of the general election may be extended by two years.

(c) Those representatives elected in odd-numbered districts in the 2010 general election shall be elected to terms of two years. Those representatives elected in even-numbered

districts in the 2010 general election shall be elected to terms of four years.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENTS

ARTICLE III, SECTION 15

ARTICLE VI, SECTION 4

ARTICLE XII

TERMS OF STATE SENATORS, STATE REPRESENTATIVES, AND ELECTED COUNTY AND MUNICIPAL OFFICERS.—The State Constitution provides that State Senators are elected to terms of 4 years and State Representatives are elected to terms of 2 years. The State Constitution also generally limits State Senators and State Representatives to serving 8 consecutive years in office. However, the State Constitution does not limit the number of consecutive years in office that may be served by a county or municipal officer.

This amendment lengthens the terms of State Senators to 6 years and the terms of State Representatives to 4 years. The amendment also generally limits State Senators, State Representatives, and elected county and municipal officers to 12 consecutive years in office. However, the amendment does not change the length of the term of any elected county or municipal office.

Amendment No.

COUNCIL/COMMITTEE ACTION

ADOPTED __ (Y/N)

ADOPTED AS AMENDED __ (Y/N)

ADOPTED W/O OBJECTION __ (Y/N)

FAILED TO ADOPT __ (Y/N)

WITHDRAWN __ (Y/N)

OTHER _____

Council/Committee hearing bill: Policy Council

Representative Troutman offered the following:

Amendment (with title amendment)

Remove everything after the resolving clause and insert:

That the following amendment to Section 4 of Article VI and the creation of a new Section in Article XII of the State Constitution are agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE VI

SUFFRAGE AND ELECTIONS

SECTION 4. Disqualifications.—

(a) A ~~No~~ person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, is not ~~shall be~~ qualified to vote or hold office until restoration of civil rights or removal of disability.

Amendment No.

(b) A ~~No~~ person may not appear on the ballot for re-election as a senator, representative, county officer, or municipal officer if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for twelve consecutive years. ~~to any of the following offices:~~

~~(1) Florida representative,~~

~~(2) Florida senator,~~

(c)~~(3)~~ A person may not appear on the ballot for re-election as the ~~Florida~~ Lieutenant governor, or to

~~(4)~~ any ~~office of the Florida~~ cabinet office~~,~~

~~(5) U.S. Representative from Florida, or~~

~~(6) U.S. Senator from Florida~~

if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

ARTICLE XII

SCHEDULE

Implementation of amendments relating to the limitation on terms of certain elected officials.—The amendment to Section 4 of Article VI and the creation of this section shall take effect upon approval by the electors.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENTS

ARTICLE VI, SECTION 4

ARTICLE XII

Amendment No.

LIMITATION ON TERMS OF STATE SENATORS, STATE REPRESENTATIVES, AND ELECTED COUNTY AND MUNICIPAL OFFICERS.—The State Constitution generally limits state senators and state representatives to serving 8 consecutive years in office. However, the State Constitution does not limit the number of consecutive years in office that may be served by a county or municipal officer.

This amendment generally limits state senators, state representatives, and elected county and municipal officers to 12 consecutive years in office. However, the amendment does not change the length of the term of any legislative or elected county or municipal office.

T I T L E A M E N D M E N T

Remove the entire title and insert:

House Joint Resolution

A joint resolution proposing an amendment to Section 4 of Article VI and the creation of a new section in Article XII of the State Constitution to revise the term limits that apply to state senators and state representatives and to impose term limits on elected county and municipal officers.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HM 553 Fishery Conservation and Management
SPONSOR(S): General Government Policy Council, Coley and Workman
TIED BILLS: **IDEN./SIM. BILLS:** SM 1168

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	General Government Policy Council	14 Y, 0 N, As CS	Deslatte	Hamby
2)	Rules & Calendar Council	12 Y, 0 N	Kirksey	Birtman
3)	Policy Council		Varn	Ciccone
4)				
5)				

SUMMARY ANALYSIS

Council Substitute for House Memorial 553 urges Congress to consider all available mechanisms to lessen the sudden impact of the changes made to the Magnuson-Stevens Fishery Conservation and Management Act and seek to balance resource protection and economic prosperity in Florida.

The memorial provides for copies to be submitted to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives and to each member of the Florida delegation to the United States Congress.

This memorial does not have a fiscal impact on state or local governments.

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:

Current Situation

In 1976, the U.S. Congress passed the Fishery Conservation and Management Act, known as the Magnuson Act of 1976, later renamed the Magnuson-Stevens Act (MSA or Act), due to growing concerns regarding the potential economic losses from foreign fleet catches. The statute was intended to end foreign overfishing, establish a U.S. Exclusive Economic Zone (EEZ), and industrialize the U.S. fishing fleet.[1] Conservation efforts were mentioned in the initial section of the Act, but the primary aim was to extend U.S. territorial waters from 12 to 200 miles and to mandate a phase-out of foreign fishing within the EEZ.[2]

To render the management process more efficient, the MSA established grant programs and other subsidies to help modernize and industrialize the U.S. commercial fishing fleet. The MSA also created eight Regional Fishery Management Councils composed of state fisheries managers, the regional National Marine Fisheries Service (NMFS)[3] fisheries administrator, and qualified fishing industry, academic, and environmental representatives. Florida is represented on two regional councils: the Gulf of Mexico Fishery Management Council (includes the Gulf coast of Florida, Alabama, Mississippi, Louisiana, and Texas) and the South Atlantic Fishery Management Council (includes North Carolina, South Carolina, Georgia, and the Atlantic coast of Florida). The Governor directly appoints one member to both councils as the principal state official with fishery management responsibility. The Governor also submits a list of names to the Secretary of Commerce for discretionary appointment by the Secretary to the councils.[4]

In 1996, the Act was amended to add new regulations intended to stop overfishing, rebuild fish populations, minimize the incidental capture and killing of non-commercial marine life, and protect areas of the ocean vital to the development of juvenile fish. These amendments were meant to ensure that U.S. fisheries remained healthy and productive for future generations.

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[1] 16 U.S.C.A. § 1801b (West 2010).
[2] General Governmental Policy Council (Agriculture and Natural Resources Policy Committee, The National Saltwater Angler Registry/ Florida's Shoreline Exemption, Jan., 2009.
[3] The NMFS is a federal agency (under the National Oceanic and Atmospheric Administration (NOAA)) responsible for the stewardship of the nation's living marine resources and their habitat. NOAA falls under the Department of Commerce.
[4] Florida Fish & Wildlife Conservation Commission (FWCC) 2010 Legislative Bill Analysis on file with the Policy Council.

In 2007, the Act was reauthorized to include a significant additional requirement to implement annual catch limits and accountability measures for all federally managed species (Section 303(a)(15)).[5] The reauthorized Act set a deadline of 2011 to implement these measures. For those species that were classified as undergoing overfishing, the Act specified a deadline of 2010 to implement annual catch limits and accountability measures. Specifically, Section 304(3)[6] of the reauthorized Act addresses the rebuilding of overfished stocks including a requirement that overfishing is ended within two years of notification that a fishery is overfished, and that the rebuilding plan not exceed 10 years. Overfishing is defined as harvesting at a rate equal to or greater than that which will meet the management goal. A stock or stock complex is considered undergoing overfishing when the rate of fishing mortality exceeds a specific threshold. A rebuilding plan can exceed 10 years however, if the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the U.S. participates dictates otherwise.[7]

The South Atlantic Fishery Management Council (Council) has initiated steps to meet these deadlines. The Council has implemented a shallow-water grouper closure from January 1 through April 30, 2010. The closure prohibits recreational and commercial harvest of shallow-water grouper species in order to end overfishing of gag, black and red grouper. The Council has also implemented a November 1, 2009 through April 30, 2010, closure on the recreational harvest of vermilion snapper, reducing the annual commercial quota by about 50% according to the Florida Fish and Wildlife Conservation Commission (FWCC) analysis. The Council and the National Oceanic and Atmospheric Administration (NOAA) Fisheries Service are developing regulatory changes to end the overfishing of the Atlantic red snapper and rebuild the stock. NOAA Fisheries has already implemented a temporary action that closed all harvest of red snapper in federal waters of the South Atlantic region. The Council is developing recommendations for permanent changes that would continue to prohibit all red snapper fishing. The Council is also considering a large-area closure to fishing for any species of snapper or grouper because so many red snapper are caught incidentally when other reef fish are being caught, and die when re-released back into the water. Another recommendation the Council has proposed is prohibiting the harvest and possession of several species of deepwater snapper and grouper in federal waters deeper than 240 feet. This action would end overfishing of Warsaw grouper and speckled hind, and give protection to the snowy grouper and golden tilefish, which are overfished.[8]

The Gulf of Mexico has also seen changes in regulations for red snapper over the last few years. In 2008, these regulations reduced the recreational bag limit and substantially reduced the recreational harvest season. For recreational fishers, the bag limit is two red snapper per person per day. However, possession of bag limits by captains and crew of for-hire vessels is prohibited.[9]

Currently, the open recreational harvest season for red snapper in state and federal waters of the Gulf of Mexico is June 1 through August 14.[10] The NMFS estimated that recreational fishers in the Gulf exceeded 2008's annual red snapper catch limit by approximately 1.2 million pounds, and federal law requires that harvest levels must be reduced in the year following a previous year's overharvest. To offset last year's overharvest, the NMFS shortened the recreational red snapper harvest season in Gulf federal waters (beyond 9 nautical miles from shore) from June 1 through September 30 to June 1 through August 14. The FWCC approved the same season change in state waters at its Commission Meeting on June 18, 2009.[11]

According to FWCC, for the red snapper commercial fishery, an Individual Fishing Quota (IFQ) system was implemented in 2007 and operated under a lower overall quota in 2008. The commercial minimum size limit of harvested and imported fish is 13 inches total length. The commercial daily bag and trip limit is 2 fish per person in state waters. The commercial quota is set at 2.55 million pounds. Seasonal

[5] 120 Stat 3575 (2007); PL 109-479.
[6] Id.
[7] Florida Fish & Wildlife Conservation Commission (FWCC) 2010 Legislative Bill Analysis on file with the Policy Council.
[8] Id.
[9] Id.
[10] Id.
[11] Id.

and area closures are in place for the commercial shrimping industry to reduce effort in order in minimize juvenile red snapper bycatch.[12]

Effect of Proposed Changes

CS/HM 553 urges Congress to consider all available mechanisms to lessen the sudden impact of the changes made to the Magnuson-Stevens Fishery Conservation and Management Act and seek to balance resource protection and economic prosperity in Florida.

B. SECTION DIRECTORY:

None

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This memorial 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

[12] Id.

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

Florida Fish and Wildlife Conservation Commission (FWCC)[13] provided the following comment:

"If the Memorial is acted upon by Congress, the called-for changes have the potential to reduce short-term and perhaps long-term negative economic impacts to recreational and commercial fisheries by ameliorating the hard deadlines established in the 2007 reauthorization of the Act. The following description of the fishery provides an overview of the historical participation in these fisheries and applies to all states in the South Atlantic Fishery Management Council (North Carolina, South Carolina, Georgia, and Florida). It is taken from South Atlantic Fishery Management Council documents (Draft Amendment 17A to the Fishery Management Plan for the Snapper Grouper Fishery of the South Atlantic Region and draft Environmental Impact Statement. November 2009. South Atlantic Fishery Management Council. Charleston, SC.)"

"From 2003-2007, which is the period of data used in the analysis of the expected impacts of this action, an average of 944 vessels per year were permitted to operate in the commercial snapper grouper fishery. Of these vessels, 749 held transferable permits and 195 held non-transferable permits. On average, 890 vessels landed 6.43 million pounds of snapper grouper and 1.95 million pounds of other species on snapper grouper trips. Total dockside revenues from snapper grouper species stood at $13.81 million (2007 dollars) and from other species, at $2.30 million (2007 dollars). Considering revenues from both snapper grouper and other species, the revenues per vessel would be $18,101. An average of 27 vessels per year harvested more than 50,000 pounds of snapper grouper species per year, generating at least, at an average price of $2.15 (2007 dollars) per pound, dockside revenues of $107,500. Vessels that operate in the snapper grouper fishery may also operate in other fisheries, the revenues of which cannot be determined with available data and are not reflected in these totals. Although a vessel that possesses a commercial snapper grouper permit can harvest any snapper-grouper species, not all permitted vessels or vessels that landed snapper grouper landed all of the six major species in this amendment. The following average number of vessels landed the subject species in 2003-2007: 292 for gag, 253 for vermilion snapper, 220 for red snapper, 237 for black sea bass, 323 for black grouper, and 402 for red grouper. Combining revenues from snapper grouper and other species on the same trip, the average revenue (2007 dollars) per vessel for vessels landing the subject species would be $20,551 for gag, $28,454 for vermilion snapper, $22,168 for red snapper, $19,034 for black sea bass, $7,186 for black grouper, and $17,164 for red grouper."

"For the period 2003-2007, an average of 1,635 vessels were permitted to operate in the snapper grouper for-hire fishery, of which 82 are estimated to have operated as headboats. Within the total number of vessels, 227 also possessed a commercial snapper grouper permit and would be included in the summary information provided on the commercial sector. The for-hire fleet is comprised of charterboats, which charge a fee on a vessel basis, and headboats, which charge a fee on an individual angler (head) basis. The charterboat annual average gross

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[13] The FWCC's seven Commissioners are appointed by the governor and confirmed by the Florida Senate to five-year terms. Their constitutional duty is to exercise the "...regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees and penalties for violating regulations shall be as provided by law." *See* Florida Fish and Wildlife Conservation Commission, http://myfwc.com/ABOUT/About_commissioners.htm. (last visited March 08, 2010.) *See also,* Art. IV, § 9 Fla. Const.

revenue is estimated to range from approximately $62,000-$84,000 for Florida vessels, $73,000-$89,000 for North Carolina vessels, $68,000-$83,000 for Georgia vessels, and $32,000-$39,000 for South Carolina vessels. For headboats, the appropriate estimates are $170,000-$362,000 for Florida vessels, and $149,000-$317,000 for vessels in the other states."

"The sudden reductions in allowable harvest being implemented for a wide range of species will reduce business income. Public testimony to date received by the Councils and NOAA Fisheries Service indicate that recreational charter businesses have been or expect to see reductions in business ranging from 25 to 60% because of the growing number of regulatory restrictions being implemented. Some fishing business owners have stated publicly that they will not be able to stay in business at all."

"The short-term negative impacts to fishing and fishing industries could be severe. However, there are long term negative fiscal impacts associated with delaying or prolonging the rebuilding and recovery of targeted fisheries. As an example, the current projections for rebuilding the South Atlantic red snapper fishery indicate a doubling of the available harvest (landings) by 2020. This result is expected because fishing pressure will be reduced by about 80% immediately. As the fish population (stock) rebuilds it is expected that commercial and recreational fishermen will benefit from increased harvest allowances and higher average annual yields than are available now."

