The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

COMMERCE AND TOURISM
Senator Detert, Chair
Senator Dockery, Vice Chair

MEETING DATE: Monday, January 9, 2012
TIME: 3:15 —5:15 p.m.
PLACE: *James E. "Jim" King, Jr. Committee Room,* 401 Senate Office Building

MEMBERS: Senator Detert, Chair; Senator Dockery, Vice Chair; Senators Flores, Lynn, Montford, and Ring

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 798** Commerce and Tourism	OGSR/Florida Opportunity Fund and the Institute for the Commercialization of Public Research; Amending provisions which provide exemptions from public records and open meeting requirements for the Florida Opportunity Fund and the Institute for the Commercialization of Public Research; reorganizing the exemptions by removing references to the Institute for the Commercialization of Public Research and transferring the exemptions relating to the institute to a new statute; clarifying that the exemptions pertaining to the Florida Opportunity Fund apply to prospective investments, alternative investments, and certain confidential proprietary information provided by a proprietor; reducing the time period during which proprietary confidential business information is confidential and exempt from disclosure; imposing criminal penalties on a person who willfully and knowingly violates the public records or public meetings exemptions pertaining to the institute, etc. CM 01/09/2012 GO BC	
2	**SB 540** Smith (Compare H 885)	Secondary Metals Recyclers; Revising the period required for secondary metals recyclers to maintain certain information regarding purchase transactions involving regulated metals property; revising requirements for payments made by secondary metals recyclers to sellers of regulated metals property, to which penalties apply; prohibiting secondary metals recyclers from purchasing regulated metals property without maintaining certain records; limiting civil liability of secondary metals recyclers under certain circumstances; establishing an inference that secondary metals recyclers do not commit theft or deal in stolen property under certain circumstances; preempting to the state the regulation of secondary metals recyclers and purchase transactions involving regulated metals property, etc. CM 01/09/2012 CA BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
3	**SB 222** Siplin (Similar H 827)	Domestic Corporations; Providing a fee for a certificate of conversion into a domestic corporation; providing for conversion of a limited agricultural association into a domestic corporation; requiring that the association file certain information with the Department of State to convert into a domestic corporation; providing criteria for the certificate of conversion; providing for when an association conversion into a domestic corporation is effective; providing that the conversion does not affect any obligation or liability of the association; providing for all rights and obligations of the association to be vested in the domestic corporation; prohibiting any requirement that the association wind up its affairs or pay its liabilities and distribute its assets; requiring that the conversion and the articles of incorporation be approved by the association-governing documents before the certificate of conversion is filed with the Department of State, etc. CM 01/09/2012 AG BC	
4	**SB 432** Flores (Compare CS/H 189)	Unauthorized Copying of Recordings; Requiring restitution by persons who knowingly commit certain violations relating to recordings for commercial advantage or private financial gain; authorizing recovery by a trade association representing the owner or lawful producer of a recording; providing for calculation of a restitution amount; providing that a crime victim entitled to restitution may include a trade association representing the owner or lawful producer of a pirated recording in certain circumstances, etc. CM 01/09/2012 CJ BC	
5	**SB 562** Lynn (Identical H 4027)	Community-based Development Organizations; Repealing provisions relating to the Community-Based Development Organization Assistance Act, the eligibility of community-based development organizations and eligible activities for certain grant funding, the award of grants by the former Department of Community Affairs, the reporting of certain information by grant recipients to the former department, and rulemaking authority of the former department, etc. CA 12/05/2011 Favorable CM 01/09/2012 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
6	**SB 170** Altman (Identical H 103)	Transfer of Tax Liability; Revising provisions relating to a tax liability when a person transfers or quits a business; providing that the transfer of the assets of a business or stock of goods of a business under certain circumstances is considered a transfer of the business; requiring the Department of Revenue to provide certain notification to a business before a circuit court temporarily enjoins business activity by that business; providing that transferees of the business are liable for certain taxes unless specified conditions are met; requiring the department to conduct certain audits relating to the tax liability of transferors and transferees of a business within a specified time period; requiring certain notification by the Department of Revenue to a transferee before a circuit court enjoins business activity in an action brought by the Department of Legal Affairs seeking an injunction, etc. CA 10/04/2011 Favorable CM 01/09/2012 BC	
7	Presentation by Space Florida on an update of the current projects and jobs of the space industry in Florida		
	Other Related Meeting Documents		
	An electronic copy of the Appearance Request form is available to download from any Senate committee page on the Senate's website, www.flsenate.gov.		

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Commerce and Tourism

BILL: SB 798

INTRODUCER: Commerce and Tourism Committee

SUBJECT: OGSR/the Florida Opportunity Fund and the Institute for the Commercialization of Public Research

DATE: January 6, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Hrdlicka	CM	**Pre-meeting**
2.			GO	
3.			BC	
4.				
5.				
6.				

I. Summary:

In 2007, the Legislature created the Florida Opportunity Fund (FOF) and the Institute for the Commercialization of Public Research (institute) to provide certain types of businesses access to capital – both public and private investments – that would assist them in reaching their full potential as job-creators. Additionally, the Legislature created exemptions from the state's public records and public meetings laws, under specified circumstances, for both entities. The exemptions will expire October 2, 2012, unless saved from repeal through reenactment by the Legislature.

SB 798 is the result of Interim Report 2012-303,[1] the Commerce and Tourism Committee's Open Government Sunset Review of the public records and public meetings exemptions for the FOF and the institute. The report recommended re-enactment of the public records exemption and public meetings exemption in s. 288.9626, F.S., with a few changes. The key recommended change is to create a separate statute for the institute's exemptions. These changes will clarify, but not expand, the scope of the current statutory exemptions.

This committee bill substantially amends s. 288.9626, F.S., and creates. 288.9627, F.S. It must pass each chamber of the Legislature by a two-thirds vote of the members present and voting.

[1] "Open Government Sunset Review of Section 288.9626, F.S., Public Records Exemption for Information Held by the Florida Opportunity Fund and the Institute for the Commercialization of Public Research." Report available at: http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-303cm.pdf. Site last visited October 19, 2011.

II. Present Situation:

Background on the FOF

Initial Responsibility

Created by the Legislature in 2007, the Florida Opportunity Fund (FOF)[2] was intended to attract venture capital investment into targeted Florida industries by providing a state match.[3] The FOF is organized as a private, not-for-profit corporation under ch. 617, F.S., with a five-member board of directors selected by an Enterprise Florida, Inc., (EFI) appointments committee.[4] The FOF's administrative staff is provided by EFI, and has a separate investment manager, Florida First Partners, comprised of Florida-based MILCOM Venture Partners and the Credit Suisse Customized Fund Investment Group. The Legislature appropriated $29.5 million for investment funds in FY 2007-2008.[5]

Originally, the FOF was established as a "fund-of-funds" program, meaning that it could only invest in investment funds, not directly in individual businesses. Additionally, the investment funds had to match each $1 in state investment with $2 of their own. The initial emphasis was on "seed" and "early-stage" investments, because proponents of creating the FOF concluded that these types of companies were least likely to have access to venture funding and traditional financing.[6] Targeted industries for the FOF investments included, but were not limited to, life sciences, information technology, advanced manufacturing processes, aviation and aerospace, and homeland security and defense. To be eligible for state participation, an investment fund must have an experienced and successful investment manager or team, and must focus on investment opportunities in Florida.

The FOF invested in its first fund in FY 2008-2009: $594,000 in Element Partners II, according to FOF's financial statements.[7] Currently, the FOF has invested $27 million of the original $29.5 million appropriation.[8]

Recent developments

In 2009, the Florida Legislature amended s. 288.9624, F.S., to allow the FOF to make loans and other direct investments to individual businesses and infrastructure projects; to form or operate other entities; and to accept funds from other public and private sources for use as investments.[9]

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[2] Section 288.9624, F.S. Also, the FOF's website is http://www.floridaopportunityfund.com/HomePage.asp. Site last visited October 19, 2011.

[3] The State Board of Administration (SBA) has, for many years, invested in so-called "alternative investments" that included Florida-based businesses, and in 2009, pursuant to ch. 2008-31, L.O.F., created the $250 million Florida Growth Fund for venture-capital private-equity and direct investments within Florida. More information is available at http://www.floridagrowthfund.com. Site last visited Oct. 19, 2011. These SBA programs are separate from the FOF.

[4] The current FOF board members are: chairman Kenneth Wright, partner with Baker Hostetler; vice chairman Andrew Hyltin, president of CNL Private Equity Corporation; Thomas Cornish, president and CEO of Seitlin Insurance and Advisory Services; Brian Nicholas, executive with the Acquired Asset Group of BB&T; and Pedro Pizarro, chairman and CEO of eLandia Group.

[5] This appropriation was included in Section 4 of the substantive legislation, ch. 2007-189, L.O.F., which created the FOF.

[6] See bill analysis for CS/SB 2420, which was the Senate companion to CS/CS/HB 83, which created the FOF. Available at http://archive.flsenate.gov/data/session/2007/Senate/bills/analysis/pdf/2007s2420.cm.pdf. Site last visited Oct. 19, 2011.

[7] The auditor described the $594,000 investment as a payment of a $4 million commitment to Element Partners II, which specializes in investments in "cleantech" companies. See http://www.elementpartners.com. Site last visited Oct. 19, 2011.

[8] Information on file with the Senate Commerce and Tourism Committee.

[9] Sections 25-26, ch. 2009-51, L.O.F.

These direct investments must be made in Florida infrastructure projects, or in businesses that are Florida-based or have significant business activities in Florida, and operate in technology sectors that are strategic to Florida, including the original list of industry types. The FOF may not use its original appropriation of $29.5 million to make direct investments or for any purposes not specified in the original legislation.