"Fiscal estimates of the effects of the Act depend upon the management alternatives used, and the severity of those alternatives. For example, an extended closed season for an economically important species like red snapper would affect the for-hire sector (charter boats and head boats) who have a direct business connection to the availability of that species. Other economic factors, e.g., fuel sales, fishing tackle sales, would also be affected by restrictive management measures associated with rebuilding plans. Likewise, fishing closures have an effect on the availability of species that are commercially sold in the marketplace, and this could lead to that species being replaced in the market by imports or other species not under management."[14]

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On February 17, 2010, the General Government Policy Council amended and passed HM 553.

The amendment deletes "of 2007" after the "Magnuson-Stevens Conservation and Management Act" to avoid confusion.

The amendment clarifies federal requirements for the implementation of annual catch limits and the deadlines for those catch limits.

The bill was reported favorably as a Council Substitute. The analysis reflects the Council Substitute.

[14] Florida Fish & Wildlife Conservation Commission (FWCC) 2010 Legislative Bill Analysis on file with the Policy Council.

House Memorial

A memorial to the Congress of the United States, urging Congress to consider all available mechanisms to lessen the sudden impact of the changes made to the Magnuson-Stevens Fishery Conservation and Management Act and seek to balance resource protection and economic prosperity in Florida.

WHEREAS, the Magnuson-Stevens Fishery Conservation and Management Act emphasized preventing overfishing and rebuilding overfished stocks, and

WHEREAS, recent revisions to the act were prompted in part by criticism of progress toward ending overfishing and rebuilding fish stocks, and

WHEREAS, such revisions impose significant restrictions on commercial and recreational fishing in federal waters and prohibitively short deadlines to end overfishing, and

WHEREAS, every federally managed fishery that is classified as undergoing overfishing is required to have annual catch limits and accountability measures in place by 2010, and

WHEREAS, all other federally managed species are required to have annual catch limits and accountability measures in place by 2011, and

WHEREAS, such requirements include accountability measures which stipulate that if catch limits are exceeded for such federally managed species, federal actions must be stipulated to compensate for the harvest overage, and

WHEREAS, the consequence of such accountability measures is

that certain types of fishing activity, such as recreational fishing, could be faced with ever-increasing limits imposed over a minimal timeframe, and

WHEREAS, in the federal waters of the South Atlantic, there are 10 species of economically important reef fish that are subject to the new deadline, and

WHEREAS, a number of similar actions to restrict harvest of reef fish in the Gulf of Mexico have been instituted, and

WHEREAS, federal managers are considering a complete closure of all fishing for the Atlantic red snapper fishery, and

WHEREAS, severely restricting or eliminating harvest for 10 of the state's most valuable reef fish species simultaneously will have the unfortunate impact of putting people out of business, and

WHEREAS, the act requires federal managers to use the best scientific information available to end overfishing and provide future sustainable harvest, and

WHEREAS, even though fishery scientists are using the best scientific information available, there continues to be inadequate funding to conduct the level of fisheries monitoring and research work necessary to meet the standards of the act, and

WHEREAS, to meet such standards, it is imperative to provide federal fishery managers with the financial means necessary to gather and analyze more complete and continuous information on the status of fish stocks, and

WHEREAS, consistent with these conservation requirements, recent changes to the act direct that economic impacts to

fishing communities be minimized and that mechanisms be provided to support the economic health of fishing communities, and

WHEREAS, every effort should be made to provide economic assistance to key fishing industries and businesses that cannot survive the restrictions being implemented by recent changes to the Magnuson-Stevens Fishery Conservation and Management Act, NOW, THEREFORE,

Be It Resolved by the Legislature of the State of Florida:

That the Congress of the United States is requested to consider all available mechanisms to lessen the sudden impact of the changes made to the Magnuson-Stevens Fishery Conservation and Management Act and seek to balance resource protection and economic prosperity in Florida.

BE IT FURTHER RESOLVED that copies of this memorial be dispatched to the President of the United States, to the President of the United States Senate, to the Speaker of the United States House of Representatives, and to each member of the Florida delegation to the United States Congress.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 787 Child Abduction Prevention
SPONSOR(S): Public Safety & Domestic Security Policy Committee, Rouson and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1862

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	10 Y, 0 N, As CS	Krol	Cunningham
2)	Policy Council		Varn	Ciccone
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

SUMMARY ANALYSIS

Committee Substitute for House Bill 787 provides additional risk factors for a judge to consider when deciding whether or not a child is at risk of parental abduction. The bill also clearly outlines and makes additions to preventative measures that a judge may order if the judge finds credible evidence that a child is at risk of abduction. Finally, the bill provides that violation of the parenting plan may subject the party to civil or criminal penalties or a federal or state warrant under federal or state law.

The bill does not appear to have a fiscal impact.

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

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:

Child Abduction

Approximately 49 percent of child abductions are committed by a parent or relative.[1] When a child is abducted, it is often extremely difficult, time-consuming, and expensive to recover the child.[2] If the child has been taken overseas, the situation becomes worse and the child may be almost impossible to locate or recover.[3]

Uniform Child Abduction Prevention Act

The Uniform Child Abduction Prevention Act (UCAPA) was promulgated by the National Conference of Commissioners on Uniform States Laws (NCCUSL) in 2006.[4] The NCCUSL recommends laws for adoption by states in areas where it believes the laws should be uniform. The UCAPA's stated purpose is to provide a mechanism for a court to impose child abduction prevention measures at any time, both before and after the court has entered a custody decree, thereby deterring and preventing domestic and international abduction.[5] The abduction can be committed by a parent, persons acting on behalf of a parent, or others.

The UCAPA was created to complement and strengthen existing law, such as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[6], the federal Parental Kidnapping Prevention Act (PKPA), and with regard to international child abduction, the Hague Convention on the Civil Aspects of

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[1] Karen A. Bilich, Parenting, *Child Abduction Facts*, http://www.parents.com/kids/safety/stranger-safety/child-abduction-facts/, (Last accessed March 17, 2010).

[2] Merle Weiner, *Uniform Child Abduction Prevention Act: Understanding the Basics*, Summer 2009, http://www.haguedv.org/articles/Weiner%20&%20Mitchell%20UCAPA%20Synergy%202009.pdf, (Last accessed March 17, 2010).

[3] *Ibid.*

[4] Illinois General Assembly, *Uniform Child Abduction Prevention Act (UCAPA)*, http://www.ilga.gov/commission/lru/56.Abduction.pdf, (Last accessed March 17, 2010).

[5] Child abduction is defined as "wrongful removal" or "wrongful retention" of an unemancipated minor. State of New Jersey Law Revision Commission, *Final Report Relating to Uniform Child Abduction Prevention Act*, www.lawrev.state.nj.us/ucapa/ucapaFR122208.doc, (Last accessed March 17, 2010).

[6] *Op. cit.*, Illinois General Assembly. The UCCJEA is the law in 48 states. In 2002, Florida enacted the Uniform Child Custody Jurisdiction and Enforcement Act to replace the outdated Uniform Child Custody Jurisdiction Act. *See* ss. 61.501-61.542, F.S.

International Child Abduction (Hague Convention.)[7] The UCAPA is "premised on the general principle that preventing abduction is in a child's best interests."[8]

Thus, the UCAPA, "provides states with a valuable tool for deterring both domestic and international child abductions by parents and people acting on behalf of the parents."[9] The UCAPA will become the law of a state only if the state enacts it.[10] During its initial legislative year (2007), seven states enacted the UCAPA into law.[11]

Child Abduction Prevention in Florida

Section 61.45, F.S., provides that when imposing a parenting plan, the court will consider a variety of factors in determining whether there is a risk that the plan will be violated. The court may also impose a bond if they believe there is a risk that the plan will be violated. In a proceeding in which the court enters a parenting plan, if competent substantial evidence is presented that there is a risk one party may violate the court's parenting plan by removing the child from the state or country or concealing the whereabouts of the child, the court may impose the following preventative measures:

- Order that a parent may not remove the child from this state without the notarized written permission of both parents or further court order;
- Order that a parent may not remove the child from this country without the notarized written permission of both parents or further court order;
- Order that a parent may not take the child to a country that has not ratified or acceded to the Hague Convention unless the other parent agrees in writing that the child may be taken to the country;
- Require a parent to surrender the passport of the child; or
- Require a party to post bond or other security.

If the court enters a parenting plan that includes a provision that the party not remove the child from the country without notarized written permission of both parents or take the child to a country that has not ratified or acceded to the Hague Convention, a certified copy of the order should be sent by the parent who requested the restriction to the Passport Services Office of the U.S. Department of State requesting that the office not issue a passport to the child without the parents' signature or further court order.

In assessing the need for a bond or other security, the court may consider any reasonable factor bearing upon the risk that a party may violate a parenting plan by removing a child from this state or country or by concealing the whereabouts of a child, including but not limited to whether:

- A court has found that a party previously removed a child from Florida or another state in violation of a parenting plan, or whether a court had found that a party has threatened to take a child out of Florida or another state in violation of a parenting plan;
- The party has strong family and community ties to Florida or to other states or countries, including whether the party or child is a citizen of another country;
- The party has strong financial reasons to remain in Florida or to relocate to another state or country;
- The party has engaged in activities that suggest plans to leave Florida, such as quitting employment; sale of a residence or termination of a lease on a residence, without efforts to acquire an alternative residence in the state; closing bank accounts or otherwise liquidating assets; or applying for a passport;

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[7] 81 countries have ratified the Hague Convention. *The Hague Convention on the Civil Aspects of International Child Abduction,* http://hcch.evision.nl/index_en.php?act=conventions.status&cid=24#nonmem, (Last accessed March 17, 2010).

[8] *Ibid.*

[9] The National Conference of Commissioners on Uniform State Laws, *Summary: Uniform Child Abduction Prevention Act,* http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ucapa.asp, (Last accessed March 17, 2010).

[10] *Op. cit.,* Weiner.

[11] *Op. cit.,* Illinois General Assembly. The seven states include: Colorado; Kansas; Louisiana; Nebraska; Nevada; South Dakota; and Utah.

- Either party has had a history of domestic violence as either a victim or perpetrator, child abuse or child neglect evidenced by criminal history, including but not limited to, arrest, an injunction for protection against domestic violence issued after notice and hearing, medical records, affidavits, or any other relevant information; or
- The party has a criminal record.

Section 61.45, F.S., also makes provisions for the determination and forfeiture of the bond or security. It provides an exception to the bond requirements for a parent determined by the court to be a victim or potential victim of domestic violence. The statute also provides for allocation of the bond proceeds upon entry of a forfeiture order.

Effect of Proposed Changes
Committee Substitute for House Bill 787 adds additional risk factors for a judge to consider when deciding whether or not a child is at risk of parental abduction. The bill also clearly outlines and makes additions to preventative measures that a judge may order if the judge finds credible evidence that a child is at risk of abduction. The bill also provides that a violation of the parenting plan may subject the party to civil or criminal penalties or a federal or state warrant under federal or state law. The bill also renames s. 61.45, F.S., to the "Child Abduction Prevention Act."

New Preventative Measures
Currently, preventative measures may be ordered by a judge if one of the parties presents competent substantial evidence there is a risk of abduction or if both parties agree there is a risk of abduction. CS/HB 787 would also permit a judge to order preventative measures upon the motion of another individual or entity having a right under the laws of Florida. Additionally, the bill would allow the court to order preventative measures, if the court finds evidence that establishes credible risk of removal of the child.

In addition to the existing preventative measure for a parent to surrender the child's passport, the court may also require that:

- The petitioner place the child's name in the Children's Passport Issuance Alert Program of the U.S. Department of State;[12]
- The respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and child; and
- The respondent may not apply on behalf of the child for a new or replacement passport or visa.

As noted above, the court may require the party to post bond or other security in an amount sufficient to serve as a financial deterrent to abduction. The bill specifies that the bond may be used to pay for the reasonable expenses of recovery of the child, including reasonable attorney's fees and costs, if the child is abducted.

In addition to the existing preventative measure for a court to order a party not to remove the child from the state or country without notarized written permission, a court may order:

- An imposition of travel restrictions that require that a party traveling with the child outside a designated geographic area provide the other party with the travel itinerary of the child; a list of

[12] The Children's Passport Issuance Alert Program of the U.S. Department of State allows a parent to register his or her U.S. citizen children under the age of 18 in the Department of State's Passport Lookout System. The parent or parents receive an alert from the Department of State if an application is submitted for a child that is registered in the program. The passport lookout system gives all U.S. passport agencies as well as U.S. embassies and consulates abroad an alert on a child's name if a parent or guardian registers an objection to passport issuance for his or her child. U.S. Passport Service Guide, *The Children's Passport Issuance Alert Program,* available at: http://travel.state.gov/family/abduction/resources/resources_554.html. (Last accessed March 17, 2010).

physical addresses and telephone numbers at which the child can be reached at specified times; and copies of all travel documents;

- A prohibition of the respondent from, directly or indirectly:
  - Removing the child from the state or country or specified region without written consent;
  - Removing or retaining a child in violation of a child custody determination;
  - Removing the child from school, child care or similar facility; or
  - Approaching the child at any location other than a site designated for supervised visitation.
- A requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state;
- As a prerequisite to exercising custody or visitation, a court may order a requirement that the respondent provide the following:
  - Authenticated court order detailing passport and travel restrictions for the child to the Office of Children's Issues within the Bureau of Consular Affairs of the U.S. Department of State and relevant foreign consulate or embassy;
  - Proof to the court that the respondent has provided the information as noted above;
  - An acknowledgement to the court in a record from the relevant foreign consulate or embassy that no passport application has been made or issued on behalf of the child;
  - Proof to the petitioner and court of registration with the U.S. embassy or other U.S. diplomatic presence in the destination country and with the destination country's central authority for the Hague Convention, if that convention is in effect between this country and the destination country, unless one of the parties objects;
  - A written waiver under the Privacy Act, 5 U.S.C. s. 552(a), as amended, with respect to any document, application, or other information pertaining to the child or party authorizing its disclosure to the court and petitioner;
  - A written waiver with respect to any document application, or other information pertaining to the child or respondent in records held by the U.S. Bureau of Citizenship and Immigration Services authorizing its disclosure to the court and the petitioner;
  - Upon the court's request, a requirement that the party obtain an order from the relevant foreign country, containing terms identical to the child custody determination issued in this country; or
  - Upon the court's request, a requirement that the child be entered into the Prevent Departure Program of the U.S. Department of State[13] or a similar federal program designed to prevent unauthorized departure into foreign country.
- The court may impose conditions on the exercise of custody or visitation that limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary and orders the respondent to pay the costs of supervision.

New Risk Factors

The bill imposes additional risk factors that a party has engaged in activities that suggest that he or she may violate the parenting plan by abducting the child. The new factors include whether:

- The party has engaged in activities that suggest plans to leave Florida such as applying for a passport or visa or obtaining travel documents for the respondent; a family member, or the child;
- The party has sought to obtain the child's birth certificate or school medical records;
- The party is likely to take the child to a country that:
  - Is not a party to the Hague Convention and does not provide for the extradition of an abducting parent or for the return of an abducted child;
  - Is a party to the Hague Convention, but:
    - The Hague Convention is not in force between this country and that country;
    - Is noncompliant or demonstrating patterns of noncompliance according to the most recent compliance report issued by the U.S. Department of State; or

[13] The Department of Homeland Security's Prevent Departure Program prevents non-U.S. citizens from leaving the U.S. The program only applies to aliens. It is not available to stop U.S. citizens or dual U.S./foreign citizens from leaving the country. Office of Juvenile Justice and Delinquency Prevention. *A Family Resource Guide on International Parental Kidnapping.* http://www.ncjrs.gov/pdffiles1/ojjdp/215476.pdf. (Last accessed March 17, 2010).

        - Lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention;
    - Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;
    - Has laws or practices that would:
        - Enable the respondent, without due cause, to prevent the petitioner from contacting the child;
        - Restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status, or religion; or
        - Restrict the child's ability legally to leave the country after the child reaches the age of majority because of a child's gender, nationality, or religion;
    - Is included by the U.S. Department of State on a current list of state sponsors of terrorism
    - Does not have an official U.S. diplomatic presence in the country; or
    - Is engaged in active military action or war, including a civil war, to which the child may be exposed
- The party is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in this country legally;
- The party has had an application for U.S. citizenship denied;
- The party has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, or travel documents, a social security card, a driver's license, or other government-issued identification card or has made a misrepresentation to the U.S. government;
- The party has used multiple names to attempt to mislead or defraud;
- The party has been diagnosed with a mental health disorder the court considers relevant to the risk of abduction; or
- The party is engaged in any other conduct the court considers relevant to the risk of abduction.

A violation of the court-ordered parenting plan may subject the party committing the violation to civil or criminal penalties or a federal or state warrant under federal or state laws, including the International Parental Kidnapping Crime Act,[14] and may subject the violating parent to apprehension by a law enforcement officer.

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

B. SECTION DIRECTORY:

Section 1. Names the act as the "Child Abduction Prevention Act."

Section 2. Amends s. 61.45, F.S., relating to court-ordered parenting plan; risk of violation; bond.

Section 3. Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

[14] The International Parental Kidnapping Crime Act (IPKCA) of 1993 provides that a criminal arrest warrant can be issued for a parent who takes a juvenile under 16 outside of the U.S. without the other custodial parent's permission. Federal Bureau of Investigation, *Crimes Against Children*, http://www.fbi.gov/hq/cid/cac/family.htm, (Last accessed March 17, 2010).

See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill provides that law enforcement officers may be required to take a child into custody in certain situations, which could cause an increase in workload. However, to the extent that this bill could prevent the abduction of a child, courts and law enforcement officers are likely to see a reduction in litigation and enforcement costs respectively.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Several states have considered adopting the UCAPA, but declined to do so. One of the reasons some states did not adopt the UCAPA is that they believe that the measures to prevent abduction took away certain fundamental liberties, such as the right to travel.[15] Another reason was that some of the factors that the court may consider to determine whether a credible risk of abduction of a child exists do not in and of themselves display evidence of such a risk and may be used by a parent as a control mechanism.[16] Examples include obtaining a child's school records or birth certificate, a parent changing jobs, or the purchase of airline tickets. These actions may evidence parental responsibility or change of circumstances, rather than evidence a possible abduction.[17] Some states have rectified some of the problems by modifying the UCAPA to apply only to international child abductions and allow for the consideration of risk factors in their totality rather than individually.[18]

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[15] *Op. cit.*, State of New Jersey Law Revision Commission.
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.* Louisiana is one state that has adopted a version of UCAPA that applies exclusively to international adoptions.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 22, 2010, the Public Safety & Domestic Security Policy Committee adopted an amendment to the bill. The amendment:

- Removes "delusional paranoiac" and "severely sociopathic" from the risk factors the court can consider; and
- Adds to the list of risk factors: "The party has been diagnosed with a mental health disorder the court considers relevant to the risk of abduction."

The bill was reported favorably as a Committee Substitute. This analysis reflects the Committee Substitute.

A bill to be entitled

An act relating to child abduction prevention; providing a short title; amending s. 61.45, F.S.; authorizing additional persons to move to have certain restrictions placed in parenting plans upon showing of a risk that one party may violate the court's parenting plan by removing a child from this state or country or by concealing the child's whereabouts; authorizing courts to impose certain restrictions in parenting plans upon a specified finding; authorizing a court to impose certain restrictions in addition to or in lieu of a requirement that a child's passport be surrendered; authorizing a court to impose specified restrictions upon entry of an order to prevent removal of a child from this state or country; providing additional factors that may be considered in assessing the risk that a party may violate a parenting plan by removing a child from this state or country or by concealing the child's whereabouts; providing that violations may subject a violator to specified penalties or other consequences; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. <u>This act may be cited as the "Child Abduction Prevention Act."</u>

Section 2. Section 61.45, Florida Statutes, is amended to read:

61.45 Court-ordered parenting plan; risk of violation; bond.—

(1) In any proceeding in which the court enters a parenting plan, including a time-sharing schedule, including in a modification proceeding, upon the presentation of competent substantial evidence that there is a risk that one party may violate the court's parenting plan by removing a child from this state or country or by concealing the whereabouts of a child, ~~or~~ upon stipulation of the parties, upon the motion of another individual or entity having a right under the law of this state, or if the court finds evidence that establishes credible risk of removal of the child, the court may:

(a) Order that a parent may not remove the child from this state without the notarized written permission of both parents or further court order;

(b) Order that a parent may not remove the child from this country without the notarized written permission of both parents or further court order;

(c) Order that a parent may not take the child to a country that has not ratified or acceded to the Hague Convention on the Civil Aspects of International Child Abduction unless the other parent agrees in writing that the child may be taken to the country;

(d) Require a parent to surrender the passport of the child or require that:

1. The petitioner place the child's name in the Children's Passport Issuance Alert Program of the United States Department of State;

2. The respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and the child; and

3. The respondent not apply on behalf of the child for a new or replacement passport or visa; or

(e) Require that party to post bond or other security in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to pay for the reasonable expenses of recovery of the child, including reasonable attorney's fees and costs, if the child is abducted.

(2) If the court enters a parenting plan, including a time-sharing schedule, including in a modification proceeding, that includes a provision entered under paragraph (1)(b) or paragraph (1)(c), a certified copy of the order should be sent by the parent who requested the restriction to the Passport Services Office of the United States Department of State requesting that they not issue a passport to the child without their signature or further court order.

(3) If the court enters an order under paragraph (1)(a) or paragraph (1)(b) to prevent the removal of the child from this state or country, the order may include one or more of the following:

(a) An imposition of travel restrictions that require that a party traveling with the child outside a designated geographic area provide the other party with the following:

1. The travel itinerary of the child.

2. A list of physical addresses and telephone numbers at which the child can be reached at specified times.

3. Copies of all travel documents.

(b) A prohibition of the respondent directly or indirectly:

1. Removing the child from this state or country or another specified geographic area without permission of the court or the petitioner's written consent;

2. Removing or retaining the child in violation of a child custody determination;

3. Removing the child from school or a child care or similar facility; or

4. Approaching the child at any location other than a site designated for supervised visitation.

(c) A requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state.

(d) As a prerequisite to exercising custody or visitation, a requirement that the respondent provide the following:

1. An authenticated copy of the order detailing passport and travel restrictions for the child to the Office of Children's Issues within the Bureau of Consular Affairs of the United States Department of State and the relevant foreign consulate or embassy.

2. Proof to the court that the respondent has provided the information in subparagraph 1.

3. An acknowledgment to the court in a record from the relevant foreign consulate or embassy that no passport

application has been made, or passport issued, on behalf of the child.

4. Proof to the petitioner and court of registration with the United States embassy or other United States diplomatic presence in the destination country and with the destination country's central authority for the Hague Convention on the Civil Aspects of International Child Abduction, if that convention is in effect between this country and the destination country, unless one of the parties objects.

5. A written waiver under the Privacy Act, 5 U.S.C. s. 552a, as amended, with respect to any document, application, or other information pertaining to the child or the respondent authorizing its disclosure to the court and the petitioner.

6. A written waiver with respect to any document, application, or other information pertaining to the child or the respondent in records held by the United States Bureau of Citizenship and Immigration Services authorizing its disclosure to the court and the petitioner.

7. Upon the court's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child custody determination issued in this country.

8. Upon the court's request, a requirement that the respondent be entered in the Prevent Departure Program of the United States Department of State or a similar federal program designed to prevent unauthorized departures to foreign countries.

(e) The court may impose conditions on the exercise of custody or visitation that limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary and orders the respondent to pay the costs of supervision.

(4) ~~(3)~~ In assessing the need for a bond or other security, the court may consider any reasonable factor bearing upon the risk that a party may violate a parenting plan by removing a child from this state or country or by concealing the whereabouts of a child, including but not limited to whether:

(a) A court has previously found that a party previously removed a child from Florida or another state in violation of a parenting plan, or whether a court had found that a party has threatened to take a child out of Florida or another state in violation of a parenting plan;

(b) The party has strong family and community ties to Florida or to other states or countries, including whether the party or child is a citizen of another country;

(c) The party has strong financial reasons to remain in Florida or to relocate to another state or country;

(d) The party has engaged in activities that suggest plans to leave Florida, such as quitting employment; sale of a residence or termination of a lease on a residence, without efforts to acquire an alternative residence in the state; closing bank accounts or otherwise liquidating assets; ~~or~~ applying for a passport or visa or obtaining travel documents for the respondent, a family member, or the child;

(e) The party has sought to obtain the child's birth certificate or school or medical records;

(f) ~~(e)~~ Either party has had a history of domestic violence as either a victim or perpetrator, child abuse or child neglect evidenced by criminal history, including but not limited to, arrest, an injunction for protection against domestic violence issued after notice and hearing under s. 741.30, medical records, affidavits, or any other relevant information; ~~or~~

(g) ~~(f)~~ The party has a criminal record; ~~.~~

(h) The party is likely to take the child to a country that:

1. Is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide for the extradition of an abducting parent or for the return of an abducted child;

2. Is a party to the Hague Convention on the Civil Aspects of International Child Abduction, but:

a. The Hague Convention on the Civil Aspects of International Child Abduction is not in force between this country and that country;

b. Is noncompliant or demonstrating patterns of noncompliance according to the most recent compliance report issued by the United States Department of State; or

c. Lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention on the Civil Aspects of International Child Abduction;

3. Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of

specific circumstances relating to the child or because of human rights violations committed against children;

4. Has laws or practices that would:

a. Enable the respondent, without due cause, to prevent the petitioner from contacting the child;

b. Restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status, or religion; or

c. Restrict the child's ability legally to leave the country after the child reaches the age of majority because of a child's gender, nationality, or religion;

5. Is included by the United States Department of State on a current list of state sponsors of terrorism;

6. Does not have an official United States diplomatic presence in the country; or

7. Is engaged in active military action or war, including a civil war, to which the child may be exposed;

(i) The party is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in this country legally;

(j) The party has had an application for United States citizenship denied;

(k) The party has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a social security card, a driver's license, or other government-issued identification card or has made a misrepresentation to the United States government;

(l) The party has used multiple names to attempt to mislead or defraud;

(m) The party has been diagnosed with a mental health disorder the court considers relevant to the risk of abduction; or

(n) The party has engaged in any other conduct the court considers relevant to the risk of abduction.

(5) ~~(4)~~ The court must consider the party's financial resources prior to setting the bond amount under this section. Under no circumstances may the court set a bond that is unreasonable.

(6) ~~(5)~~ Any deficiency of bond or security shall not absolve the violating party of responsibility to pay the full amount of damages determined by the court.

(7) ~~(6)~~(a) Upon a material violation of any parenting plan by removing a child from this state or ~~this~~ country or by concealing the whereabouts of a child, the court may order the bond or other security forfeited in whole or in part.

(b) This section, including the requirement to post a bond or other security, does not apply to a parent who, in a proceeding to order or modify a parenting plan or time-sharing schedule, is determined by the court to be a victim of an act of domestic violence or provides the court with reasonable cause to believe that he or she is about to become the victim of an act of domestic violence, as defined in s. 741.28. An injunction for protection against domestic violence issued pursuant to s. 741.30 for a parent as the petitioner which is in effect at the time of the court proceeding shall be one means of demonstrating

sufficient evidence that the parent is a victim of domestic violence or is about to become the victim of an act of domestic violence, as defined in s. 741.28, and shall exempt the parent from this section, including the requirement to post a bond or other security. A parent who is determined by the court to be exempt from the requirements of this section must meet the requirements of s. 787.03(6) if an offense of interference with the parenting plan or time-sharing schedule is committed.

(8) ~~(7)~~(a) Upon an order of forfeiture, the proceeds of any bond or other security posted pursuant to this subsection may only be used to:

1. Reimburse the nonviolating party for actual costs or damages incurred in upholding the court's parenting plan.

2. Locate and return the child to the residence as set forth in the parenting plan.

3. Reimburse reasonable fees and costs as determined by the court.

(b) Any remaining proceeds shall be held as further security if deemed necessary by the court, and if further security is not found to be necessary; applied to any child support arrears owed by the parent against whom the bond was required, and if no arrears exists; all remaining proceeds will be allocated by the court in the best interest of the child.

(9) ~~(8)~~ At any time after the forfeiture of the bond or other security, the party who posted the bond or other security, or the court on its own motion may request that the party provide documentation substantiating that the proceeds received as a result of the forfeiture have been used solely in

accordance with this subsection. Any party using such proceeds for purposes not in accordance with this section may be found in contempt of court.

(10) A violation may subject the party committing the violation to civil or criminal penalties or a federal or state warrant under federal or state laws, including the International Parental Kidnapping Crime Act, and may subject the violating parent to apprehension by law enforcement.

Section 3. This act shall take effect July 1, 2010.

Amendment No. 1

COUNCIL/COMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Policy Council

Representative(s) Rouson offered the following:

Amendment

Remove everything after the enacting clause and insert:

Section 1. This act may be cited as the "Child Abduction Prevention Act."

Section 2. Section 61.45, Florida Statutes, is amended to read:

61.45 Court-ordered parenting plan; risk of violation; bond.—

(1) In any proceeding in which the court enters a parenting plan, including a time-sharing schedule, including in a modification proceeding, upon the presentation of competent substantial evidence that there is a risk that one party may violate the court's parenting plan by removing a child from this state or country or by concealing the whereabouts of a child, ~~or~~ upon stipulation of the parties, upon the motion of another individual or entity having a right under the law of this state,

or if the court finds evidence that establishes credible risk of removal of the child, the court may:

(a) Order that a parent may not remove the child from this state without the notarized written permission of both parents or further court order;

(b) Order that a parent may not remove the child from this country without the notarized written permission of both parents or further court order;

(c) Order that a parent may not take the child to a country that has not ratified or acceded to the Hague Convention on the Civil Aspects of International Child Abduction unless the other parent agrees in writing that the child may be taken to the country;

(d) Require a parent to surrender the passport of the child or require that:

1. The petitioner place the child's name in the Children's Passport Issuance Alert Program of the United States Department of State;

2. The respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and the child; and

3. The respondent not apply on behalf of the child for a new or replacement passport or visa; or

(e) Require that a party ~~to~~ post bond or other security in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to pay the

reasonable expenses of recovery of the child, including reasonable attorney's fees and costs, if the child is abducted.