In May 2010, the FOF launched a direct investment program with the now-defunct Florida Energy and Climate Commission, which at the time was the lead entity for state energy and climate-change programs and policies.[10] This new FOF program is expected to increase the availability of investment capital in Florida for businesses engaged in developing or producing energy-efficient or renewable energy (EE/RE) products or services. The FOF has access initially to $32.4 million in federal funds through the 2009 American Recovery and Reinvestment Act[11] to make loans or investments in qualifying businesses. Under the terms of the federal agreement, these investments are restricted to facility and equipment improvement using EE/RE products; acquisition or demonstration of renewable energy products; and improvement of existing production, manufacturing, assembly, or distribution processes to reduce consumption or increase the efficient use of energy in such processes.

FOF has invested $12 million of the $32.4 million in federal funds into three Florida companies, matching $80 million in private investment.[12]

Lastly, in mid-2011, EFI entered into an agreement with the Florida Department of Economic Opportunity (DEO) for use of $43.5 million in federal funds from the U.S. State Small Business Credit Initiative.[13] These funds will be used by the FOF to make direct investments in eligible businesses.[14] EFI estimates that it can leverage the $43.5 million into $652.5 million in private investment. The U.S. Treasury has approved DEO's application to access Florida's full share of $97.6 million in federal funds, and in September, the Legislative Budget Commission approved the release of a portion of the federal funds.

Background on the institute

Created in the same legislation as the FOF, the Institute for the Commercialization of Public Research (institute) was envisioned as a matchmaker for venture capitalists and young companies trying to turn research ideas, technology, or patents, developed at public institutions, into marketable products and services.[15] The institute's stated purpose is:

> to assist in the commercialization of products developed by the research and development activities of publicly supported universities and colleges, research institutes, and other

[10] The commission's statutes were repealed and its responsibilities transferred to the Florida Department of Agriculture and Consumer Services (DACS) by the Legislature in the 2011 session. See s. 500, ch. 2011-142, L.O.F.
[11] The website at http://www.recovery.gov/pages/default.aspx has links to the federal law and other program information.
[12] Information on file with the Senate Committee on Commerce and Tourism.
[13] This initiative is part of the federal Small Business Jobs Act of 2010. Information about the initiative is available at http://www.treasury.gov/resource-center/sb-programs/Pages/ssbci.aspx. Site last visited Oct. 19, 2011.
[14] Florida's total share of the federal funding is $97.6 million. The monies not allocated to EFI for the investment program are earmarked for small business loans, export financing, and credit enhancement programs. More information on file with the Senate Commerce and Tourism Committee.
[15] Section 288.9625, F.S. The institute's website is http://www.florida-institute.com. Site last visited Oct. 19, 2011.

publicly supported organizations within the state.[16]

The institute must support existing commercialization efforts at Florida universities, and may not supplant, replace, or direct existing technology transfer operations or other commercialization programs, including incubators and accelerators.

Governance of the institute

The institute is a not-for-profit corporation that is eligible for sovereign immunity and is subject to Florida law, but is not an "agency," as defined in s. 20.03(11), F.S. It is governed by a five-member board of directors[17] comprised of:

- the chair of EFI or designee;
- the president of the state university where the institute is located or designee, or if jointly sponsored by a number of universities, the presidents of those universities must agree on the designated person to serve on the board; and
- three appointees by the Governor, to serve staggered 3-year terms to which they may be reappointed.

The institute also has a 15-member Industry Advisory Board, selected by the board of directors, to assist with mentoring companies selected by the institute, reviewing grant applications, and providing other guidance.

Staffing the institute is an interim executive director[18] and an executive assistant. The institute is based in Boca Raton, and is preparing to open a second administrative office in Gainesville.

State Funding for the institute

In 2007, the Legislature appropriated $900,000 in general revenue to the institute for its operations.[19] An additional $600,000 was appropriated in 2009, as a transfer from the Florida Small Business Technology Growth Trust Fund administered by EFI.[20] In 2010, the institute was authorized to use up to 5 percent of the $3 million appropriated for the Research Commercialization Matching Grant Program to administer the grants.[21] In FY 2011-2012, the institute received a $10 million general revenue appropriation, which did not specify the uses or amount set aside for the institute's administration.[22] The institute and DEO have entered into a contract that specifies how the funds may be spent, including a low-interest loan program for eligible companies.

[16] Section 288.9625(2), F.S.
[17] The institute's current board members are: chairman Beau Ferrari, Special Assistant to the CEO of Univision Communications, Inc.; vice-chairman David Day, the university designee and director of the Office of Technology Licensing at the University of Florida; treasurer Rhys Williams, president of iTherapeutics, a biotechnology company developing therapies for retinal degenerative disease; John Fraser, executive director of the Office of IP Development and Commercialization at Florida State University; and EFI designee Carl Roston, an attorney with Akerman Senterfitt who specializes in mergers & acquisitions and private equity.
[18] The institute's interim executive director is Jane Teague, who also is the executive director of the Enterprise Development Corporation of South Florida, a public-private partnership that helps recruit investors and acts as a business incubator.
[19] Section 4, ch. 2007-189, L.O.F.
[20] Section 72, ch. 2009-81, L.O.F.
[21] Section 56, ch. 2010-147, L.O.F.
[22] Section 39(3), ch. 2011-76, L.O.F.

Responsibilities of the institute[23]

To be eligible for the institute's assistance, the company or organization attempting to commercialize its product or service must be accepted by the institute into its program. The institute reviews the business plans and technology information of each company recommended by an institute peer-review board, before making its decision whether to accept a recommended company.

For each company that is accepted, the institute provides mentoring, develops marketing information, and uses its resources to attract capital investment into the company. The institute's other duties are to:

- Maintain a centralized location to showcase companies and their technologies and products;
- Develop an efficient process to inventory and publicize companies and products that have been accepted by the institute for commercialization;
- Routinely communicate with private investors and venture capital organizations regarding the investment opportunities in its showcased companies;
- Facilitate meetings between prospective investors and eligible companies in the institute;
- Develop cooperative relationships with publicly supported organizations all of which work together to provide resources or special knowledge that is likely to be helpful to institute companies; and
- Administer the Florida Research Commercialization Matching Grant Program, created in s. 288.9552, F.S.

The institute is prohibited from developing or accruing any ownership, royalty, or other such rights over, or interest in, companies or products in the institute and must maintain the confidentiality of proprietary information. It also may not charge for services rendered to state universities and affiliated organizations, community colleges, or state agencies.

In 2010, the Legislature created the Research Commercialization Matching Grant Program, to leverage existing federal grant programs for small businesses, and directed the institute to manage it.[24] The grant program is intended to assist small or startup companies that take advantage of federal and private financial support to accelerate their growth and market penetration. Program applicants must meet several criteria, such as having attracted funding from non-government sources and achieved certain milestones required by the federal government. As mentioned above, the Legislature appropriated $3 million for the grant program. Last fall, the institute awarded Phase II grants to 11 Florida companies and Phase I grants to two companies.[25] A second round of grants is not planned for FY 2011-2012.

[23] Section 288.9625(8), F.S.

[24] Background on the federal programs – the Small Business Innovation Research Program (SBIR) and the Small Business Technology Transfer (STTR) Program – is on the website of the U.S. Small Business Administration, available at http://www.sba.gov/aboutsba/sbaprograms/sbir/index.html. Site last visited Oct. 20, 2011.

[25] The Office of Program Policy and Government Accountability is preparing an evaluation of the Commercialization Matching Grant Program. The evaluation may be published by December 2011.

Public Records and Public Meetings Exemptions for the FOF and the institute

The Legislature created a joint public records and public meetings exemption, in s. 288.9626, F.S., for the FOF and the institute in 2007.[26] Covered under the public records exemption in s. 288.9626(2), F.S., are:

- Materials that relate to methods of manufacture or production; potential trade secrets, patentable material, actual trade secrets as defined in s. 688.002, F.S., or proprietary information received, generated, ascertained, or discovered by or through research projects conducted by universities and other publicly supported organizations in Florida;
- Information that would identify investors or potential investors in projects reviewed by the FOF or the institute;
- Any information received from a person or another state or nation, or from the federal government, which is otherwise confidential or exempt from that governmental entity's laws; and
- Proprietary confidential business information regarding alternative investments for 10 years after the termination of the alternative investments.

The term "proprietary confidential business information" is defined to mean information that has been designated by the proprietor when provided to the FOF or the institute as owned or controlled by a proprietor; that is intended to be and is treated by the proprietor as private and the disclosure of which would harm the business operations of the proprietor and has not been intentionally disclosed by the proprietor unless pursuant to a private agreement that provides that the information will not be released to the public except as required by law or legal process, or pursuant to law or an order of a court or administrative body; and that concerns:

- Trade secrets as defined in s. 688.002, F.S.;
- Information provided to the FOF or institute regarding a prospective investment in a private equity fund, venture capital fund, angel fund, or portfolio company which is proprietary to the provider of the information;
- Financial statements and auditor reports of an alternative investment vehicle or portfolio company, unless such records have been released by the alternative investment vehicle or portfolio company and are publicly available;
- Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle or portfolio company;
- Information regarding the portfolio positions in which an alternative investment vehicle or the FOF invests;
- Capital call and distribution notices to investors of an alternative investment vehicle or the FOF;
- Alternative investment agreements and related records; and
- Information concerning investors, other than the FOF itself, in an alternative investment vehicle or portfolio company.[27]

[26] Chapter 2007-190, L.O.F.
[27] Section 288.9626(1)(g)1., F.S.