(2) If the court enters a parenting plan, including a time-sharing schedule, including in a modification proceeding, that includes a provision entered under paragraph (1)(b) or paragraph (1)(c), a certified copy of the order should be sent by the parent who requested the restriction to the Passport Services Office of the United States Department of State requesting that they not issue a passport to the child without their signature or further court order.

(3) If the court enters an order under paragraph (1)(a) or paragraph (1)(b) to prevent the removal of the child from this state or country, the order may include one or more of the following:

(a) An imposition of travel restrictions that require that a party traveling with the child outside a designated geographic area provide the other party with the following:

1. The travel itinerary of the child.

2. A list of physical addresses and telephone numbers at which the child can be reached at specified times.

3. Copies of all travel documents.

(b) A prohibition of the respondent directly or indirectly:

1. Removing the child from this state or country or another specified geographic area without permission of the court or the petitioner's written consent;

2. Removing or retaining the child in violation of a child custody determination;

3. Removing the child from school or a child care or similar facility; or

4. Approaching the child at any location other than a site designated for supervised visitation.

(c) A requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state.

(d) As a prerequisite to exercising custody or visitation, a requirement that the respondent provide the following:

1. An authenticated copy of the order detailing passport and travel restrictions for the child to the Office of Children's Issues within the Bureau of Consular Affairs of the United States Department of State and the relevant foreign consulate or embassy.

2. Proof to the court that the respondent has provided the information in subparagraph 1.

3. An acknowledgment to the court in a record from the relevant foreign consulate or embassy that no passport application has been made, or passport issued, on behalf of the child.

4. Proof to the petitioner and court of registration with the United States embassy or other United States diplomatic presence in the destination country and with the destination country's central authority for the Hague Convention on the Civil Aspects of International Child Abduction, if that convention is in effect between this country and the destination country, unless one of the parties objects.

5. A written waiver under the Privacy Act, 5 U.S.C. s. 552a, as amended, with respect to any document, application, or other information pertaining to the child or the respondent authorizing its disclosure to the court.

6. A written waiver with respect to any document, application, or other information pertaining to the child or the respondent in records held by the United States Bureau of Citizenship and Immigration Services authorizing its disclosure to the court.

7. Upon the court's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child custody determination issued in this country.

8. Upon the court's request, a requirement that the respondent be entered in the Prevent Departure Program of the United States Department of State or a similar federal program designed to prevent unauthorized departures to foreign countries.

(e) The court may impose conditions on the exercise of custody or visitation that limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary and orders the respondent to pay the costs of supervision.

(4)~~(3)~~ In assessing the need for a bond or other security, the court may consider any reasonable factor bearing upon the risk that a party may violate a parenting plan by removing a child from this state or country or by concealing the whereabouts of a child, including but not limited to whether:

(a) A court has previously found that a party previously removed a child from Florida or another state in violation of a parenting plan, or whether a court had found that a party has threatened to take a child out of Florida or another state in violation of a parenting plan;

(b) The party has strong family and community ties to Florida or to other states or countries, including whether the party or child is a citizen of another country;

(c) The party has strong financial reasons to remain in Florida or to relocate to another state or country;

(d) The party has engaged in activities that suggest plans to leave Florida, such as quitting employment; sale of a residence or termination of a lease on a residence, without efforts to acquire an alternative residence in the state; closing bank accounts or otherwise liquidating assets; ~~or~~ applying for a passport or visa; or obtaining travel documents for the respondent or the child;

(e) Either party has had a history of domestic violence as either a victim or perpetrator, child abuse or child neglect evidenced by criminal history, including but not limited to, arrest, an injunction for protection against domestic violence issued after notice and hearing under s. 741.30, medical records, affidavits, or any other relevant information; ~~or~~

(f) The party has a criminal record;~~.~~

(g) The party is likely to take the child to a country that:

1. Is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide

for the extradition of an abducting parent or for the return of an abducted child;

2. Is a party to the Hague Convention on the Civil Aspects of International Child Abduction, but:

a. The Hague Convention on the Civil Aspects of International Child Abduction is not in force between this country and that country;

b. Is noncompliant or demonstrating patterns of noncompliance according to the most recent compliance report issued by the United States Department of State; or

c. Lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention on the Civil Aspects of International Child Abduction;

3. Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;

4. Has laws or practices that would:

a. Enable the respondent, without due cause, to prevent the petitioner from contacting the child;

b. Restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status, or religion; or

c. Restrict the child's ability to legally leave the country after the child reaches the age of majority because of a child's gender, nationality, or religion;

5. Is included by the United States Department of State on a current list of state sponsors of terrorism;

6. Does not have an official United States diplomatic presence in the country; or

7. Is engaged in active military action or war, including a civil war, to which the child may be exposed;

(h) The party is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in this country legally;

(i) The party has had an application for United States citizenship denied;

(j) The party has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a social security card, a driver's license, or other government-issued identification card or has made a misrepresentation to the United States government;

(k) The party has used multiple names to attempt to mislead or defraud;

(l) The party has been diagnosed with a mental health disorder that the court considers relevant to the risk of abduction; or

(m) The party has engaged in any other conduct that the court considers relevant to the risk of abduction.

(5) ~~(4)~~ The court must consider the party's financial resources prior to setting the bond amount under this section. Under no circumstances may the court set a bond that is unreasonable.

(6)~~(5)~~ Any deficiency of bond or security does ~~shall~~ not absolve the violating party of responsibility to pay the full amount of damages determined by the court.

(7)~~(6)~~(a) Upon a material violation of any parenting plan by removing a child from this state or ~~this~~ country or by concealing the whereabouts of a child, the court may order the bond or other security forfeited in whole or in part.

(b) This section, including the requirement to post a bond or other security, does not apply to a parent who, in a proceeding to order or modify a parenting plan or time-sharing schedule, is determined by the court to be a victim of an act of domestic violence or provides the court with reasonable cause to believe that he or she is about to become the victim of an act of domestic violence, as defined in s. 741.28. An injunction for protection against domestic violence issued pursuant to s. 741.30 for a parent as the petitioner which is in effect at the time of the court proceeding shall be one means of demonstrating sufficient evidence that the parent is a victim of domestic violence or is about to become the victim of an act of domestic violence, as defined in s. 741.28, and shall exempt the parent from this section, including the requirement to post a bond or other security. A parent who is determined by the court to be exempt from the requirements of this section must meet the requirements of s. 787.03(6) if an offense of interference with the parenting plan or time-sharing schedule is committed.

(8)~~(7)~~(a) Upon an order of forfeiture, the proceeds of any bond or other security posted pursuant to this subsection may only be used to:

1. Reimburse the nonviolating party for actual costs or damages incurred in upholding the court's parenting plan.

2. Locate and return the child to the residence as set forth in the parenting plan.

3. Reimburse reasonable fees and costs as determined by the court.

(b) Any remaining proceeds shall be held as further security if deemed necessary by the court, and if further security is not found to be necessary; applied to any child support arrears owed by the parent against whom the bond was required, and if no arrears exists; all remaining proceeds will be allocated by the court in the best interest of the child.

(9) ~~(8)~~ At any time after the forfeiture of the bond or other security, the party who posted the bond or other security, or the court on its own motion may request that the party provide documentation substantiating that the proceeds received as a result of the forfeiture have been used solely in accordance with this subsection. Any party using such proceeds for purposes not in accordance with this section may be found in contempt of court.

(10) A violation of this section may subject the party committing the violation to civil or criminal penalties or a federal or state warrant under federal or state laws, including the International Parental Kidnapping Crime Act, and may subject the violating parent to apprehension by a law enforcement officer.

Section 3. This act shall take effect January 1, 2011.

Amendment No. 1

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to child abduction prevention; providing a short title; amending s. 61.45, F.S.; authorizing additional persons to move to have certain restrictions placed in parenting plans upon showing of a risk that one party may violate the court's parenting plan by removing a child from this state or country or by concealing the child's whereabouts; authorizing courts to impose certain restrictions in parenting plans upon a specified finding; authorizing a court to impose certain restrictions in addition to or in lieu of a requirement that a child's passport be surrendered; authorizing a court to impose specified restrictions upon entry of an order to prevent removal of a child from this state or country; providing additional factors that may be considered in assessing the risk that a party may violate a parenting plan by removing a child from this state or country or by concealing the child's whereabouts; providing that violations may subject a violator to specified penalties or other consequences; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 845 Reverse Mortgage Loans to Senior Individuals
SPONSOR(S): Insurance, Business & Financial Affairs Policy Committee, Legg
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Insurance, Business & Financial Affairs Policy Committee	12 Y, 1 N, As CS	Marra	Cooper
2)	Policy Council		Liepshutz	Ciccone
3)	General Government Policy Council			
4)				
5)				

SUMMARY ANALYSIS

A reverse mortgage is a type of loan that allows a senior homeowner to convert a portion of his or her home equity into cash. The lender advances money as a lump sum, in monthly payments or as a line of credit. The homeowner does not have to make monthly payments; rather, the total loan amount comes due upon certain occurrences, such as the homeowner's death or a sale of the home.

The Federal Housing Administration (FHA) insures reverse mortgages through the Home Equity Conversion Mortgage (HECM) program, which places certain requirements on disclosure, fees and counseling on lenders. Loans available under the HECM program are capped at $625,500. Homeowners seeking loans for amounts beyond that amount turn to proprietary reverse mortgage programs, which account for approximately 5 to 10 percent of the market. These loans are not subject to the HECM regulations and are only subject to general fair practice and disclosure requirements.

Consumer advocates have expressed concern that some borrowers may not fully understand the complexities of the terms and costs of a reverse mortgage loan. Additionally, reverse mortgages have given rise to claims of abuse. Such claims range from marketing reverse mortgages as "free money," or government programs for seniors, to aggressively cross-selling annuities or other insurance or financial products.

The bill would subject proprietary reverse mortgages to many of the same requirements that HECMs must meet, including those requiring counseling and disclosure of certain terms, prohibiting cross-selling, and limiting origination fees.

The bill may have an insignificant fiscal impact on the Office of Financial Regulation, which licenses and regulates non-depository mortgage lenders.

The bill provides an effective date of January 1, 2011.

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:

Current Situation

A reverse mortgage is a type of loan that allows a homeowner to convert a portion of their home equity into cash. The lender advances money as a lump sum, in monthly payments or as a line of credit. The homeowner does not have to make monthly payments; rather, the total loan amount comes due upon certain occurrences, such as the homeowner's death or a sale of the home.

Generally, to be eligible for a reverse mortgage, a homeowner must be older than 62 years of age and must own his or her home with little to no outstanding liens. Because the transaction is equity-based, there are seldom income or credit qualifications.[1] Reverse mortgages are generally non-recourse loans, meaning that the borrower will never owe more than the value of the property.[2]

Equity conversion products, including reverse mortgages, have been around since the early 1960s and grew in popularity during the 1980s. In 1988, Congress created the Home Equity Conversion Mortgage (HECM) program, allowing the Federal Housing Administration (FHA) to insure reverse mortgages.[3] While HUD was originally limited to insuring 2,500 mortgages, the number of insured reverse mortgages had reached 425,000 by 2008.[4]

HECMs are only available through an FHA-approved lender and are subject to certain regulations; including:[5]

Borrower Eligibility Requirements:

- Be 62 years of age or older
- Own the property outright or have a small mortgage balance
- Occupy the property as principal residence
- Not be delinquent on any federal debt

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[1] Tara Twomey, Subprime Revisited: How Reverse Mortgage Lenders Put Older Homeowners' Equity at Risk. National Consumer Law Center 2 (Oct. 2009).

[2] *See* Mortgage Letter 2008-38. If an estate or homeowner wishes to maintain ownership of the home, however, it must pay the loan balance, regardless of the home's value.

[3] 12 U.S.C. 1715z–20 and 24 C.F.R. 206.

[4] Twomey, *supra* n. 1 at 4-5.

[5] *See* U.S. Dept. of Housing and Urban Development. FHA Reverse Mortgages (HECMs) for Consumers. *Available at* http://www.hud.gov/offices/hsg/sfh/hecm/hecmabou.cfm.

- Participate in a consumer information session given by an approved HECM counselor

Eligible Properties (must meet FHA requirements)
- Single family home or 1-4 unit home with one unit occupied by the borrower
- Manufactured home
- HUD-approved condominium

Financial Requirements:
- No income or credit qualifications
- No repayment as long as the property is the principal residence
- Closing costs may be financed in the mortgage

Mortgage Amount Based On:
- Age of the youngest borrower
- Current interest rate
- Lesser of appraised value or the HECM-FHA mortgage limit, currently $625,500.

Repayment – The loan becomes due and payable in full if:
- Borrower dies or sells home
- Borrower fails to live in the home for 12 consecutive months
- Borrower permanently moves to a new principal residence
- Borrower allows the property to deteriorate and fails to make necessary repairs
- Property taxes or hazard insurance are not paid or borrower violates other obligations

However, not all reverse mortgages are HECMs. Homeowners seeking loan amounts beyond the HECM maximum turn to proprietary programs. An accurate assessment of the number of proprietary reverse mortgages made does not exist. However, it is widely believed that proprietary reverse mortgages account for 5-10% of all reverse mortgages made. With the recent developments in the housing market and economy in general, this percentage may be smaller.[6]

These programs are not subject to the same restrictions as HECMs. They are, however, subject to basic federal creditor protection laws, including:

- Truth in Lending Act (TILA), as implemented by Regulation Z[7]
  - Requires disclosure of overall costs of credit.
  - Requires a disclosure of the "total annual cost" using three scenarios.

- Real Estate Settlement Procedures Act (RESPA)[8]
  - Requires disclosure of fees and charges in the real estate settlement process.
  - Prohibits kickbacks between settlement service providers.

- Fair Lending (Equal Credit Opportunity & Fair Housing acts)[9]
  - Prohibits discrimination in all aspects of credit transactions on certain prohibited bases.

- Unfair and Deceptive Acts or Practices (UDAP)[10]
  - Generally prohibits unfair or deceptive acts or practices in all aspects of the transaction.
  - Provides legal parameters for determining whether a particular act or practice is unfair or deceptive.

[6] Twomey, *supra* n. 1 at 4-5.
[7] 15 U.S.C. 1601 *et seq.* and 12 C.F.R. 226.1.
[8] 12 U.S.C. 2601 *et seq.*, Regulation X, 24 CFR 3500.
[9] 15 U.S.C. 1691 et *seq.*, Regulation B, 12 CFR 202, and 42 U.S.C. 3601 *et seq.*
[10] Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a)

In Florida, the Office of Financial Regulation (OFR) is responsible for the licensure and regulation of loan originators, mortgage broker businesses, and non-depository, mortgage lender businesses. State and federally chartered depository institutions and other specified entities are exempt from state licensure. A person licensed or required to be licensed under parts I-III of ch. 494, F.S., is subject to administrative fines and penalties for violating any provision of parts I-III of ch. 494, F.S., RESPA, TILA, or any regulations adopted under such acts.[11]

Consumer advocates have expressed concern that some borrowers may not fully understand the complexities of the terms and costs of a reverse mortgage loan.[12] Additionally, reverse mortgages have given rise to claims of abuse.[13] Such claims range from marketing reverse mortgages as "free money," or as a government program for seniors, to aggressively cross-selling annuities or other insurance or financial products.