The statute also expressly excludes certain items from the definition of proprietary confidential business information:

- The name, address, and vintage year of an alternative investment vehicle or the FOF, and the identity of principals involved in the management of the alternative investment vehicle or the FOF;
- The dollar amount of the commitment made by the FOF to each alternative investment vehicle since inception;
- The dollar amount and date of cash contributions made by the FOF to each alternative investment vehicle since inception;
- The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the FOF from each alternative investment vehicle;
- The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the FOF, plus the remaining value of alternative-vehicle assets that are attributable to the FOF investment in each alternative investment vehicle;
- The net internal rate of return of each alternative investment vehicle since inception;
- The investment multiple of each alternative investment vehicle since inception; and
- The dollar amount of the total management fees and costs paid on an annual fiscal-year-end basis by the FOF to each alternative investment vehicle on a fiscal-year-end basis.[28]

Section 288.9626(3), F.S., creates a public meetings exemption for the FOF and the institute. The boards of directors of those entities may close that portion of their otherwise public meetings when they are discussing information that is confidential and exempt, per subsection (2) of that statute. The closed portions of the meetings still must be recorded and transcribed, but this information also is confidential and exempt from s. 119.07(1), F.S., and Art. I, s. 24(a), of the State Constitution.

Pursuant to s. 288.9626(4), F.S., the FOF and the institute may release the protected records to a governmental entity in the performance of its duties upon written request. The confidentiality must be maintained by those receiving entities. Violating s. 288.9626, F.S., is a first-degree misdemeanor, punishable as provided in ss. 775.082 or 775.083, F.S.[29]

Once a confidential and exempt record becomes legally available or subject to public disclosure for any reason, that record is no longer confidential and exempt, and shall be made available for inspection and copying.

The legislation's "statement of necessity" listed a number of reasons why certain documents and information in the possession of the FOF and the institute should be confidential and exempt:[30]

- Disclosure of proprietary confidential business information to the public would harm the business operations of the proprietor.
- Information received by the FOF or the institute from a person from another state or nation or the Federal Government, which is otherwise exempt or confidential pursuant to the laws of that state or nation or pursuant to federal law, should remain exempt or

[28] Section 299.9626(1)(g)2., F.S.
[29] Section 288.9626(5), F.S.
[30] Section 2, ch. 2007-190, L.O.F.

confidential because the highly confidential nature of research necessitates that it be protected.

- Without these exemptions, the disclosure of confidential and exempt information would jeopardize the effective and efficient administration of the FOF and the institute.
- Disclosure of investor identities may adversely impact the ability of the FOF or the institute to attract investors who desire anonymity.
- Disclosing proprietary confidential business information used in determining how private equity investments are made or managed by private partnerships investing assets on behalf of the FOF would negatively affect the business interests of private partnerships that rely heavily on their information advantage to generate investment returns, and competitor partnerships could gain an unfair competitive advantage if provided access to such information.
- The release of proprietary confidential business information revealing how alternative investments are made could result in inadequate returns and ultimately frustrate attainment of the investment objective of the FOF.
- Portions of meetings of the FOF and institute boards of directors at which records made confidential and exempt by this act are discussed be made exempt from public meetings requirements in order to maintain the confidential and exempt status of this information.

General Background on Florida's Public Records and Public Meetings Laws

Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.[31] One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.[32]

Article I, s. 24, of the State Constitution, provides that:

> (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,[33] which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

> Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

[31] Sections 1390 and 1391, F.S. (Rev. 1892)
[32] Article I, s. 24, of the State Constitution.
[33] Chapter 119, F.S.

Unless specifically exempted, all agency[34] records are available for public inspection. The term "public record" is broadly defined to mean:

> ". . .all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."[35]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.[36] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[37]

Article I, s. 24, of the State Constitution also provides that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the Legislature shall be open and noticed as provided in Art. III, s. 4(e), of the State Constitution, except with respect to meetings exempted pursuant to this section or specifically closed by the Constitution. In addition, the Sunshine Law, s. 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

Only the Legislature is authorized to create exemptions to open government requirements.[38] An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.[39] A bill enacting an exemption[40] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[41]

There is a difference between records that the Legislature has made exempt from public inspection and those that are <u>confidential</u> and exempt. If the Legislature makes a record

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[34] The word "agency" is defined in s. 119.011(2), F.S., to mean ". . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

[35] Section 119.011(12), F.S.

[36] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

[37] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

[38] Article I, s. 24(c), of the State Constitution.

[39] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

[40] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

[41] Article I, s. 24(c), of the State Constitution.

confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[42] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[43]

The Open Government Sunset Review Act (the act)[44] provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Sunshine Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are that the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.[45]

The act also requires the Legislature to consider the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?[46]

[42] Attorney General Opinion 85-62.
[43] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[44] Section 119.15, F.S.
[45] Section 119.15(6)(b), F.S.
[46] Section 119.15(6)(a), F.S.

While the standards in the Act may appear to limit the Legislature in the exemption review process, those aspects of the Act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.[47] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

> "… notwithstanding s. 778.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment."

Background on Florida's Trade Secrets Law

Over the years, the Legislature has created a number of specific exemptions from public records for trade secrets.[48] Chapter 688, F.S., the Uniform Trade Secrets Act, defines a trade secret to mean:

> . . . information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[49]

Chapter 688, F.S., also provides for injunctive relief, damages, and attorneys' fees for misappropriating a trade secret. It permits the courts to enter an injunction for the actual or threatened misappropriation of a trade secret.[50] Further, the court may, in appropriate circumstances, require affirmative acts to protect trade secrets. A complainant under the act is also entitled to damages, which can include the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In the alternative, royalties can be required.[51]

In an action under the Uniform Trade Secrets Act, the court is required to preserve the secrecy of the alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the

[47] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).
[48] See, e.g., s. 1004.78(2), F.S. (trade secrets produced in technology research within community colleges); s. 365.174, F.S. (proprietary confidential business information and trade secrets submitted by wireless 911 provider to specified agencies); s. 570.544(8), F.S. (trade secrets contained in records of the Division of Consumer Services of the Department of Agriculture and Consumer Services); and s. 627.6699(8)(c), F.S. (trade secrets involving small employer health insurance carriers).
[49] Section 688.002(4), F.S.
[50] Section 688.003, F.S.
[51] Section 688.004, F.S.

action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.[52]

Additionally, s. 812.081(2), F.S., provides that:

> Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his or her own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

Section 812.081(1)(c), F.S., defines "trade secret" to mean ". . . the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it." The term "trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof.

Additionally, irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, when the owner of a trade secret takes measures to prevent it from becoming available to persons other than those selected by the owner to have access to it, the trade secret is considered to be:

- Secret;
- Of value;
- For use or in use by the business; and
- Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.

The Florida Attorney General has concluded that the fact certain information constitutes a trade secret under s. 812.081, F.S., does not, in and of itself, remove it from the requirements of the Public Records Act.[53] When there is no exemption making information confidential or exempt, an agency is therefore under a duty to release public records even though such records may constitute trade secrets.

III. Effect of Proposed Changes:

SB 798 incorporates the findings and recommendations of Senate Interim Report 2012-303. The report recommended reenacting s. 288.9626, F.S., with some technical changes – primarily, to give the FOF and the institute separate statutes for public records exemptions and public meetings exemptions more closely tied to their individual responsibilities and missions. None of the recommended changes expands the scope of the existing exemptions in s. 288.9626, F.S.

[52] Section 688.006, F.S.
[53] Attorney General Opinion 92-43.

Section 1: Amends s. 288.9626, F.S., to:

- Remove references to the institute from s. 288.9626, F.S., so that it applies only to the FOF;
- Reduce from 10 years to 7 years the period of time that investment, loan, or other confidential and exempt information may be shielded from public review;
- Modify certain definitions to better reflect the full extent of the FOF's investment responsibilities, without expanding their scope; and
- Clarify and make consistent terminology in s. 288.9626, F.S.

Section 2: Creates s. 288.9627, F.S., and transfers to it the relevant provisions of s. 288.9626, F.S., pertaining to public records and public meetings exemptions that apply strictly to the institute. The institute's current exemptions are maintained but not expanded.

Section 3: Specifies that SB 798 takes effect upon becoming law.

SB 798 requires passage by a two-thirds vote of the Senate and the House of Representatives in order to become law. It takes effect upon becoming a law.

Other Potential Implications:
If the Legislature chooses not to retain the public-records exemption for the information obtained by the FOF and the institute, or the public meetings exemption, then they will expire on October 2, 2012. Without the exemption, certain types of proprietary business information, trade secrets, and donor identities will become public, at least, what is not otherwise protected under federal law. The FOF and the institute contend this would hamper their ability to attract private investments and other participation in their programs, thus reducing their programs' ability to encourage economic and job growth.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

SB 798 retains the substance of an existing public records exemption and existing public meetings exemption. It also complies with the requirement of Art. I, s. 24, of the Florida Constitution that public-records exemptions be addressed in legislation separate from substantive law changes. Finally, the committee bill complies with s. 119.15(4)(c), F.S., which specifies that only existing exemptions that are substantially amended must undergo another scheduled repeal in 5 years.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

Interim Report 2012-303 *September 2011*

Committee on Commerce and Tourism

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 288.9626, F.S., PUBLIC RECORDS EXEMPTION FOR INFORMATION HELD BY THE FLORIDA OPPORTUNITY FUND AND THE INSTITUTE FOR THE COMMERCIALIZATION OF PUBLIC RESEARCH

Issue Description

The Legislature created the Florida Opportunity Fund (FOF) and the Institute for the Commercialization of Public Research (institute) in 2007[1] with similar missions of providing certain types of businesses access to capital – both public and private investments – that would assist them in reaching their full potential as job-creators.

The FOF is a not-for-profit corporation, governed by a 5-member board selected by Enterprise Florida, Inc., which uses appropriated state funds to match investments from private sources or other government entities into investment funds or into individual companies. FOF investments may be made into investment funds comprising multiple businesses or into individual businesses, representing statutorily specified industry sectors.

The institute is a not-for profit corporation, governed by a 5-member board as provided in statute, that has a broad directive to "assist in the commercialization of products"[2] developed through the research activities of Florida universities, research institutes, or publicly funded organizations. A specific responsibility of the institute is to administer the Commercialization Matching Grant Program, created in s. 288.9552, F.S.

Because both of these entities, in the course of conducting their missions, likely would have access to proprietary business information that, if released, could put the businesses at a competitive disadvantage in the marketplace, the Legislature, in 2007, created public records and public meeting exemptions for these entities.[3] Specified types of business and investment information to which the FOF and the institute may have access are defined as confidential and thus unavailable to public review for up to 10 years. Also, these entities may close to the public those portions of their meetings where confidential information is discussed.

The Open Government Sunshine Review Act[4] provides for the systematic review by the Legislature, through a cycle ending October 2 of the fifth year following enactment, of each exemption from the Public Records Act or the public meetings laws. Based on that schedule, the public records and public meetings exemptions created in s. 288.9626, F.S., are repealed October 2, 2012, unless reenacted after review by the Legislature prior to that date.

Background

Venture Capital in Florida

Over the past decade, Florida, Massachusetts, Connecticut, and a number of states have created programs to participate in venture capital financing[5] – primarily to promote economic development in targeted industry

[1] Chapter 2007-189, L.O.F., the "Florida Capital Formation Act." The statute cite is s. 288.9624, F.S.
[2] Section 288.9625(2), F.S.
[3] Chapter 2007-190, L.O.F.
[4] Section 119.15, F.S.
[5] "Venture capital" is money provided by professional investors and, increasingly, governmental entities, who invest in new and/or rapidly growing companies with the potential to develop into significant economic contributors. Venture capital is an

sectors, but also to attract more private investment venture capital. Historically, Florida has lagged behind similar-sized and competitor states in attracting private venture, but saw an uptick in 2010, when Florida ranked 14th among the states, with $225 million in private venture capital.[6]

The impact that venture capital can have on the success of young businesses is illustrated by this statistic: public companies headquartered in Florida that were once venture-backed account for 444,450 U.S. jobs and $79 billion in U.S. revenue.[7]

Florida has a number of organizations that actively recruit venture capital, such as The Florida Venture Forum, the Florida Research Consortium, the State University System's Technology Transfer and Licensing Offices, and the Miami Innovation Fund. There also are national organizations, such as the Community Development Venture Capital Alliance[8] that is a network of venture capital partners that can provide financing to eligible projects. Also, a January 2011 federal initiative called "Startup America" includes $1 billion in funds through the U.S. Small Business Administration for investment in small companies.[9]

Florida Opportunity Fund

Created by the Legislature in 2007, the Florida Opportunity Fund (FOF)[10] was intended to attract venture capital investment into targeted Florida industries by providing a state match.[11] The FOF is organized as a private, not-for-profit corporation under ch. 617, F.S., with a 5-member board of directors selected by an Enterprise Florida, Inc., (EFI) appointments committee.[12] The FOF's administrative staff is provided by EFI, and has a separate investment manager, Florida First Partners, comprised of Florida-based MILCOM Venture Partners and the Credit Suisse Customized Fund Investment Group. The Legislature appropriated $29.5 million for investment funds in FY 2007-2008.[13]

Original directive

The FOF was established as a fund-of-funds program, meaning that it could only invest in investment funds, not directly in individual businesses; additionally, the investment funds had to match the state $2 for every $1 it invested. The emphasis was on "seed" and "early-stage" investments, because proponents of creating the FOF concluded that these types of companies were least likely to have access to venture funding and traditional

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important source of equity for startup companies, in particular. A venture capitalist may invest before there is a real product or company organized, known as "seed investing," or may provide capital to a company in its first or second stages of development, known as "early stage investing." Venture capitalists mitigate their risks by developing a portfolio of young companies into a single venture fund, known as the "fund of funds" approach.

[6] Information based on 2010 data from The MoneyTree Report and IHS Global Insight. See National Venture Capital Association report, "Venture Capital Impact by State." Available at http://www.nvca.org/index.php?option=com_content&view=article&id=321:vc-impact-by-state-&catid=38:nvca-public-policy&Itemid=586. Site last visited July 26, 2011. California led the list with $11.6 billion, Massachusetts was next with $2.4 billion, and New York was third with $1.4 billion. Among competitor states, North Carolina was ranked 8th with $529 million and Georgia was ranked 13th with $343 million.

[7] Ibid.

[8] See http://www.cdvca.org/. Site last visited July 26, 2011.

[9] See http://www.startupamericapartnership.org. Site last visited July 26, 2011.

[10] Section 288.9624, F.S. Also, the FOF's website is http://www.floridaopportunityfund.com/HomePage.asp. Site last visited July 26, 2011.

[11] The State Board of Administration (SBA) has, for many years, invested in so-called "alternative investments" that included Florida-based businesses, and in 2009, pursuant to ch. 2008-31, L.O.F., created the $250 million Florida Growth Fund for venture-capital private-equity and direct investments within Florida. More information is available at http://www.floridagrowthfund.com. Site last visited July 26, 2011. These SBA programs are separate from the FOF.

[12] The current FOF board members are: chairman Kenneth Wright, partner with Baker Hostetler; vice chairman Andrew Hyltin, president of CNL Private Equity Corporation; Thomas Cornish, president and CEO of Seitlin Insurance and Advisory Services; Brian Nicholas, executive with the Acquired Asset Group of BB&T; and Pedro Pizarro, chairman and CEO of eLandia Group.

[13] This appropriation was included in Section 4 of the substantive legislation, ch. 2007-189, L.O.F., which created the FOF.

financing.[14] Targeted industries for the FOF investments included, but were not limited to, life sciences, information technology, advanced manufacturing processes, aviation and aerospace, and homeland security and defense. To be eligible for state participation, an investment fund must have an experienced and successful investment manager or team, and must focus on investment opportunities in Florida.
The FOF invested in its first fund in FY 2008-2009: $594,000 in Element Partners II, according to FOF's financial statements.[15] Currently, the FOF has six investment fund partners and as of June 30, 2010, had invested just over $3 million.[16]

Expansion of investment authority

In 2009, the Florida Legislature amended s. 288.9624, F.S., to allow the FOF to make direct investments, including loans, in individual businesses and infrastructure projects; to form or operate other entities; and to accept funds from other public and private sources for use as investments.[17] These direct investments must be made in Florida infrastructure projects, or in businesses that are Florida-based or have significant business activities in Florida and operate in technology sectors that are strategic to Florida, including the original list of industry types. The FOF may not use its original appropriation of $29.5 million to make direct investments or for any purposes not specified in the original legislation.

In May 2010, the FOF launched a direct investment program with the Florida Energy and Climate Commission (commission), a nine-member board housed administratively in the Governor's Office that, at the time, was the lead entity for state energy and climate-change programs and policies.[18] This new FOF program is expected to increase the availability of investment capital in Florida for businesses engaged in developing or producing energy-efficient or renewable energy (EE/RE) products or services. The FOF has access initially to $36 million in federal funds through the 2009 American Recovery and Reinvestment Act to make loans or investments in qualifying businesses. Under the terms of the federal agreement, these investments are restricted to facility and equipment improvement using EE/RE products; acquisition or demonstration of renewable energy products; and improvement of existing production, manufacturing, assembly, or distribution processes to reduce consumption or increase the efficient use of energy in such processes. FOF has made one energy investment as of August 1, 2011.

2011 developments

EFI is partnering with the Department of Economic Opportunity (DEO) to allocate $43.5 million in federal funds, as part of the U.S. State Small Business Credit Initiative,[19] to the FOF for direct investments in eligible businesses. EFI has estimated that it can leverage the $43.5 million into $652.5 million in private investment. DEO has submitted an application to the U.S. Department of the Treasury to access Florida's full $97.6 million share of federal funds, and may hear a decision by early autumn. The Legislative Budget Commission must approve the release of the federal funds.

Reporting Requirements

The FOF is required by statute[20] to submit an annual report by December of each year to the Governor, the President of the Senate, and the Speaker of the House of Representatives that includes, at a minimum, an accounting of the amount of investments disbursed by the FOF fund; the progress of the FOF in accomplishing its responsibilities; a description of the benefits to the state resulting from the FOF, including the number of

[14] See bill analysis for CS/SB 2420, which was the Senate companion to CS/CS/HB 83, which created the FOF. Available at http://archive.flsenate.gov/data/session/2007/Senate/bills/analysis/pdf/2007s2420.cm.pdf. Site last visited Aug. 8, 2011.
[15] The auditor described the $594,000 investment as a payment of a $4 million commitment to Element Partners II, which specializes in investments in "cleantech" companies. See http://www.elementpartners.com. Site last visited July 19, 2011.
[16] The FOF's financial statements are on file with the Senate Commerce and Tourism Committee.
[17] Sections 25-26, ch. 2009-51, L.O.F.
[18] The commission's statutes were repealed and its responsibilities transferred to the Florida Department of Agriculture and Consumer Services by the Legislature in the 2011 session. See s. 500, ch. 2011-142, L.O.F.
[19] This initiative is part of the federal Small Business Jobs Act of 2010. Information about the initiative is available at http://www.treasury.gov/resource-center/sb-programs/Pages/ssbci.aspx. Site last visited July 26, 2011.
[20] Section 288.9624(5), F.S.

businesses and jobs created, the number of associated industries started, and the growth of related research projects; and independently audited financial statements for the FOF that show receipts and expenditures during the preceding fiscal year for personnel, administration, and operating costs.

The Institute for the Commercialization of Public Research

Created in the same legislation as the FOF,[21] the institute was envisioned as a matchmaker for venture capitalists and young companies trying to turn research ideas, technology, or patents, developed at public institutions, into marketable products and services.[22] The institute's stated purpose is:

> to assist in the commercialization of products developed by the research and development activities of publicly supported universities and colleges, research institutes, and other publicly supported organizations within the state.[23]

The institute must support existing commercialization efforts at Florida universities, and may not supplant, replace, or direct existing technology transfer operations or other commercialization programs, including incubators and accelerators.