Financial service providers may encourage borrowers to invest the reverse mortgage proceeds in an annuity, sometimes earning less than the interest mounting on the reverse mortgage and restricting the borrower's access to much-needed funds. The federal Housing and Economic Recovery Act of 2008 prohibits lenders from conditioning the extension of an HECM loan on a requirement that borrowers purchase any other financial or insurance product, except those that are usual and customary in mortgage lending, such as hazard or flood insurance.[14] However, this prohibition does not apply to proprietary reverse mortgage lenders.

Proposed changes

The bill limits originating reverse mortgages to Florida-licensed mortgage lenders and brokers.

The bill provides the following requirements for reverse mortgages:

- Prepayment must be allowed without penalty.
- Periodic advances to a borrower may not be reduced based on adjustments in the interest rate.
- The reverse mortgage may become due upon:
  - Death of the last mortgagor;
  - Sale or transfer of the home;
  - The borrowers' failure to occupy the home as a principal residence for more than 12 months; or
  - The borrowers' failure to perform an obligation under the mortgage.
- The lender may collect an origination fee of 2% of the maximum claim amount up to $200,000 and 1% of amounts greater than $200,000, subject to a maximum origination fee of $6,000.
- The lender must provide disclosures to the borrower before the loan closing, including information regarding the Interest rate, term of the loan, schedule of advancements, and conditions under which repayment is triggered. The Financial Services Commission is given rulemaking authority to require additional specific disclosures.
- The lender may not condition the reverse mortgage on the applicant purchasing an insurance annuity or other financial product, excluding those customary for mortgages. The lender or broker may not participate in or be associated with a party associated with another financial or insurance activity, unless it can demonstrate to the Office of Financial Regulation that it can ensure that cross selling will not occur.
- The borrower must receive financial counseling regarding reverse mortgages.
  - The lender must provide prospective borrowers with a list of 5 independent, HUD-approved counseling agencies, including at least 2 offering counseling by phone.

[11] Section 494.00255, F.S.

[12] *See, e.g.,*Twomey, *supra* n. 1 at 1.

[13] *See, e.g.,* Sid Kirchheimer, Scam Alert: Reverse Mortgage Seduction, AARP Bulletin Today. (Feb. 9, 2009); Twomey, *supra* n. 1.

[14] 12 U.S.C. 1715z–20.

- Counseling may be face to face or by phone.
- Counseling must include financial and other implications of reverse mortgages and alternative options.
- The borrower may be charged a fee for the counseling, which may be financed under the loan.
- The lender may not accept a final application or collect any fees without receiving a certification that the applicant has received the requisite counseling.

The bill also provides that failure to comply with the requirements does not invalidate the loan agreement. However, the application of any other existing civil remedies at law is not precluded.

The bill provides an effective date of January 1, 2011.

B. SECTION DIRECTORY:

Section 1 creates a new, unnumbered section to provide definitions and requirements for reverse mortgage loans.

Section 2 provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill may have an insignificant fiscal impact on the Office of Financial Regulation, which licenses and regulates non-depository mortgage lenders.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides additional disclosure requirements that may help consumers choose a more cost-effective reverse mortgage.

The bill may impact proprietary reverse mortgage lenders not currently following HECM guidelines for disclosure.

D. FISCAL COMMENTS:

The bill may have an insignificant fiscal impact on the Office of Financial Regulation, which licenses and regulates non-depository mortgage lenders.

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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 25, 2010, the Insurance, Business and Financial Affairs Policy Committee met, adopted a strike-all amendment, and passed the bill as a Committee Substitute.

The Committee Substitute differs from the bill as follows:

- Changes definitions and loan requirements,
- Limits originators of reverse mortgages to those licensed by the state,
- Caps fees consistent with federal limits,
- Removes provisions granting treble damages for a lender's failure to make scheduled payments
- Removes provisions exempting reverse mortgages from laws in conflict with their purpose;
- Changes the effective date to January 1, 2011; and
- Clarifies that civil remedies available at law are **not** precluded by the act.

The analysis reflects the Committee Substitute.

A bill to be entitled

An act relating to reverse mortgage loans; creating s. 494.00297, F.S.; providing definitions; limiting originating or making reverse mortgage loans to licensed mortgage lenders and mortgage brokers; specifying requirements for reverse mortgage loans; specifying loan limitations and parameters; authorizing mortgage lenders to impose and collect an origination fee for reverse mortgage loans; specifying origination fee limitations; prohibiting additional origination fees; providing for certain fees to be included in the origination fee; requiring mortgage lenders to provide borrowers certain loan information; providing additional lender requirements; prohibiting lenders from requiring reverse mortgage loan applicants to purchase certain financial products; specifying prohibited reverse mortgage lender or broker activities; providing counseling and consumer education requirements for reverse mortgage lenders; specifying a criterion for a property to be owner-occupied; prohibiting invalidation of arrangements, transfers, or liens under certain circumstances; preserving application of other existing civil remedies provided by law; authorizing the Financial Services Commission to adopt rules; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 494.00297, Florida Statutes, is created to read:

494.00297 Reverse mortgage loans.-

(1) DEFINITIONS.-For purposes of this section, the term:

(a) "Department" means the United States Department of Housing and Urban Development.

(b) "Making a reverse mortgage loan" means funding and closing a reverse mortgage loan pursuant to this section.

(c) "Maximum claim" means the maximum amount of proceeds over the life of the reverse mortgage loan the mortgagor is entitled to receive under the loan.

(d) "Mortgagor" means an individual who:

1. Is, or whose spouse is, at least 62 years of age.

2. Holds title to the entire property that is the security for the reverse mortgage loan, or if there are multiple mortgagors, all the mortgagors collectively hold title to the entire property.

3. Has received adequate counseling, as provided in subsection (7).

4. Has received full disclosure of all costs charged to the mortgagor, including costs of estate planning, financial advice, and other services that are related to the reverse mortgage loan but are not required to obtain the loan, which disclosure clearly states which charges are required to obtain the loan and which are not required to obtain the loan.

(e) "Originating a reverse mortgage loan" means taking an application for a reverse mortgage loan pursuant to this section.

(f) "Program" means the Home Equity Conversion Mortgage Program of the Federal Housing Administration.

(g) "Reverse mortgage loan" or "loan" means a loan that provides future payments and is secured by a mortgage, deed of trust, or equivalent security interest in the principal residence of the mortgagor, excluding loans made under the program. Future payments include lump sum, periodic cash advances, or lines of credit based on the equity or the value in the place of residence.

(2) MORTGAGE LENDERS.—Only mortgage lenders and mortgage brokers licensed under ss. 494.001-494.0077 may engage in originating or making a reverse mortgage loan under this section.

(3) LOAN LIMITATIONS AND PARAMETERS.—A reverse mortgage loan must comply with all of the following:

(a) Any prepayment of the loan by the mortgagor, in whole or in part, is permitted without penalty at any time during the term of the loan. For purposes of this section, the term "penalty" does not include any fees, payments, or other charges that would have otherwise been due upon the reverse mortgage loan being due and payable.

(b) If a reverse mortgage loan provides for periodic advances to a mortgagor, the advances may not be reduced in amount or number based upon any adjustment in the interest rate.

(c) The loan balance is due and payable in full if any of the following events occur:

1. The mortgagor dies and the property is not the principal residence of at least one other mortgagor;

2. The mortgagor conveys all of his or her title in the property and no other mortgagor retains title to the property;

3. The property ceases to be the principal place of residence of the mortgagor or, for a period of longer than 12 consecutive months, a mortgagor fails to occupy the property because of physical or mental illness and the property is not the principal residence of at least one other mortgagor; or

4. An obligation of the mortgagor under the mortgage is not performed.

(d) The loan may not require payment of any principal or interest until the entire loan becomes due and payable.

(4) ORIGINATION FEES.—

(a) The mortgage lender may impose and collect, in cash at the time of closing or through an initial payment under the reverse mortgage loan, an origination fee to compensate the lender for expenses incurred in originating and closing the loan, which may be fully financed by the loan mortgage. The origination fee is equal to 2 percent of the maximum claim amount of the loan, up to a maximum claim amount of $200,000, plus 1 percent of any portion of the maximum claim amount which is greater than $200,000 and is subject to a maximum origination fee of $6,000.

(b) The mortgagor may not be required to pay any additional origination fee of any kind to a mortgage broker or loan originator. A mortgage broker's fee may be included as part of the origination fee only if the mortgage broker is engaged independently by the homeowner and if there is no financial interest between the mortgage broker and the mortgage lender.

(5) DISCLOSURES.—

(a) A mortgage lender shall provide the mortgagor, at any time during the reverse mortgage loan process but before the loan closing, with a document disclosing in plain language a summary of the core terms and conditions of the loan. The terms and conditions must include, but are not limited to:

1. The interest rate.

2. Whether the rate is fixed or adjustable.

3. If the rate is adjustable, the frequency of the rate change and the maximum amount the rate can change in any period.

4. The public index to which any changes in the interest rate will be tied.

5. The term of the loan.

6. The schedule of payments paid out during the term of the loan.

7. The conditions under which repayment is triggered.

(b) The commission may adopt rules requiring mortgage lenders to make specific disclosures to mortgagors regarding a reverse mortgage loan. In adopting such rules, the commission shall consider general industry standards as provided in the federal Real Estate Settlement Procedures Act, as amended, 12 U.S.C. ss. 2601 et seq., the federal Truth in Lending Act, as amended, 15 U.S.C. ss. 1601 et seq., the federal Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, the federal Housing and Community Development Act of 1987, 12 U.S.C. s. 1715z-20, and any regulations adopted under such acts.

(6) CROSS-SELLING.—

(a) A mortgage lender or any other party may not require an applicant for a reverse mortgage loan to purchase insurance, an annuity, or similar financial product, excluding title insurance or hazard, flood, or other peril insurance, as a condition of obtaining a reverse mortgage loan.

(b) A mortgage lender or a mortgage broker arranging a reverse mortgage loan may not participate in, be associated with, or employ any party that participates in or is associated with any other financial or insurance activity unless the mortgage lender or mortgage broker demonstrates to the office that the mortgage lender or other party maintains, or will maintain, firewalls and other safeguards designed to ensure that:

1. Individuals participating in the origination of the reverse mortgage loan have no involvement with, or incentive to provide the mortgagor with, any other financial or insurance product; and

2. The mortgagor will not be required, directly or indirectly, as a condition of obtaining a reverse mortgage, to purchase any other financial or insurance product.

(7) COUNSELING AND CONSUMER EDUCATION.—

(a) Before making a reverse mortgage loan, a mortgagor must receive counseling as provided in this subsection.

(b) The mortgage lender shall provide the mortgagor with a list of at least five counseling agencies approved by the department, including at least two agencies that can provide counseling by telephone. The counseling agency must be an independent third party that is not, directly or indirectly,

associated with or compensated by a party involved in:

1. Originating or servicing the reverse mortgage loan;

2. Funding the loan underlying the reverse mortgage loan; or

3. Funding the sale of annuities, investments, long-term care insurance, or any other type of financial or insurance product.

(c) Counseling may be face to face or by telephone. The information covered in the counseling session shall include:

1. Options other than a reverse mortgage loan that are available to the homeowner, including other housing, social service, health, and financial options.

2. Other reverse mortgage loan options that are or may become available to the homeowner, including, but not limited to, sale-leaseback financing, deferred payment loans, and property tax deferrals.

3. The financial implications of entering into a reverse mortgage loan.

4. A disclosure that a reverse mortgage loan may have tax consequences, affect eligibility for assistance under federal and state programs, and have an impact on the estate and heirs of the mortgagor.

5. Any other information the commission may require by rule.

(d) For mortgagors represented by an individual who is a court-appointed guardian or possesses a durable power of attorney for the borrower, such individual must complete the counseling requirements.

(e) Upon the request of the mortgagor, other parties shall be permitted to attend the counseling with the mortgagor. This paragraph does not create an obligation or duty on the part of the mortgage lender to inform, notify, or advise any other party of the opportunity to attend the counseling.

(f) The mortgagor may be assessed a fee for the counseling. The fee may be financed under the loan amount as limited by the department.

(g) A mortgage lender may not accept a final and complete application for a reverse mortgage loan from a prospective mortgagor or assess and collect any fees from a prospective mortgagor without first receiving a certification from the mortgagor or the mortgagor's authorized representative that the mortgagor has received counseling from an approved agency.

1. The certification shall be signed by the mortgagor and the agency counselor and shall include the dates of the counseling and the names, addresses, and telephone numbers of the counselor and the mortgagor. An electronic facsimile copy of the counseling certification satisfies the requirements of this subparagraph.

2. The mortgage lender shall maintain the certification in an accurate, reproducible, and accessible format for the term of the reverse mortgage loan.

(8) OTHER PROVISIONS.—

(a) For purposes of this section, a property the legal title to which is held in the name of a trust is deemed to be owner-occupied if the occupant of the property is a beneficiary of the trust.

(b) An arrangement, transfer, or lien subject to this section may not be invalidated solely because of the failure of a mortgage lender to comply with any provision of this section. However, this section does not preclude the application of any other existing civil remedies provided by law.

(9) RULES.-The commission may adopt rules necessary to administer this section.

Section 2. This act shall take effect January 1, 2011.

CS/HB 1075

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1075 Office of Supplier Diversity of the Department of Management Services
SPONSOR(S): Governmental Affairs Policy Committee and Braynon
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1612

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Governmental Affairs Policy Committee	13 Y, 0 N, As CS	McDonald	Williamson
2)	Policy Council		Varn	Ciccone
3)	Economic Development & Community Affairs Policy Council			
4)				
5)				

SUMMARY ANALYSIS

The Office of Supplier Diversity (office) is established within the Department of Management Services (department) to assist minority business enterprises (MBEs) in becoming suppliers of commodities, services, and construction to state government. One of the duties of the office is to certify MBEs pursuant to specified statutory criteria, and to recertify MBEs at least once every two years. Recertification is accomplished via a process in which a vendor enters information in online forms, prints the forms, has the forms notarized, and returns the forms to the office.

Committee Substitute for House Bill 1075 amends the minority business enterprise certification and recertification process by deleting the requirement for an affidavit and by permitting certifications to include electronic signatures. According to the Office of Supplier Diversity in the Department of Management Services, this change in law would fully automate the recertification process.

The bill has no fiscal impact.

The bill takes effect July 1, 2010.

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 Office of Supplier Diversity (office) is established within the Department of Management Services (department) to assist minority business enterprises (MBEs) in becoming suppliers of commodities, services, and construction to state government.[1] One of the duties of the office is to certify MBEs[2] pursuant to specified statutory criteria,[3] and to recertify MBEs at least once every two years. Recertification is accomplished via a process in which a vendor enters information in online forms, prints the forms, has the forms notarized, and returns the forms to the office.