Governance[24]

The institute is a not-for-profit corporation that is eligible for sovereign immunity and is subject to Florida law, but is not an "agency," as defined in s. 20.03(11), F.S. It is governed by a 5-member board of directors[25] comprised of:

- the chair of EFI or designee;
- the president of the state university where the institute is located or designee, or if jointly sponsored by a number of universities, the presidents of those universities must agree on the designated person to serve on the board; and
- three appointees by the Governor, to serve staggered 3-year terms to which they may be reappointed.

The institute also has a 15-member Industry Advisory Board, selected by the board of directors, to assist with mentoring companies selected by the institute, reviewing grant applications, and providing other guidance.

Staffing the institute is an interim executive director[26] and an executive assistant. The institute is based in Boca Raton.

From FY 2007-2008 through FY 2010-2011, the institute received its state funding through a management agreement with EFI. But beginning with FY 2011-2012, the new Department of Economic Opportunity (DEO) will serve as contract manager for the institute's state funding.[27]

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[21] See FN 1.
[22] The institute's website is http://www.florida-institute.com. Site last visited July 25, 2011.
[23] Section 288.9625(2), F.S.
[24] Section 288.9565(4), F.S.
[25] The institute's current board members are: chairman Beau Ferrari, Special Assistant to the CEO of Univision Communications, Inc.; vice-chairman David Day, the university designee and director of the Office of Technology Licensing at the University of Florida; treasurer Rhys Williams, president of iTherapeutics, a biotechnology company developing therapies for retinal degenerative disease; John Fraser, executive director of the Office of IP Development and Commercialization at Florida State University; and EFI designee Carl Roston, an attorney with Akerman Senterfitt who specializes in mergers & acquisitions and private equity.
[26] The institute's interim executive director is Jane Teague, who also is the executive director of the Enterprise Development Corporation of South Florida, a public-private partnership that helps recruit investors and acts as a business incubator.
[27] Section 192, ch. 2011-142, L.O.F.

State Funding for the Institute

In 2007, the Legislature appropriated $900,000 in general revenue to the institute for its operations.[28] An additional $600,000 was appropriated in 2009, as a transfer from the Florida Small Business Technology Growth Trust Fund administered by EFI.[29] In 2010, the institute was authorized to use up to 5 percent of the $3 million appropriated for the Research Commercialization Matching Grant Program to administer the grants.[30] In FY 2011-2012, the Institute received a $10 million general revenue appropriation, which did not specify the uses or amount set aside for the institute's administration. [31] The institute and DEO currently are negotiating a contract on how the funds may be spent.

Responsibilities[32]

To be eligible for the institute's assistance, the company or organization attempting to commercialize its product or service must be accepted by the institute into its program. The institute reviews the business plans and technology information of each company recommended by an institute peer-review board, before making its decision whether to accept a recommended company.

For each company that is accepted, the institute provides mentoring, develops marketing information, and uses its resources to attract capital investment into the company. The institute's other duties are to:

- Maintain a centralized location to showcase companies and their technologies and products;
- Develop an efficient process to inventory and publicize companies and products that have been accepted by the institute for commercialization;
- Routinely communicate with private investors and venture capital organizations regarding the investment opportunities in its showcased companies;
- Facilitate meetings between prospective investors and eligible companies in the institute;
- Develop cooperative relationships with publicly supported organizations all of which work together to provide resources or special knowledge that is likely to be helpful to institute companies; and
- Administer the Florida Research Commercialization Matching Grant Program, created in s. 288.9552, F.S.

The institute is prohibited from developing or accruing any ownership, royalty, or other such rights over, or interest in, companies or products in the institute and must maintain the confidentiality of proprietary information. It also may not charge for services rendered to state universities and affiliated organizations, community colleges, or state agencies.

The institute's newest responsibility is administering the state's Research Commercialization Matching Grant Program, created in 2010 to leverage existing federal grant programs for small businesses.[33] The state program is intended to assist small or startup companies that take advantage of federal and private financial support to accelerate their growth and market penetration. Program applicants must meet several criteria, such as having attracted funding from non-government sources and achieved certain milestones required by the federal government. As mentioned above, the Legislature appropriated $3 million for the grant program. Last fall, the institute awarded Phase II grants to 11 Florida companies and Phase I grants to two companies. A second round of grants is not planned for FY 2011-2012.

[28] Section 4, ch. 2007-189, L.O.F.
[29] Section 72, ch. 2009-81, L.O.F.
[30] Section 56, ch. 2010-147, L.O.F.
[31] Section 39(3), ch. 2011-76, L.O.F.
[32] Section 288.9625(8), F.S.
[33] Background on the federal programs – the Small Business Innovation Research Program (SBIR) and the Small Business Technology Transfer (STTR) Program – is on the website of the U.S. Small Business Administration, available at http://www.sba.gov/aboutsba/sbaprograms/sbir/index.html. Site last visited July 27, 2011.

Reporting requirements[34]

The institute's board must submit a report each December 1 to the Governor, the President of the Senate, the Speaker of the House of Representatives, EFI, and the president of the university under whose aegis the institute is placed. The report must include, at a minimum:

- Any assistance and activities provided to assist publicly supported universities, colleges, research institutes, and other publicly supported organizations in the state, by institute;
- A description of the benefits to this state resulting from the institute, including the number of businesses created, associated industries started, the number of jobs created, and the growth of related projects; and
- Independently audited financial statements, including statements that show receipts and expenditures during the preceding fiscal year for personnel, administration, and operational costs of the institute.

The Public Records and Public Meetings Exemptions for the FOF and the Institute

The Legislature created a joint public records and public meetings exemption, in s. 288.9626, F.S., for the FOF and the institute in 2007.[35] Covered under the public records exemption in s. 288.9626(2), F.S., are:

- Materials that relate to methods of manufacture or production; potential trade secrets, patentable material, actual trade secrets as defined in s. 688.002, F.S., or proprietary information received, generated, ascertained, or discovered by or through research projects conducted by universities and other publicly supported organizations in Florida;
- Information that would identify investors or potential investors in projects reviewed by the FOF or the institute;
- Any information received from a person or another state or nation, or from the federal government, which is otherwise confidential or exempt from that governmental entity's laws; and
- Proprietary confidential business information regarding alternative investments for 10 years after the termination of the alternative investments.

The term "proprietary confidential business information" is defined to mean information that has been designated by the proprietor when provided to the FOF or the institute as owned or controlled by a proprietor; that is intended to be and is treated by the proprietor as private and the disclosure of which would harm the business operations of the proprietor and has not been intentionally disclosed by the proprietor unless pursuant to a private agreement that provides that the information will not be released to the public except as required by law or legal process, or pursuant to law or an order of a court or administrative body; and that concerns:

- Trade secrets as defined in s. 688.002, F.S.;
- Information provided to the FOF or institute regarding a prospective investment in a private equity fund, venture capital fund, angel fund, or portfolio company which is proprietary to the provider of the information;
- Financial statements and auditor reports of an alternative investment vehicle or portfolio company, unless such records have been released by the alternative investment vehicle or portfolio company and are publicly available;
- Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle or portfolio company;
- Information regarding the portfolio positions in which an alternative investment vehicle or the FOF invests;
- Capital call and distribution notices to investors of an alternative investment vehicle or the FOF;
- Alternative investment agreements and related records; and
- Information concerning investors, other than the FOF itself, in an alternative investment vehicle or portfolio company.[36]

[34] Section 288.9625(11), F.S.
[35] Chapter 2007-190, L.O.F.
[36] Section 288.9626(1)(g)1., F.S.

The statute also expressly excludes certain items from the definition of proprietary confidential business information:

- The name, address, and vintage year of an alternative investment vehicle or the FOF, and the identity of principals involved in the management of the alternative investment vehicle or the FOF;
- The dollar amount of the commitment made by the FOF to each alternative investment vehicle since inception;
- The dollar amount and date of cash contributions made by the FOF to each alternative investment vehicle since inception;
- The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the FOF from each alternative investment vehicle;
- The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the FOF, plus the remaining value of alternative-vehicle assets that are attributable to the FOF investment in each alternative investment vehicle;
- The net internal rate of return of each alternative investment vehicle since inception;
- The investment multiple of each alternative investment vehicle since inception;
- The dollar amount of the total management fees and costs paid on an annual fiscal year end basis by the FOF to each alternative investment vehicle on a fiscal-year-end basis.[37]

Section 288.9626(3), F.S., creates the public meetings exemption for the FOF and the institute. The boards of directors of those entities may close that portion of their otherwise public meetings when they are discussing information that is confidential and exempt, per subsection (2) of that statute. The closed portions of the meetings still must be recorded and transcribed, but this information also is confidential and exempt from s. 119.07(1), F.S., and Art. I, s. 24(a), of the State Constitution.

Pursuant to s. 288.9626(4), F.S., the FOF and the institute may release the protected records to a governmental entity in the performance of its duties upon written request. The confidentiality must be maintained by those receiving entities. Violating s. 288.9626, F.S., is a first-degree misdemeanor, punishable as provided in ss. 775.082 or 775.083, F.S.[38]

Once a confidential and exempt record becomes legally available or subject to public disclosure for any reason, that record is no longer confidential and exempt, and shall be made available for inspection and copying.

The legislation's "statement of necessity" listed a number of reasons why certain documents and information in the possession of the FOF and the institute should be confidential and exempt:[39]

- Disclosure of proprietary confidential business information to the public would harm the business operations of the proprietor.
- Information received by the FOF or the institute from a person from another state or nation or the Federal Government, which is otherwise exempt or confidential pursuant to the laws of that state or nation or pursuant to federal law, should remain exempt or confidential because the highly confidential nature of research necessitates that it be protected.
- Without these exemptions, the disclosure of confidential and exempt information would jeopardize the effective and efficient administration of the FOF and the institute.
- Disclosure of investor identities may adversely impact the ability of the FOF or the institute to attract investors who desire anonymity.
- Disclosing proprietary confidential business information used in determining how private equity investments are made or managed by private partnerships investing assets on behalf of the FOF would negatively affect the business interests of private partnerships that rely heavily on their information advantage to generate investment returns, and competitor partnerships could gain an unfair competitive advantage if provided access to such information.