The Uniform Electronic Transaction Act in Ch. 668, F.S., permits governmental agencies to accept electronic signatures,[4] and defines an "electronic signature" as an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.[5]

Effect of Proposed Changes

CS/HB 1075 provides that the certification of a minority business enterprise may include an electronic signature, and deletes the requirement for an affidavit.

According to the Department of Management Services, the option of electronic signature would fully automate the recertification process.[6]

B. SECTION DIRECTORY:

Section 1. Amends s. 287.09451, F.S., removing the requirement for an affidavit and permitting that certifications may include an electronic signature.

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[1] Section 287.09451(2), F.S.
[2] Minority business enterprises are defined in s. 288.703, F.S.
[3] Sections 287.0943 and 287.09431, F.S., specify the requirements for certification as an MBE.
[4] Section 668.50(18), F.S.
[5] Section 668.50(2)(h), F.S.
[6] Analysis of HB 1075, Department of Management Services, February 10, 2010, p. 1 (on file with the Governmental Affairs Policy Committee).

Section 2. Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 24, 2010, the Governmental Affairs Policy Committee adopted a strike-all amendment to conform the bill to its Senate companion, CS/SB 1612. The committee substitute amends the minority business enterprise certification and recertification process by deleting the requirement for an affidavit and by permitting certifications to include electronic signatures.

The bill was reported favorably as a Committee Substitute. The analysis reflects the Committee Substitute.

A bill to be entitled

An act relating to the Office of Supplier Diversity of the Department of Management Services; amending s. 287.09451, F.S.; revising the duties of the Office of Supplier Diversity with respect to requirements for the certification and recertification of minority business enterprises; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (m) of subsection (4) of section 287.09451, Florida Statutes, is amended to read:

287.09451 Office of Supplier Diversity; powers, duties, and functions.—

(4) The Office of Supplier Diversity shall have the following powers, duties, and functions:

(m) To certify minority business enterprises, as defined in s. 288.703, and as specified in ss. 287.0943 and 287.09431, and shall recertify such minority businesses at least once every 2 years. Minority business enterprises must be recertified at least once every 2 years ~~by affidavit~~. Such certifications may include an electronic signature.

Section 2. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1197 Estate Tax
SPONSOR(S): Finance & Tax Council; McBurney
TIED BILLS: **IDEN./SIM. BILLS:** SB 2620

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Finance & Tax Council	14 Y, 0 N, As CS	Diez-Arguelles	Langston
2)	Policy Council		Liepshutz	Ciccone
3)	Full Appropriations Council on Education & Economic Development			
4)				
5)				

SUMMARY ANALYSIS

The bill imposes an estate or inheritance tax on the transfer of property located in Florida which is owned by a nonresident at the time of the nonresident's death.

The tax is imposed only if the nonresident decedent's state of domicile imposes a tax on the transfer of a Florida resident's property located in that state and the tax imposed on the Florida resident is in excess of the taxes that would be imposed by Florida on transfers of the nonresident's similar property located in Florida.

The tax takes effect on July 1, 2010, and applies to nonresidents who die after June 30, 2010.

Also, the bill creates s. 733.1051, F.S., to provide a means for judicial construction of a will that includes references to federal estate tax provisions that may not apply during 2010. If a will contains a formula-based distribution where the formula is based on federal estate tax provisions, the court may construe the will to reflect the testator's probable intent. A personal representative that withholds distributions pending a determination under this section is not liable to any beneficiary for damages related to the delay in distribution.

Section 733.1051 takes effect upon this act becoming law and applies retroactively to January 1, 2010.

The Revenue Estimating Conference has estimated that the provisions of this bill will have an indeterminate positive impact on state revenues.

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:

Retaliatory Estate and Inheritance Tax

Current Situation

The Florida Constitution states that:

> No tax upon estates or inheritances or upon the income of natural persons who are residents or citizens of the state shall be levied by the state, or under its authority, in excess of the aggregate amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States or any state.[1]

Until 2005, Florida levied an estate tax "upon the transfer of the estate of every person who, at the time of death, was a resident of this state . . .."[2] Florida also levied an estate tax on every person who at the time of death was not a resident of this state, but was a resident of the United States.[3]

As prescribed by the Florida Constitution, the amount of the Florida estate tax could not exceed the amount of the credit for state taxes allowed by the federal government for state estate taxes. The Florida estate tax was what is known as a "pick-up" tax, which only "picks-up" taxes that would have otherwise been paid to the federal government.

While the Florida estate tax provisions are still set forth in the statutes,[4] they are inoperative at the present time. In 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001 (the Act). The Act phased out the federal estate tax over a 10-year period and the federal estate tax credit for state taxes over a 5-year period. Once the credit for state taxes was completely phased out, Florida's tax became inoperable. The Act's provisions have also resulted in the absence of federal estate taxes during 2010. Finally, unless Congress acts, the Act provides for the federal estate tax, and the credit for state taxes, to be reinstated in 2011, thereby reviving Florida's estate tax. However, while most observers expect that Congress will take action to amend the federal estate tax before it is reinstated in 2011, they do not expect the credit for state taxes to be reinstated.

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[1] Article 7, Section 5(a), Florida Constitution (emphasis added)
[2] Sec. 198.02, F.S.
[3] Sec. 198.03, F.S.
[4] Ch. 198, F.S.

While the federal credit for state taxes was in existence, all 50 states and the District of Columbia imposed a "pick-up" tax. Some states also imposed estate and inheritance taxes that were not dependent on the federal credit. Since the phase-out of the credit in the early 2000s a few states have de-coupled from the federal tax to impose estate and inheritance taxes. At present, there are 19 states and the District of Columbia that impose estate or inheritance taxes.

Proposed Changes

The bill imposes an estate or inheritance tax on the transfer of property located in Florida which is owned by a nonresident at the time of the nonresident's death.

The tax is imposed only if the nonresident decedent's state of domicile imposes a tax on the transfer of a Florida resident's property located in that state and the tax imposed on the Florida resident is in excess of the taxes that would be imposed by Florida on transfers of the nonresident's similar property located in Florida.

The amount of tax due is equal to the amount of tax a nonresident would have to pay under the laws of his or her state of domicile if he or she were a Florida resident and the property located in Florida were located in the nonresident's state of domicile and the nonresident's property located in the state of domicile were located in Florida.

The bill provides that tax payments and tax returns are due in Florida at the same time as tax returns and payments are due in the nonresident's state of domicile.

Judicial Construction of a Will with Federal Estate Tax Provisions

Current Situation

Wills and trust agreements (both revocable and irrevocable) frequently contain provisions designed to eliminate, minimize or defer payment of the federal estate tax and the federal generation-skipping transfer tax. These provisions are usually phrased not in terms of fixed-dollar amounts but, instead, in terms of a formula intended to produce the optimal result under the law prevailing at the time the formula is applied (usually, but not always, at the death of the testator, testatrix or trust settlor).

As mentioned above, in 2001, Congress enacted a phase-out of the estate tax (and related taxes such as the gift tax and the generation skipping tax). The phase-out has resulted in the taxes not being in existence during 2010, with such taxes returning (with different rates and exemptions) in 2011. For poorly drafted wills that do not take into account the suspension of the taxes, it is unclear how such formulas in wills will be interpreted. For example, a formula phrased in terms of "the most I can pass free from estate taxes at my death" can result in an unintended disinheriting of the surviving spouse if the decedent's children are to receive the formula amount (in 2010, everything) and the surviving spouse is to receive the balance (in 2010, nothing). Section 732.6005, F.S., provides that the testator's intent controls over the legal effect of the testator's dispositions. It is likely that one or more affected beneficiaries under these poorly drafted wills would file an action for judicial determination of the testator's intent.

Proposed Changes

This bill creates s. 733.1051, F.S., to provide a means for judicial construction of a will that includes references to federal estate tax provisions that may not apply during 2010. If a will contains a formula-based distribution where the formula is based on federal estate tax provisions, the court may construe the will to reflect the testator's probable intent. This section applies retroactively to January 1, 2010. A personal representative that withholds distributions pending a determination under this section is not liable to any beneficiary for damages related to the delay in distribution.

B. SECTION DIRECTORY:

Section 1 provides that this act may be cited as the "Florida Taxpayers Protection Act."

Section 2 creates s. 198.46, F.S., and imposes the tax.

Section 3 creates s. 733.1051, F.S., regarding judicial construction of a will in light of the repeal of the federal estate tax.

Section 4 provides an effective date of July 1, 2010, except as otherwise provided.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Revenue Estimating Conference has estimated that the provisions of this bill will have an indeterminate positive impact on state revenues.

2. Expenditures:

Whether the Department of Revenue will incur additional expenses is not known at this time.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The provisions of the bill will impose taxes on the estates and inheritances of some nonresidents who own property located in Florida at the time of death.

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None

2. Other:

The Florida Constitution limits estate and inheritance taxes on residents and citizens of the state to the amount allowed as a federal credit. The Florida Constitution does not limit taxes on nonresidents.[5]

[5] See *Department of Revenue v. Good,* 398 So.2d 938 (Fla. 3d DCA 1981)

The provisions of this bill may result in the imposition of a tax on the transfer of Florida property owned by a nonresident decedent in excess of the taxes imposed on similar Florida property owned by a Florida resident decedent. This result -- disparate treatment of residents and nonresidents -- may lead to affected nonresidents challenging the constitutionality of the tax as discriminating against nonresidents. These types of cases usually implicate three provisions of the U.S. Constitution: the Commerce Clause,[6] the Privileges and Immunities Clause,[7] and the Equal Protection Clause.[8]

In a challenge involving the Commerce Clause, the courts will examine four criteria in determining the validity of the tax:

- Is the tax applied to an activity that has a substantial nexus with the state?
- Is the tax fairly apportioned to activities in the state?
- Does the tax discriminate against interstate commerce?
- Is the tax fairly related to services provided by the state?[9]

Under the Privileges and Immunities Clause, "tax provisions imposing discriminatory treatment on nonresident individuals must be reasonable in effect and based on a substantial justification other than the fact of nonresidence."[10]

In a case challenging, under the Equal Protection Clause, a retaliatory insurance premium tax similar to the tax proposed by this bill, the U.S. Supreme Court approved the tax.[11]

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Department of Revenue may need emergency rulemaking authority to comply with the effective date of the bill.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 25, 2010, the Finance and Tax Council adopted 2 amendments. One amendment substantially revised Section 2, dealing with the taxation of nonresident decedents. The other amendment added a new Section 3, dealing with the construction of wills.

The bill was reported favorably as a Council Substitute. The analysis reflects the Council Substitute.

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[6] Article 1, Section 8, U.S. Constitution.
[7] Article 4, Section 2, U.S. Constitution.
[8] Article 14, Section 1, U.S. Constitution.
[9] See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)
[10] *Lunding v. New York Tax Appeal Tribunal*, 522 U.S. 287 (1998), a state income tax case. See, also, *Austin v. New Hampshire,* 420 U.S. 656 (1975) , another state income tax case, where the Court stated, at 668, "Nor, we may add, can the constitutionality of one State's statutes affecting nonresidents depend upon the present configuration of the statutes of another state."
[11] *Western and Southern Life Insurance Co.*, 451 U.S. 648 (1981). Neither the Commerce Clause, because Congress has removed Commerce Clause limitations on states' authority to tax the insurance business, nor the Privilege and Immunities Clause, because it does not apply to corporations, were discussed in the case.[11]

A bill to be entitled

An act relating to probate of an estate; providing a short title; creating s. 198.46, F.S.; providing definitions; imposing a retaliatory tax on property of a nonresident decedent when the nonresident's state of domicile imposes estate, inheritance, or other death taxes upon a resident of this state; providing a limitation; specifying tax rate criteria; providing tax payment requirements; creating s. 733.1051, F.S.; authorizing a court to construe the terms of certain wills for certain purposes under certain circumstances; providing definitions; providing criteria for court construction of a will; providing for nonapplication to certain dispositions; authorizing a personal representative to take certain actions without court order pending a determination of estate distribution; limiting personal representative liability; preserving certain rights to construe a will; providing for retroactive operation; providing application; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. <u>This act may be cited as the "Florida Taxpayers Protection Act."</u>

Section 2. Section 198.46, Florida Statutes, is created to read:

<u>198.46 Retaliatory estate, inheritance, or other death taxes.—</u>

(1) For purposes of this section, the term:

(a) "Nonresident" means any person who is not a resident of this state but is a resident of the United States.

(b) "State of domicile" means the state where a person is a resident.

(2) A tax is imposed upon the transfer of property located in this state of every person who at the time of death was a nonresident. The tax is imposed only if the nonresident's state of domicile imposes an estate, inheritance, or other death tax upon the transfer of the property of a resident of this state that is located in that state and the amount of tax is in excess of the amount of such taxes that would be imposed by this state on transfers of such nonresident's similar property located in this state.

(3) The tax due under this section shall be equal to the tax that a nonresident would have to pay under the laws of his or her state of domicile if he or she were a resident of this state and the nonresident's property located in this state were located in the nonresident's state of domicile and the nonresident's property located in the state of domicile were located in this state.

(4) Notwithstanding any other provision of this chapter, the tax imposed by this section is due and payable, and tax returns are due, on or before the last day prescribed by the laws of the nonresident's state of domicile for the payment of tax or the filing of returns.

Section 3. Effective upon this act becoming a law, section 733.1051, Florida Statutes, is created to read:

733.1051 Limited judicial construction of will with federal tax provisions.-

(1) Upon the application of a personal representative or a person who is or may be a beneficiary who is affected by the outcome of a court's construction, a court at any time may construe the terms of a will to define the respective shares or determine beneficiaries, in accordance with the intention of a testator, if a disposition occurs during the applicable period and the will contains a provision that:

(a) Includes a disposition formula referring to the terms "unified credit," "estate tax exemption," "applicable exemption amount," "applicable credit amount," "applicable exclusion amount," "generation-skipping transfer tax exemption," "GST exemption," "marital deduction," "maximum marital deduction," "unlimited marital deduction," or "maximum charitable deduction";

(b) Measures a share of an estate based on the amount that may pass free of federal estate tax or the amount that may pass free of federal generation-skipping transfer tax;

(c) Otherwise makes a disposition referring to a charitable deduction, marital deduction, or another provision of federal estate tax or generation-skipping transfer tax law; or

(d) Appears to be intended to reduce or minimize the federal estate tax or generation-skipping transfer tax.

(2) For purposes of this section:

(a) The term "applicable period" means a period beginning January 1, 2010, and ending on the end of the day on the earlier of December 31, 2010, or the day before the date that an act

becomes law that repeals or otherwise modifies or has the effect of repealing or modifying s. 901 of The Economic Growth and Tax Relief Reconciliation Act of 2001.

(b) A "disposition occurs" when the testator dies.

(3) In construing the will, the court shall consider the terms and purposes of the will, the facts and circumstances surrounding the creation of the will, and the testator's probable intent. In determining the testator's probable intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will.

(4) This section does not apply to a disposition that is specifically conditioned upon no federal estate or generation-skipping transfer tax being imposed.

(5)(a) Unless otherwise ordered by the court, during the applicable period and without court order, the personal representative administering a will containing one or more provisions described in subsection (1) may:

1. Delay or refrain from making any distribution.

2. Incur and pay fees and costs reasonably necessary to determine his or her duties and obligations, including, but not limited to, compliance with provisions of existing and reasonably anticipated future federal tax laws.

3. Establish and maintain reserves for the payment of such fees and costs and federal taxes.

(b) The personal representative shall not be liable for his or her actions as provided in this subsection made or taken in good faith.

(6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to construe a will.

(7) This section is remedial in nature and intended to provide a new or modified legal remedy. This section shall operate retroactively to January 1, 2010.

Section 4. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2010, and section 198.46, Florida Statutes, as created by this act, shall apply to nonresidents who die after June 30, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1277 Sellers of Travel
SPONSOR(S): Insurance, Business & Financial Affairs Policy Committee, Rivera
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Insurance, Business & Financial Affairs Policy Committee	13 Y, 0 N, As CS	Lowrance	Cooper
2)	Policy Council		Liepshutz	Ciccone
3)	General Government Policy Council			
4)				
5)				

SUMMARY ANALYSIS

The Sellers of Travel Act (Act), ss. 559.926-559.939, F.S., requires sellers to register with the Department of Agriculture and Consumer Services (Department) annually. When a seller of travel registers with the Department, a registrant must provide to the Department a number of items including, among other things, the registrant's legal business or trade name, mailing address, business locations, and the full names, addresses, and telephone numbers of its owners or corporate officers and directors and the Florida agent of the corporation.

Chapter 2008-214, Laws of Florida, implemented substantial changes to the Seller of Travel Act. As a result of the 2008 amendments, a number of affected air service charter operators and sellers of tickets to Cuba sued the Commissioner of the Department for violations of their federally-protected rights. The U.S. District Court for the Southern District of Florida permanently enjoined the Department from implementing the amendments in Chapter 2008-214. The court held that these amendments violated the U.S. Constitution on four grounds:

1. The implementation would interfere with the federal government's exclusive authority to conduct foreign affairs in violation of the Supremacy Clause;
2. The implementation would interfere with the federal government's exclusive authority to conduct foreign commerce in violation of the Foreign Commerce Clause;
3. Federal regulation of interaction with terrorist nations is so pervasive it leaves no room for state action;
4. The implementation would be an improper burden on interstate commerce in violation of the Interstate Commerce Clause.

The CS/HB 1277 provides that sellers of travel who are engaged in selling pre-arranged travel, tourist related services, or tour-guide services to any person traveling from Florida to a terrorist nation are not subject to registration exemptions. The bill also defines terrorist nation to mean any state, country, or nation designated by the U.S. Department of State as a state sponsor of terrorism.

A fiscal impact is contingent upon possible litigation regarding federal rights violations.

The effective date of this act is July 1, 2010.

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 U.S. Supreme Court has recognized an international right to travel.[1] However, this right may be infringed upon where national security is at stake. Title 31 of the Code of Federal Regulations, Chapter V, delineates the ability to travel and do business with terrorist countries. Currently, four countries are designated by the U.S. Department of State as terrorist states: Cuba, Iran, Sudan, and Syria. The ability to travel to these countries varies, as do the requirements for the ability to be authorized or licensed by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury for such travel.

The Sellers of Travel Act (Act), ss. 559.926-559.939, F.S., requires sellers to register with the Department of Agriculture and Consumer Services (Department) annually. When a seller of travel registers with the Department, a registrant must provide to the Department a number of items including, among other things, the registrant's legal business or trade name, mailing address, business locations, and the full names, addresses, and telephone numbers of its owners or corporate officers and directors and the Florida agent of the corporation.[2]

Chapter 2008-214, Laws of Florida, implemented substantial changes to the Seller of Travel Act. The 2008 amendments, among other things:

- Automatically make any violation of federal law by the sellers of travel to terrorist nations a third-degree felony under Florida Law;
- Require companies providing lawful travel related to service to terrorist states post a bond in an amount ranging from $100,000 to $250,000 and allows other sellers of travel to use the Department to use the bond to pay its own investigatory expenses without any limits to the exposure under the bond;
- Create two classes of travel providers subject to different standards (i.e. those sellers doing business with terrorist states and those who do not);
- Require disclosure and identification by sellers of travel to terrorist states of each company with whom each seller does business and make that information available to the public and competitors.

[1] See, *Haig v. Agee*, 453 U.S. 280, 306 (1981); see also Heather E. Reser, Comment, Airline Terrorism: *The Effect of Tightened Security on the Right to Travel*, 68 J. Air L. & Com. 819.

[2] Section 559.928, F.S.

As a result of the 2008 amendments, a number of affected air service charter operators and sellers of tickets to Cuba sued the Commissioner of the Department for violations of their federally-protected rights.[3] The U.S. District Court for the Southern District of Florida permanently enjoined the Department from implementing the amendments in Chapter 2008-214.[4] The court held these amendments violated the U.S. Constitution on four grounds:

1. The implementation would interfere with the federal government's exclusive authority to conduct foreign affairs in violation of the Supremacy Clause;
2. The implementation would interfere with the federal government's exclusive authority to conduct foreign commerce in violation of the Foreign Commerce Clause;
3. Federal regulation of interaction with terrorist nations is so pervasive it leaves no room for state action;
4. The implementation would be an improper burden on interstate commerce in violation of the Interstate Commerce Clause.

Effect of the Bill

The bill provides that sellers of travel who are engaged in selling pre-arranged travel, tourist related services, or tour-guide services to any person traveling from Florida to a terrorist nation are not exempt from the current law[5] which includes all registration and regulatory requirements. Consequently, sellers of travel engaged in selling services to terrorist nations will be subject to all the requirements in current law[6].

The bill also defines a terrorist nation to mean any state, country, or nation designated by the U.S. Department of State as a state sponsor of terrorism. Thus, the bill would apply to sellers of travel who sell services originating in Florida with a destination of Cuba, Sudan, Syria, or Iran.

B. SECTION DIRECTORY:

Section 1: Amends s. 559.935, F.S., to provide an exception to the exemptions from the current law.

Section 2: Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   According to the Department, the bill will most likely result in federal rights litigation.[7] A contingent fiscal liability of the state exists; approximately $360,000 if the plaintiffs (sellers of travel) prevail in the existing litigation. This contingency reflects minimum estimated legal costs payment from the Department of Financial Services' State Risk Management Trust Fund (self insurance fund). Federal law permits plaintiffs to seek from the court an award of legal fees and costs to be paid by the defendant, and the $360,000 amount is the least amount that would be paid.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

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[3] See *ABC Charters, Inc. et al. v. Bronson*, 591 F. Supp.2d 1272 (2008); Order granting Plaintiff's motion for preliminary injunction.
[4] See *ABC Charters, Inc. et al., v. Bronson*, 2009 WL 1010435 (S.D. Fla.).
[5] See s. 559.935, F.S., relating to Exemptions.
[6] See comments appearing in Section III. A. 2. of this analysis relating to whether the committee substitute clearly expresses legislative intent as to its application.
[7] The Department provided a bill analysis on HB 1277, however, discussions with the Department have indicated that they anticipate this committee substitute will have the same fiscal impact as the original bill.

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Sellers of travel may be required to certify whether they sell travel from Florida directly to a terrorist nation as well as whether they engage in any other business with terrorist nations. Those violating the Sellers of Travel Act in connection with selling travel from Florida to a terrorist nation may face criminal punishment and administrative/civil sanctions significantly greater for the same violations than those not selling to terrorist nations.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

2. Other:

According to the court in *ABC Charters, Inc. et al v. Bronson*[8], the design and intent of the 2008 amendments to the Florida Sellers of Travel Act encroaches on federal foreign affairs powers in violation of the Supremacy Clause, the Foreign Commerce Clause, the Foreign Affairs Power, and the Interstate Commerce Clause of the U.S. Constitution.

By stating that sellers of travel to terrorist nations are not exempt from the current law, confusion could result as to whether the Legislature intends to subject these sellers of travel to the chapter as it existed before the 2008 amendments, or to once again subject them to the chapter as it was amended in 2008. Since the court has already found the 2008 amendments unconstitutional and enjoined enforcement of them, it appears unlikely that the court would find an attempt to re-impose them constitutional.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 25, 2010, the Insurance, Business & Financial Affairs Policy Committee considered a proposed committee substitute (PCS), did not adopt any amendments, and reported the PCS favorably with a committee substitute.

The analysis is written to reflect the changes made in the PCS (See "Effect of the bill").

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[8] See *ABC Charters, Inc. et al., v. Bronson*, 2009 WL 1010435 (S.D. Fla.).

A bill to be entitled

An act relating to sellers of travel; amending s. 559.935, F.S.; providing that exemptions to pt. XI of ch. 559, F.S., the Florida Sellers of Travel Act, do not apply to sellers of travel offering or selling prearranged travel, tourist-related services, or tour-guide services to any person traveling directly from Florida to a terrorist nation; providing a definition; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (7) is added to section 559.935, Florida Statutes, to read:

559.935 Exemptions.—

(7) The exemptions provided in this section do not apply to a seller of travel offering or selling prearranged travel, tourist-related services, or tour-guide services to any person traveling directly from Florida to a terrorist nation. "Terrorist nation" means any state, country, or nation designated by the United States Department of State as a state sponsor of terrorism.

Section 2. This act shall take effect July 1, 2010.

Amendment No. 1

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Policy Council

Representative(s) Rivera offered the following:

Amendment (with title amendment)

Remove line 23 and insert:

Section 2. This act shall take effect July 1, 2010, and shall apply to part XI of chapter 559, Florida Statutes, the Florida Sellers of Travel Act, as it existed prior to July 1, 2008, except that this act shall also apply to any sections of part XI of chapter 559, Florida Statutes, amended on or after July 1, 2008, other than sections of part XI of chapter 559, Florida Statutes, amended or created by chapter 2008-214, Laws of Florida.

T I T L E A M E N D M E N T

Amendment No. 1

Remove lines 8-9 and insert:nation; providing a definition; providing an effective date and for application of the act.

WHEREAS, on April 14, 2009, the United States District Court for the Southern District of Florida in *ABC Charters, Inc., et al., v. Charles H. Bronson, in his official capacity as Commissioner of Agriculture* (No. 08-21865-CIV.) reported at 2009 WL 1010435 (S.D.Fla.), 21 Fla. L. Weekly Fed. E 653, entered a declaratory judgment in favor of plaintiff, ABC Charters, Inc., holding that the amendments to the "Florida Sellers of Travel Act" made by Senate Bill 1310, Chapter 2008-214, Laws of Florida, are unconstitutional, and

WHEREAS, the Federal District Court found that the 2008 Travel Act Amendments are unconstitutional insofar as they are preempted by federal law and violate the federal government's foreign affairs power, the Foreign Commerce Clause, and the Interstate Commerce Clause, and

WHEREAS, the Court also permanently enjoined the Florida Department of Agriculture and Consumer Services from enforcing the 2008 Travel Act Amendments, but also held that the "Florida Sellers of Travel Act" otherwise remains unaffected by the Court's Order, and

WHEREAS, the Court confined its order to the injunction against enforcement of the 2008 legislation which amended the "Florida Sellers of Travel Act" and gave leave to the Florida Legislature to act in accordance with the Court's Order in respect to future proposed amendments to the "Florida Sellers of Travel Act," and

Amendment No. 1

WHEREAS, the Legislature finds that the enforceability of the "Florida Sellers of Travel Act," as it existed prior to the enactment of the 2008 Travel Act Amendments, remains a responsibility of the Department of Agriculture and Consumer Services, and

WHEREAS, the Legislature finds that sellers of travel who provide services to persons traveling directly from Florida to a "Terrorist Nation" should, at a minimum, be required to register with the Florida Department of Agriculture and Consumer Services and be subject to the same fees and bonding requirements that are applicable to other sellers of travel, as well as the same requirements related to the submission of information, the disclosure of information, and the maintenance of records, and

WHEREAS, the Legislature further finds it necessary to amend the "Florida Sellers of Travel Act" to ensure that sellers of travel who provide services to persons traveling directly from Florida to a "Terrorist Nation" are not exempt from having to meet such requirements under the "Florida Sellers of Travel Act," as it existed prior to the 2008 Travel Act Amendments, and

WHEREAS, the Legislature recognizes that by precluding sellers of travel who provide services to persons traveling directly from Florida to a "Terrorist Nation" from claiming an exemption, such sellers of travel will be effectively denied an exemption that may be available to other sellers of travel, and that might otherwise be available to them *but for* the fact that they provide travel services to persons traveling directly from Florida to a "Terrorist Nation," and

WHEREAS, notwithstanding the aforementioned recognition, the Legislature further finds that, in order to protect consumers and to provide a modicum of safety to its citizens, it is necessary and altogether prudent and rational to distinguish sellers of travel who provide services to persons traveling directly from Florida to a "Terrorist Nation" from other sellers of travel in regard to the availability of exemptions from registration and that to do so creates a small burden upon them and does not infringe upon or conflict in any way with federal policy or regulation of such sellers of travel, NOW, THEREFORE,

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HM 1609 Terrorist Trials in Civilian Courtrooms
SPONSOR(S): Fresen
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Policy Council		Liepshutz	Ciccone
2)	Rules & Calendar Council			
3)				
4)				
5)				

SUMMARY ANALYSIS

House Memorial 1609 urges the U.S. Congress to use its constitutional authority to prevent the trial of terrorists from taking place in a civilian courtroom.

The memorial provides for copies of it to be submitted to the President of the United States, the President of the U.S. Senate, the Speaker of the U.S. House of Representatives, and each member of the state's congressional delegation.

The memorial does not have a fiscal impact on state or local government.

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:

House Memorial 1609 expresses the Legislature's desire for the U.S. Congress to use its constitutional authority as specified in Section 1 of Article III of the United States Constitution, and to reject any efforts by the U.S. Justice Department to try terrorists in federal court in New York City or any other domestic venue.

The memorial expresses opposition to the use of the federal criminal courts to try "unlawful enemy combatants" detainees and implicitly supports instead the use of military tribunals or military commissions to try them.

The memorial provides for copies of it to be submitted to the president of the United States, the President of the U.S. Senate, the Speaker of the U.S. House of Representatives, and each member of the state's congressional delegation.

Both houses of the Florida Legislature must pass a memorial; however a memorial is not subject to gubernatorial approval or veto and upon its passage is sent directly to the specified congressional officials.[1]

Recent Actions by the 111th Congress, 2d Session[2]

Congressional legislation that directly addresses the subject of this memorial was recently introduced in both the U.S. Senate and House. Senate bill 3081 (introduced 3/4/2010) by Senator McCain and its companion, House Bill 4892 (introduced 3/19/2010) by Rep. McKeon, prohibit the use of funds appropriated or otherwise made available to the Department of Justice (DOJ) to prosecute an alien "unprivileged enemy belligerent" in Article III federal courts. For purposes of the bill, an "unprivileged enemy belligerent" is defined as someone who:

[1] The Florida House, *Guidelines for Bill Drafting*, (2009) page 20.