[37] Section 299.9626(1)(g)2., F.S.
[38] Section 288.9626(5), F.S.
[39] Section 2, ch. 2007-190, L.O.F.

- The release of proprietary confidential business information revealing how alternative investments are made could result in inadequate returns and ultimately frustrate attainment of the investment objective of the FOF.
- Portions of meetings of the FOF and institute boards of directors at which records made confidential and exempt by this act are discussed be made exempt from public meetings requirements in order to maintain the confidential and exempt status of this information.

Background on Florida's Public Records and Public Meetings Requirements

Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.[40] One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.[41]

Article I, s. 24, of the State Constitution, provides that:

> (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,[42] which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

> Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency[43] records are available for public inspection. The term "public record" is broadly defined to mean:

> ". . .all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."[44]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.[45] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[46]

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[40] Sections 1390 and 1391, F.S. (Rev. 1892)
[41] Article I, s. 24, of the State Constitution.
[42] Chapter 119, F.S.
[43] The word "agency" is defined in s. 119.011(2), F.S., to mean ". . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."
[44] Section 119.011(12), F.S.
[45] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[46] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

Article I, s. 24 of the State Constitution also provides that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the Legislature shall be open and noticed as provided in Art. III, s. 4(e), of the State Constitution, except with respect to meetings exempted pursuant to this section or specifically closed by the Constitution. In addition, the Sunshine Law, s. 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

Only the Legislature is authorized to create exemptions to open government requirements.[47] An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.[48] A bill enacting an exemption[49] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[50]
There is a difference between records that the Legislature has made exempt from public inspection and those that are confidential and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[51] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[52]

The Open Government Sunset Review Act (the act)[53] provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Sunshine Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are that the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.[54]

[47] Article I, s. 24(c), of the State Constitution.
[48] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).
[49] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[50] Article I, s. 24(c) of the State Constitution.
[51] Attorney General Opinion 85-62.
[52] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[53] Section 119.15, F.S.
[54] Section 119.15(6)(b), F.S.

The act also requires the Legislature to consider the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?[55]

While the standards in the Act may appear to limit the Legislature in the exemption review process, those aspects of the Act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.[56] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

> "… notwithstanding s. 778.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment."

Background on Florida's trade secrets law

Over the years, the Legislature has created a number of specific exemptions from public records for trade secrets.[57] Chapter 688, F.S., the Uniform Trade Secrets Act, defines a trade secret to mean:

> . . . information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[58]

Chapter 688, F.S., also provides for injunctive relief, damages, and attorneys' fees for misappropriating a trade secret. It permits the courts to enter an injunction for the actual or threatened misappropriation of a trade secret.[59] Further, the court may, in appropriate circumstances, require affirmative acts to protect trade secrets. A complainant under the act is also entitled to damages, which can include the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In the alternative, royalties can be required.[60]

In an action under the Uniform Trade Secrets Act, the court is required to preserve the secrecy of the alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery

[55] Section 119.15(6)(a), F.S.
[56] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).
[57] See, e.g., s. 1004.78(2), F.S. (trade secrets produced in technology research within community colleges); s. 365.174, F.S. (proprietary confidential business information and trade secrets submitted by wireless 911 provider to specified agencies); s. 570.544(8), F.S. (trade secrets contained in records of the Division of Consumer Services of the Department of Agriculture and Consumer Services); and s. 627.6699(8)(c), F.S. (trade secrets involving small employer health insurance carriers).
[58] Section 688.002(4), F.S.
[59] Section 688.003, F.S.
[60] Section 688.004, F.S.

proceedings, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.[61]

Additionally, s. 812.081(2), F.S., provides that:

> Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his or her own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

Section 812.081(1)(c), F.S., defines "trade secret" to mean ". . . the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it." The term "trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof.

Additionally, irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, when the owner of a trade secret takes measures to prevent it from becoming available to persons other than those selected by the owner to have access to it, the trade secret is considered to be:

- Secret;
- Of value;
- For use or in use by the business; and
- Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.

The Florida Attorney General has concluded that the fact certain information constitutes a trade secret under s. 812.081, F.S., does not, in and of itself, remove it from the requirements of the Public Records Act.[62] When there is no exemption making information confidential or exempt, an agency is therefore under a duty to release public records even though such records may constitute trade secrets.

Findings and/or Conclusions

Committee staff conducted interviews with EFI, FOF, institute, and DEO staffs, and conducted document research to collect information for this report. A discussion of committee staff's findings are summarized as they relate to the questions posed in s. 119.11(6)(a), F.S., for the Open Government Sunset Review Act process.

<u>What specific records or meetings are affected by the exemption?</u>
As explained in the "Background" section above, the exemption in s. 288.9626, F.S., affects:

- Methods of manufacture or production;
- Potential trade secrets;
- Patentable materials or discoveries;
- Actual trade secrets as defined in s. 688.002, F.S.;
- Proprietary confidential business information;
- Information received from a person or another state or nation or the Federal Government that is otherwise confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law;
- Investors other than the FOF; and
- A number of technical investment-related notices, background papers, and related documents.

[61] Section 688.006, F.S.
[62] Attorney General Opinion 92-43.

Some of these types of documentation are applicable to both the FOF and the institute, while others only are applicable to either the FOF or the institute.

Additionally, meetings or portions of meetings by the FOF and institute boards of directors, where the exempt and confidential information is discussed, are closed to the public. Records of these discussions from the closed portions of the meetings also are confidential and exempt.

Whom does the exemption uniquely affect, as opposed to the general public?
This exemption uniquely affects the FOF and the institute. Both entities are requesting that s. 288.9626, F.S., be re-enacted.

What is the identifiable public purpose or goal of the exemption?
Chapter 2007-190, L.O.F., listed several reasons (see "Background" section above) for why the specified information and records should be closed. The key reason was that making the information publicly available could prevent the FOF and the institute from fulfilling their statutory responsibilities, if funds or companies seeking investments were fearful their confidential proprietary business information could be revealed to their competitors, and if potential investors were concerned that their anonymity could not be protected.

Institute staff said they have never received a request for public records, since the institute's creation. FOF staff said they have never received a direct request for public records, although EFI has received one request for FOF documents.

Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
Some of the information made confidential by s. 288.9626, F.S., could be available, if not readily, by researching company filings to the U.S. Securities and Exchange Commission or the U.S. Patent and Trademark Office. Donor identities and contribution amounts, and contested proprietary business information, could be discovered through searches of property records, wills and codicils, lawsuits, federal tax returns, and other public records maintained at county courthouses. In summary, staff research indicates that the information listed in the statute is not readily available.

Is the record or meeting protected by another exemption?
No.

Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?
No.

Options and/or Recommendations

Committee staff recommends reenacting s. 288.9626, F.S., with some technical changes. Primarily, staff recommends giving each of the entities involved – the FOF and the institute – separate statutes granting the public records exemptions and public meetings exemptions more clearly tied to their individual responsibilities and missions. FOF and institute staffs have expressed support for these clarifying changes.

The FOF and the institute were created in an omnibus "Florida Capital Formation Act" and share an overarching mission of providing access to venture capital and other financial assistance to start-up companies and new companies with high-growth potential in specified industry sectors. But the tools at each entity's disposal, as specified in statute, are different. The FOF is focused entirely on using its state appropriations and other capital to make investments, with other partners, in either investment funds or directly in eligible businesses. The institute's primary mission is to showcase eligible companies to prospective investors so as to facilitate investment in those companies, so they become marketable. Other than for the Research Commercialization Grant Program, the institute has received no state funds specifically tied to making investments in eligible businesses.

Because the majority of information specified in s. 288.9626, F.S., is confidential and exempt, and relates only to the FOF's activities, the section can be confusing as to when it applies to the institute.

Maintaining the FOF in s. 288.9626, F.S., and moving those provisions applicable to the institute to a new section of law will add clarity.

Staff's research indicates that none of the provisions applicable to the institute need modifying, and the changes to the provisions applicable to the FOF are technical in nature. For example, the FOF's responsibilities in s. 288.9624(4)(a), F.S., now include making direct investments and loans as part of its portfolio, so the definitions in s. 288.9626, F.S., should reflect that. Also, the existing s. 288.9626, F.S., has references to "investments" and "alternative investments." FOF staff and committee staff agree consistency is needed.

Implementation of these recommendations would not, in staff's professional judgment, constitute an expansion of the current provisions in s. 288.9626, F.S., and thus would not necessitate an Open Government Sunset Review on FOF's and the institute's public records and public meetings exemptions in 2017.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce and Tourism Committee

BILL:	SB 540
INTRODUCER:	Senator Smith
SUBJECT:	Secondary Metals Recyclers
DATE:	January 6, 2012
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Juliachs	Hrdlicka	CM	**Pre-meeting**
2.			CA	
3.			BC	
4.				
5.				
6.				

I. Summary:

SB 540 revises the timeframe that secondary metals recyclers are required to maintain financial transaction records; limits the liability of secondary metals recyclers for the conversion of motor vehicles to scrap metal under specific circumstances; modifies the acceptable forms of payment a secondary metals recycler can receive when purchasing restricted regulated metals and other regulated metals; as well as imposes enhanced ownership verification requirements.

Furthermore, this bill provides that the regulation of regulated metals property is preempted to the state except as otherwise provided. Additionally, this bill states that proof of compliance with the requirements stipulated in part II of ch. 538, F.S., gives rise to an inference that the secondary metals recycler did not know, or have reason to know, that the property was stolen and did not have intent to commit theft or deal in stolen property.