[2] Research to obtain the information relating to actions of the 111th Congress was obtained using the Library of Congress, THOMAS available at http://thomas.loc.gov/home/abt_thom.html. THOMAS was launched in 1995, at the inception of the 104th Congress, which directed the Library of Congress to make federal legislative information freely available to the public. Information on Congressional legislation also obtained using NetScan, available to subscribers at http://www.netscan.com/

- Has engaged in hostilities against the United States or its coalition partners;
- Has purposely and materially supported hostilities against the United States or its coalition partner; or
- Was a part of al Qaeda at the time of capture.

As of April 6, 2010, both bills remain in their respective committees of reference. Senate bill 3081 was referred to the Committee on the Judiciary and House Bill 4892 to three House committees – Intelligence, Armed Services, and Judiciary.

Similar legislation was introduced earlier in both the U.S. Senate and House by Senator Lindsay Graham and Rep. Wolf, respectively. On February 2, 2010, both Senate bill 2977 and House Bill 4456 were introduced, prohibiting DOJ funds from being used for prosecuting individuals involved in the September 11, 2001, terrorist attacks. Both bills currently remain in their initial committees of reference. Prior to the introduction of these two measures, on November 5, 2009, an amendment to House Bill 2847 (Senate Amendment. 2669) by Senator Graham that would have prohibited the use of funds for the prosecution in Article III courts of individuals involved in the 9/11 terrorist attacks was tabled by the Senate when a *motion to table* was agreed to by a 54 to 45 vote, with one senator not voting.

Another bill that addresses the subject of this memorial was introduced January 19, 2010 by Rep. Buchanan. House Bill 4463, the Military Tribunals for Terrorists Act of 2010, would mandate military commissions as the only venue to try foreign nationals who:

- Engage or have engaged in conduct constituting an offense relating to a terrorist attack against persons or property in the U.S. or against any U.S. Government property outside the U.S. and
- Are subject to trial by a military commission under the law.

As of April 6, 2010, the bill remains in its first committee of reference, Judiciary, where it was referred to the subcommittee on the Constitution, Civil rights, and Civil Liberties on March 1, 2010.

According to the Congressional Research Service, "[in] the first session of the 111th Congress, several appropriations and authorizations measures were enacted which effectively barred funds from being used to transfer any detainee into the United States for release or purposes *other* than prosecution, and restrict funds from being used to transfer detainees into the country to face prosecution prior to the submission of certain reports to Congress." [3] [Emphasis supplied]

As a policy-making body, Congress considers policy research conducted by the Congressional Research Service (CRS), a legislative branch agency within the Library of Congress, tasked with providing non-partisan, objective, and authoritative information and analysis exclusively for members of Congress.[4] The following excerpts are from reports that were prepared by CRS and relate to federal law developments concerning the detention of unlawful enemy combatants and some of the policy issues that may arise from trying them in Article III, federal courts.

Enemy Combatant Detainees

> Following the terrorist attacks of 9/11, Congress passed the Authorization to Use Military Force (AUMF), which granted the President the authority "to use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks" against the United States." As part of the subsequent "war on terror," many persons captured during military

[3] Congressional Research Service Research (CRS) Report RL33180, February 3, 2010, "Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court, " p. 39 (citing the following in footnote 227: Supplemental Appropriations Act, 2009 (P.L. 111-32), Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88), the Consolidated Appropriations Act, 2010 (P.L. 111-117), and the Department of Defense Appropriations Act, 2010 (P.L. 111-118)

[4] See, http://www.loc.gov/crsinfo/whatscrs.html for a description of the function and mission of the Congressional Research Service.

operations in Afghanistan and elsewhere were transferred to the U.S. Naval Station at Guantanamo Bay, Cuba for detention and possible prosecution before military tribunals. Although nearly 800 persons have been transferred to Guantanamo since early 2002, the substantial majority of Guantanamo detainees have ultimately been transferred to a third country for continued detention or release. . . .

. . . .

The decision by the Bush Administration to detain suspected belligerents at Guantanamo was based upon both policy and legal considerations. From a policy standpoint, the U.S. facility at Guantanamo offered a safe and secure location away from the battlefield where captured persons could be interrogated and potentially tried by military tribunals for any war crimes they may have committed. From a legal standpoint, the Bush Administration sought to avoid the possibility that suspected enemy combatants could pursue legal challenges regarding their detention or other wartime actions taken by the Executive. The Bush Administration initially believed that Guantanamo was largely beyond the jurisdiction of the federal courts, and noncitizens held there would not have access to the same substantive and procedural protections that would be required if they were detained in the United States.

The legal support for this policy was significantly eroded by a series of Supreme Court rulings permitting Guantanamo detainees to seek judicial review of the circumstances of their detention.[5]

After the U.S. Supreme Court held that U.S. courts have jurisdiction pursuant to 28 U.S.C. § 2241 [*habeas corpus*] to hear legal challenges on behalf of persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism (*Rasul v. Bush*), the Pentagon established administrative hearings, called "Combatant Status Review Tribunals" (CSRTs), to allow the detainees to contest their status as enemy combatants, and informed them of their right to pursue relief in federal court by seeking a writ of *habeas corpus*. Lawyers subsequently filed dozens of petitions on behalf of the detainees in the District Court for the District of Columbia, where district court judges reached inconsistent conclusions as to whether the detainees have any enforceable rights to challenge their treatment and detention.

Congress subsequently passed the Detainee Treatment Act of 2005 (DTA) to divest the courts of jurisdiction to hear some detainees' challenges by eliminating the federal courts' statutory jurisdiction over *habeas* claims (as well as other causes of action) by aliens detained at Guantanamo. The DTA provided for limited appeals of CSRT determinations or final decisions of military commissions. After the Supreme Court rejected the view that the DTA left it without jurisdiction to review a *habeas* challenge to the validity of military commissions in the case of *Hamdan v. Rumsfeld*, the 109th Congress enacted the Military Commissions Act of 2006 (MCA) (P.L. 109-366) to authorize the President to convene military commissions and to amend the DTA to further reduce detainees' access to federal courts, including in cases already pending.

In June 2008, the Supreme Court held in the case of *Boumediene v. Bush* that aliens designated as enemy combatants and detained at Guantanamo Bay have the constitutional privilege of *habeas corpus*. The Court also found that MCA § 7, which limited judicial review of executive determinations of the petitioners' enemy combatant status to that available under the DTA, did not provide an adequate *habeas* substitute and therefore acted as an unconstitutional suspension of the writ of *habeas*. The immediate impact of the *Boumediene* decision is that detainees at Guantanamo may petition a federal district court for *habeas* review of the legality and possibly the circumstances of their detention, perhaps including challenges to the jurisdiction of military commissions. President Barack Obama's Executive Order calling for a temporary halt in military commission proceedings and the closure of the Guantanamo detention facility is likely to have implications for legal challenges raised by detainees. Later this year,

[5] Congressional Research Service (CRS) Report R40139, January 22, 2009: "Closing the Guantanamo Detention Center: Legal Issues," pp. 1, 2. The report is available on the U.S. Dept. of State Website at http://fpc.state.gov/c34397.htm

[2010] the Supreme Court is expected to consider arguments in the case of *Kiyemba v. Obama* as to whether federal *habeas* courts have the authority to order the release into the United States of Guantanamo detainees found to be unlawfully held.

In March 2009, the Obama Administration announced a new definitional standard for the government's authority to detain terrorist suspects, which does not use the phrase "enemy combatant" to refer to persons who may be properly detained. The new standard is similar in scope to the "enemy combatant" standard used by the Bush Administration to detain terrorist suspects. The standard would permit the detention of members of the Taliban, Al Qaeda, and associated forces, along with persons who provide "substantial support" to such groups, regardless of whether such persons were captured away from the battlefield in Afghanistan. Courts that have considered the Executive's authority to detain under the AUMF and law of war have reached differing conclusions as to the scope of this detention authority. In January 2010, a D.C. Circuit panel held that support for or membership in an AUMF-targeted organization may constitute a sufficient ground to justify military detention.[6] [No footnotes in original summary]

. . . .

Whether detainees who are facing prosecution by a military commission may challenge the jurisdiction of such tribunals prior to the completion of their trial remains unsettled, although the district court has so far declined to enjoin military commissions. Supreme Court precedent suggests that *habeas corpus* proceedings may be invoked to challenge the jurisdiction of a military court even where *habeas corpus* has been suspended. *Habeas* may remain available to defendants who can make a colorable claim not to be enemy belligerents within the meaning of the MCA, and therefore to have the right not to be subject to military trial at all, perhaps without necessarily having to await a verdict or exhaust the appeals process. Interlocutory challenges contesting whether the charges make out a valid violation of the law of war, for example, seem less likely to be entertained on a *habeas* petition.[7]

Detainees' Rights in a Criminal Prosecution

While many persons currently held at Guantanamo are only being detained as a preventative measure to stop them from returning to battle, the United States has brought or intends to pursue criminal charges against some detainees. Various constitutional provisions, most notably those arising from the Fifth and Sixth Amendments to the U.S. Constitution, apply to defendants throughout the process of criminal prosecutions. Prosecuting the Guantanamo detainees inside the United States would raise at least two major legal questions. First, does a detainee's status as an "enemy combatant" reduce the degree of constitutional protections to which he is entitled? Secondly, would the choice of judicial forum – i.e., civilian court, military commission, or courts-martial – affect interpretations of constitutional rights implicated in detainee prosecutions?

. . . [T]he nature and extent to which the Constitution applies to noncitizens detained at Guantanamo is a matter of continuing legal dispute. Although the Supreme Court held in *Boumediene* that the constitutional writ of *habeas* extends to detainees held at Guantanamo, it left open the nature and degree to which other constitutional protections, including those relating to substantive and procedural due process, may also apply. The *Boumediene* Court noted that the Constitution's application to noncitizens in places like Guantanamo located outside the United States turns on "objective factors and practical concerns." The Court has also repeatedly recognized that at least some constitutional protections are "unavailable to aliens outside our geographic borders." The application of constitutional principles to the prosecution of aliens located at Guantanamo remains unsettled.

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[6] Congressional Research Service (CRS) report RL33180, February 3. 2010: "Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court," see, Summary (no pagination).

[7] *Id.*, p. 53.

On the other hand, it is clear that if Guantanamo detainees are subject to criminal prosecution in the United States, the constitutional provisions related to such proceedings would apply. However, the application of these constitutional requirements might differ depending upon the forum in which charges are brought. The Fifth Amendment's requirement that no person be held to answer for a capital or infamous crime unless on a presentment or indictment of a grand jury, and the Sixth Amendment's requirement concerning trial by jury, have been found to be inapplicable to trials by military commissions or courts-martial. The application of due process protections in military court proceedings may also differ from civilian court proceedings, in part because the Constitution "contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." In the past, courts have been more accepting of security measures taken against "enemy aliens" than U.S. citizens, particularly as they relate to authority to detain or restrict movement on grounds of wartime security. It is possible that the rights owed to enemy combatants in criminal prosecutions would be interpreted more narrowly by a reviewing court than those owed to defendants in other, more routine cases, particularly when the constitutional right at issue is subject to a balancing test.

There are several forums in which detainees could potentially be prosecuted for alleged criminal activity, including in federal civilian court, in general courts-martial proceedings, or before military commissions. The procedural protections afforded to the accused in each of these forums may differ, along with the types of offenses for which the accused may be prosecuted. The MCA authorized the establishment of military commissions with jurisdiction to try alien "unlawful enemy combatants" for offenses made punishable by the MCA or the law of war, and affords the accused fewer procedural protections than would be available to defendants in military courts-martial or federal civilian court proceedings. Approximately 20 detainees at Guantanamo are currently facing charges before such commissions, though critics have raised questions regarding the constitutionality of the system established by the MCA. The MCA does not restrict military commissions from exercising jurisdiction within the United States, and the Supreme Court has previously upheld the use of military commissions against enemy belligerents tried in the United States. Although they have yet to be used for this purpose, detainees could also be brought before military courts-martial, which have jurisdiction over persons subject to military tribunal jurisdiction under the law of war via the Uniform Code of Military Justice (UCMJ). Detainees brought before military-courts martial could be charged with offenses under the UCMJ and the law of war, though courts-martial rules concerning the accused's right to a speedy trial may pose an obstacle to prosecution absent modification. Detainees could also potentially be prosecuted in federal civilian court for offenses under federal criminal statutes. Provisions in the U.S. Criminal Code relating to war crimes and terrorist activity apply extraterritorially and may be applicable to some detainees, though ex post facto and statute of limitation concerns may limit their application to certain offenses.[8] [Footnotes omitted]

B. SECTION DIRECTORY:

Not Applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

[8] Congressional Research Service (CRS) Report R40139, January 22, 2009: "Closing the Guantanamo Detention Center: Legal Issues," pp. 12, 13. The report is available on the U.S. Dept. of State Website at http://fpc.state.gov/c34397.htm

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The memorial does not require counties or municipalities to take an action requiring the expenditures 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:

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

House Memorial

A memorial to the Congress of the United States, urging Congress to use its constitutional authority to prevent the trial of terrorists from taking place in a civilian courtroom.

WHEREAS, on November 12, 2009, United States Attorney General Eric Holder announced the trial of self-described mastermind of 9/11 Khalid Sheikh Mohammed and the other four suspected 9/11 terrorists would be moved from a military court in Guantanamo Bay, Cuba, to a civilian court in New York City just blocks away from the World Trade Center attacks that cost the lives of nearly 3,000 people, and

WHEREAS, Khalid Sheikh Mohammed, Walid Muhammad Salih, Mubarek bin 'Attash, Ramzi bin al Shibh, and Mustafa Ahmed al Hawsawi, known as the "Gitmo 5," all fit the statutory definition of an "unprivileged enemy belligerent" by having engaged in premeditated, politically motivated violence against noncombatant civilian targets, and

WHEREAS, United States Attorney General Eric Holder has also contemplated a civilian court trial in Washington, D.C., for Riduan Isamuddin, better known as "Hambali," and potentially other Guantanamo Bay detainees, and

WHEREAS, "Hambali" is suspected of the planning and bombing of a Bali nightclub which killed 202 people, and

WHEREAS, the "Gitmo 5" or other terrorists would likely use a highly publicized civilian trial in the United States to their own political advantage, to mode themselves as martyrs and

spread their jihadist ideology both internationally and domestically, and

WHEREAS, some independent observers will not discount the possibility that civilian trials could make New York City, Washington, D.C., or any other domestic locale an even larger target, and

WHEREAS, we are a nation that is at war against terror and should treat enemy combatants in that war as such, and

WHEREAS, trying any terrorist in a civilian court would award foreign terrorists all the constitutional rights due a United States citizen defendant accused of an ordinary domestic crime, NOW, THEREFORE,

Be It Resolved by the Legislature of the State of Florida:

That Congress is urged to reject any efforts by the Justice Department to try terrorists in federal court in New York City or any other domestic venue by exercising its constitutional authority as set forth in Section 1 of Article III of the United States Constitution which states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

BE IT FURTHER RESOLVED that copies of this memorial be dispatched to the President of the United States, to the President of the United States Senate, to the Speaker of the United States House of Representatives, and to each member of the Florida delegation to the United States Congress.