This bill amends ss. 538.18, 538.19, 538.235, 538.26, 812.022, and 319.30, F.S.

This bill creates ss. 538.27 and 538.28, F.S.

II. Present Situation:

Secondary Metals Recycler

Part II of ch. 538, F.S., addresses the regulation of secondary metals recyclers[1] and purchase transactions[2] involving "regulated metals property."[3] With the economic recession, the value of metals has risen significantly, prompting an increase in metal theft crimes statewide. Law enforcement agencies have testified before county commission boards as to the negative consequences that increased criminal activity relating to the theft of secondary metals and secondary metal products has had on their respective jurisdictions.[4]

Additionally, the unlawful removing of metal from private property and government structures has caused economic loss for both the private and public sectors.[5] In an issue paper published by the National Conference of State Legislatures it was noted that "stealing copper and other metals from utilities can cause electric outages and [that] expensive repairs impact ratepayers." "The Department of Energy estimates that a theft of just $100 in copper wire can cost the utility more than $5,000 to repair."[6] In Miami Dade County alone, "since 2009, the County's Public Works Department has spent thousands of dollars to repair or replace vandalized light poles."[7] Furthermore, with the influx of the number of foreclosures, metal theft has become common in unoccupied properties, which has impeded the ability of property owners, banks, and mortgage holders to sell both residential and commercial properties.[8]

In 2008, the Legislature revised part II of ch. 538, F.S., considerably. The new statutory provisions included increasing the record keeping requirements for purchase transactions by requiring additional seller information to be obtained; providing for enhance penalties for third or subsequent violations of the statute and for providing false verification of ownership or false or altered identification to a secondary metals recycler; prohibiting secondary metals recyclers from entering into cash transactions for over the amount of $1,000; as well as requiring that all secondary metals recyclers register with the Department of Revenue prior to engaging in business.[9, 10] In 2009, part II of ch. 538, F.S., was once again amended when s. 538.21, F.S.,

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[1] The definition for "secondary metals recyclers" is defined in s. 538.18(8)(a), F.S.
[2] Section 538.18(6), F.S. (2011)("Any transaction in which a secondary metals recycler gives consideration for regulated metals property.").
[3] Section 538.18(7) F.S. (2011)("Any item composed primarily of any nonferrous metals, but shall not include aluminum beverage containers, used beverage containers, or similar beverage containers . . .").
[4] *See* Orange County, Fla. Ordinance 2010-16, pmbl (Dec. 7, 2010); *See also* Miami-Dade County, Fla. Ordinance 11-17, pmbl (April 4, 2011).
[5] Jacquelyn Pless, *Copper Theft Can Cause Major Outages and Impact Ratepayers: A Hot Issue in 2011* (October 2011), NCSL.org, *available at* http://www.ncsl.org/default.aspx?tabid=23720 (last visited December 16, 2011).
[6] *Id.* (citing U.S. Department of Energy, Office of Electricity Delivery and Energy Reliability, *An Assessment of Copper Wire Thefts from Electric Utilities*, DOE.org, *available at* http://www.oe.netl.doe.gov/docs/copper042707.pdf. (April 2007).
[7] Miami-Dade County, Fla. Ordinance 11-17, pmbl (April 4, 2011).
[8] *Id.*
[9] Chapter 2008-69, L.O.F. (2008).
[10] In 2008, the number of secondary metals recyclers registered with the Florida Department of Revenue was 278. As of August 2011, that number increased to 769. *See*, Fla. Dept. of Revenue, *Secondary Dealers and Secondary Metals Recyclers by County* (August 2011), *available at* http://dor.myflorida.com/dor/taxes/pdf/secondhand_dealers_recyclers.pdf (last visited January 3, 2012).

added a clause whereby all municipal and county ordinances relating to the issuance of hold notices by law enforcement were preempted.[11]

In light of these changes, county boards of commission have elected to enact more stringent ordinances.[12] Common trends among these ordinances include the following: the creation of a new classification of selected items that are more strictly regulated entitled "restricted regulated metals property"; prohibition of cash payment for any purchase transaction involving a "restricted regulated metals property"; imposition of heightened ownership verification requirements from sellers of "restricted regulated metals property"; as well as requirement that records be maintained for a period of not less than 5 years.[13]

III. Effect of Proposed Changes:

Section 1 amends s. 538.18, F.S., by introducing two new terms, "restricted regulated metals property" and "utility," for purposes of the secondary metals recycler's laws. Section 4 of the bill amends s. 538.26(6)(b), F.S., to set forth a list of items that are classified as "restricted regulated metals property."[14]

The term "utility" is defined to mean "a person, firm, corporation, association, or political subdivision, whether private, municipal, county, or cooperative, which is engaged in the sale, generation, provision, or delivery of gas, electricity, heat, water, oil, sewer service, or telephone, telegraph, radio, or telecommunications services."

Section 2 amends s. 538.19, F.S., by reducing the time period that a secondary metals recycler is required to maintain information concerning a transaction from 5 to 2 years from the date of purchase. A provision is also added whereby a secondary metals recycler will not be found liable for a seller's failure to comply with the titling requirements for conversion of a motor vehicle to scrap metal if the secondary metals recycler obtains and maintains a signed statement

[11] Chapter 2009-162, L.O.F. (2009) (creating s. 538.21(4), F.S., effective October 1, 2009).
[12] To the committee's best knowledge, 10 counties have enacted ordinances regulating secondary metals recyclers. They are as follows: Broward, Hillsborough, Lake, Miami-Dade, Orange, Osceola, Sarasota Seminole, Volusia and Washington. On December 13, 2011, Duval County filed Ordinance 2011-766, which would add a new section regulating secondary metals recyclers if approved by the Board of County Commissioners.
[13] Miami-Dade County, Fla. Ordinance 11-17 (April 4, 2011); Orange County, Fla. Ordinance 2010-16 (Dec. 7, 2010).
[14] Restricted regulated metals property includes the following items: manhole cover; electric light pole or other utility structure and its fixtures, wires, and hardware that are readily identifiable as connected to the utility structure; guard rail; street sign, traffic sign, or traffic sign and its fixtures and hardware; communication, transmission, distribution, and service wire from a utility, including copper or aluminum bus bars, connectors, grounding plates, or grounding wire; funeral marker or funeral vase; historical marker, railroad equipment, including, but not limited to, a tie plate, signal house, control box, switch plate, E-clip, or rail tie junction; any metal item that is observably marked upon reasonable inspection with any form of the name, initials, or logo of a governmental entity, utility company, cemetery, or railroad; copper aluminum or aluminum-copper condensing or evaporator coil, including its tubing or rods, from an air conditioning or heating unit, excluding coils from window air conditioning or heating units and motor vehicle air conditioning or heating units; aluminum or stainless steel container or bottle designed to hold propane for fueling forklifts; stainless steel beer keg; catalytic converter or any nonferrous part of a catalytic converter unless purchased as part of a motor vehicle; metallic wire that has been burned in whole or in part to remove insulation; a brass or bronze commercial valve or fitting, referred to as a "fire department connection and control valve" or an "FDC valve," which is commonly used on structures for access to water for the purpose of extinguishing fires; brass or bronze commercial portable water backflow preventer valve that is commonly used to prevent backflow of potable water from commercial structures into municipal domestic water service system; shopping cart.

from the seller stating that the seller has surrendered the vehicle's certificate of title to the Department of Highway or otherwise complied with the titling requirements provided by law.

Section 3 amends s. 538.235, F.S., by prohibiting cash transactions for the purchase of "regulated metals property" in excess of $1,000 and for the purchase of any "restricted regulated metals property." When dealing in these transactions, the acceptable forms of payment are as follows: a check issued and payable to the seller or by electronic payment to the seller's bank account or to the bank account of the seller's employer.

Section 4 amends s. 538.26, F.S., by prohibiting a secondary metals recycler from purchasing any "regulated metals property" from a seller who is required to prove ownership under s. 538.19, F.S. A new subparagraph would also be added to enumerate the items that fall under the classification of "restricted regulated metals property."[15]

As such, a secondary metals recycler may not purchase any restricted regulated metals property unless the secondary metals recycler obtains reasonable proof that the seller owns the property or is authorized to sell the property on the owner's behalf. If the seller is the owner of the property, reasonable proof is satisfied by presenting a secondary metals recycler with a receipt or bill of sale showing that the seller is the owner. When the seller is an employee, agent, or contractor of the property owner who is authorized to sell the property, reasonable proof is satisfied with a signed letter on the owner's letterhead, dated no later than 90 days before the sale, authorizing the seller to sell the property.

Section 5 creates s. 538.27, F.S., and provides that a secondary metals recycler is not liable for any civil claim of replevin[16] or damages resulting from a purchase transaction of regulated metals property where he or she has complied with the provisions embodied in part II of ch. 538, F.S. Additionally, an inference is created that could be used in future criminal prosecutions for theft or dealing in stolen property involving secondary metals recyclers. Specifically, proof that a purchase transaction for "regulated metals property" by a secondary metals recycler complied with part II of ch. 538, F.S., gives rise to an inference that he or she did not know or have reason to believe that the property was stolen and did not have intent to commit theft or deal in stolen property.

Section 7 amends s. 812.022, F.S., by adding a new subparagraph that creates the inference discussed above in section 5.

Section 6 creates s. 548.28, F.S., and provides that the regulation of purchase transactions involving "regulated metals property" is preempted to the state. As such, an ordinance or regulation adopted by a county or municipality relating to the purchase or sale of regulated metals property or the registration or licensure of secondary metals property is void. An exception to preemption is provided to an ordinance or regulation enacted by a county or

[15] *Id.*

[16] *See* s.78.01 (2011) ("Any person whose personal property is wrongfully detained by any other person or officer may have a writ of replevin to recover said personal property and any damages sustained by reason of the wrongful taking or detention as herein provided. Notice of lis pendens to charge third persons with knowledge of plaintiff's claim on the property may be recorded.").

municipality before March 1, 2011, or any subsequent amendment to such ordinance or regulation.

Section 8 amends s. 319.30, F.S., to correct a cross-reference.

Section 9 provides that the act shall take effect July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Inferences

Section 548.27, F.S., creates an inference[17] to be used in future criminal prosecutions. An inference is a procedural device that allows the trier of fact to draw a specific conclusion, which he or she is free to accept or reject, from the existence of another set of facts. Inferences differ from mandatory presumptions, which require that the trier of fact draw a specific conclusion if it finds the existence of another set of underlying facts to be true.

Under the Due Process Clause of the Fourteenth Amendment,[18] the state is required to prove every element of the case beyond a reasonable doubt.[19] Accordingly, in criminal prosecutions, presumptions will be deemed unconstitutional if they are found to shift the burden of proof away from the state. As written, s. 538.27, F.S., specifically refers to the creation of an inference and not a presumption. Because it is understood that an inference does not shift the burden of proof away from the state, s. 548.27, F.S., as written, would likely satisfy constitutional requirements.[20]

Preemption

Section 548.28, F.S., provides that the regulation of purchase transactions involving "regulated metals property" is preempted to the state. With respect to conflict of laws, a

[17] Note that inference may also be referred to as "permissive inference."
[18] U.S. Const. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law…").
[19] In re Winship, 397 U.S. 358, 364 (1970).
[20] *Marcolini v. State*, 673 So. 2d 3, 5 (Fla. 1996).

local government is prohibited from exercising authority in a manner contradictory with the state constitution or state law.[21] Preemption takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the Legislature.[22] As such, express preemption of a field by the Legislature must be accomplished by clear language stating that intent.[23] As created by this bill, s. 548.28, F.S., would likely accomplish that effect.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The term "stainless steel beer kegs" appears in both the definition of "regulated metals property" and "restricted regulated metals property." Seeing that the bill imposes heightened requirements on purchase transactions involving "restricted regulated metals property," the application of the provisions in this bill to "stainless beer kegs," as presently drafted, may be confusing.

VII. Related Issues:

As created by this bill, an exception to preemption is provided for in section 6, subparagraph 2, which states:

> [T]his part does not preempt an ordinance or regulation originally enacted by a county or municipality before March 1, 2011, or any subsequent amendment to such ordinance or regulation.

As currently written, the effect of this language would be to immune pre-March 1, 2011 ordinances and any subsequent amendments to such ordinances from preemption. However, it should be noted that an unintended consequence of this language could lead to the existence of pre-March 1, 2011 ordinances[24] and subsequent amendments to such

[21] FLA. CONST. art. VIII, sec. 1; *See also* ch. 166, F.S. (2011).
[22] *Phantom of Brevard, Inc. v. Brevard*, 3 So. 3d 309, 314 (Fla. 2008).
[23] *Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880 (Fla. 1996).
[24] To the committee's best knowledge, 3 counties have ordinances that would fall below the requirements of part II of ch. 538.F.S., as amended by this bill. They are as follows: Osceola, Washington, and Volusia.

ordinances that fall below the requirements found in part II of ch. 538, F.S., as amended by this bill.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Commerce and Tourism (Montford) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Subsection (1) of section 538.03, Florida Statutes, is reordered and amended, paragraphs (m) through (q) of subsection (2) of that section are redesignated as paragraphs (k) through (o), respectively, and present paragraphs (k), (l), and (n) of that subsection are amended, to read:

538.03 Definitions; applicability.—

(1) As used in this part, the term:

(g) ~~(a)~~ "Secondhand dealer" means any person, corporation,

or other business organization or entity that ~~which~~ is not a secondary metals recycler subject to part II and that ~~which~~ is engaged in the business of purchasing, consigning, or trading secondhand goods. A secondary metals recycler may not act as a secondhand dealer without also conforming to the requirements for a secondhand dealer pursuant to this part.

(f) ~~(b)~~ "Precious metals dealer" means a secondhand dealer who normally or regularly engages in the business of buying used precious metals for resale. The term does not include those persons involved in the bulk sale of precious metals from one secondhand or precious metals dealer to another.

(i) ~~(c)~~ "Secondhand store" means the place or premises at which a secondhand dealer is registered to conduct business as a secondhand dealer or conducts business.

(c) ~~(d)~~ "Consignment shop" means a shop engaging in the business of accepting for sale, on consignment, secondhand goods that ~~which~~, having once been used or transferred from the manufacturer to the dealer, are then received into the possession of a third party.

(a) ~~(e)~~ "Acquire" means to obtain by purchase, consignment, or trade.

(h) ~~(f)~~ "Secondhand goods" means personal property previously owned or used, which is not regulated metals property regulated under part II and which is purchased, consigned, or traded as used property. Such secondhand goods do not include office furniture, pianos, books, clothing, organs, coins, motor vehicles, costume jewelry, cardio and strength training or conditioning equipment designed primarily for indoor use, and secondhand sports equipment that is not permanently labeled with

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a serial number. For purposes of this paragraph, "secondhand sports equipment" does not include golf clubs.

(j) ~~(g)~~ "Transaction" means any purchase, consignment, or trade of secondhand goods by a secondhand dealer.

(e) ~~(h)~~ "Precious metals" means any item containing any gold, silver, or platinum, or any combination thereof, excluding any chemical or any automotive, photographic, electrical, medical, or dental materials or electronic parts.

(d) ~~(i)~~ "Department" means the Department of Revenue.

(b) "Appropriate law enforcement official" means the sheriff of the county in which a secondhand dealer is located or, if the secondhand dealer is located within a municipality, both the police chief of the municipality and the sheriff; however, the sheriff or police chief may designate as the appropriate law enforcement official for that county or municipality, as applicable, any law enforcement officer working within that respective county or municipality. This paragraph does not limit the authority or duties of the sheriff.

(2) This chapter does not apply to:

~~(k) Any person purchasing, consigning, or trading secondhand goods at a flea market regardless of whether at a temporary or permanent business location at the flea market.~~

~~(l) Any auction business as defined in s. 468.382(1).~~

(l) ~~(n)~~ A business that contracts with other persons or entities to offer its secondhand goods for sale, purchase, consignment, or trade via an Internet website, and that maintains a shop, store, or other business premises for this purpose, if all of the following apply:

1. The secondhand goods must be available on the website

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for viewing by the public at no charge;

2. The records of the sale, purchase, consignment, or trade must be maintained for at least 2 years;

3. The records of the sale, purchase, consignment, or trade, and the description of the secondhand goods as listed on the website, must contain the serial number of each item, if any;

4. The secondhand goods listed on the website must be searchable based upon the state or zip code;

5. The business must provide the appropriate law enforcement official ~~agency~~ with the name or names under which it conducts business on the website;

6. The business must allow the appropriate law enforcement official ~~agency~~ to inspect its business premises at any time during normal business hours;

7. Any payment by the business resulting from such a sale, purchase, consignment, or trade must be made to the person or entity with whom the business contracted to offer the goods and must be made by check or via a money services business licensed under part II of chapter 560; and

8.a. At least 48 hours after the estimated time of contracting to offer the secondhand goods, the business must verify that any item having a serial number is not stolen property by entering the serial number of the item into the Department of Law Enforcement's stolen article database located at the Florida Crime Information Center's public access system website. The business shall record the date and time of such verification on the contract covering the goods. If such verification reveals that an item is stolen property, the


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business shall immediately remove the item from any website on which it is being offered and notify the appropriate law enforcement official ~~agency~~; or

b. The business must provide the appropriate law enforcement official ~~agency~~ with an electronic copy of the name, address, phone number, driver ~~driver's~~ license number, and issuing state of the person with whom the business contracted to offer the goods, as well as an accurate description of the goods, including make, model, serial number, and any other unique identifying marks, numbers, names, or letters that may be on an item, in a format agreed upon by the business and the appropriate law enforcement official ~~agency~~. This information must be provided to the appropriate law enforcement official ~~agency~~ within 24 hours after entering into the contract unless other arrangements are made between the business and the law enforcement official ~~agency~~.

Section 2. Subsections (1), (6), and (7) of section 538.04, Florida Statutes, are amended to read:

538.04 Recordkeeping requirements; penalties.—

(1) A secondhand dealer ~~dealers~~ shall complete a secondhand dealers transaction form at the time of the actual transaction. A secondhand dealer shall maintain a copy of a completed transaction form on the registered premises for at least 1 year after the date of the transaction. However, the secondhand dealer shall maintain a copy of the transaction form for not less than 3 years. Unless other arrangements are ~~have been~~ agreed upon by the secondhand dealer and the appropriate law enforcement official ~~agency~~, the secondhand dealer shall, within 24 hours after acquiring ~~the acquisition of~~ any secondhand

goods, deliver to <u>such official</u> ~~the police department of the municipality where the goods were acquired or, if the goods were acquired outside of a municipality, to the sheriff's department of the county where the goods were acquired,~~ a record of the transaction on a form approved by the Department of Law Enforcement. Such record shall contain:

(a) The time, date, and place of the transaction.

(b) A complete and accurate description of the goods acquired, including the following information, if applicable:

1. Brand name.

2. Model number.

3. Manufacturer's serial number.

4. Size.

5. Color, as apparent to the untrained eye.

6. Precious metal type, weight, and content if known.

7. Gemstone description, including the number of stones, if applicable.

8. In the case of firearms, the type of action, caliber or gauge, number of barrels, barrel length, and finish.

9. Any other unique identifying marks, numbers, or letters.

(c) A description of the person from whom the goods were acquired, including:

1. Full name, current residential address, workplace, and home and work phone numbers.

2. Height, weight, date of birth, race, gender, hair color, eye color, and any other identifying marks.

3. The right thumbprint, free of smudges and smears, of the person from whom the goods were acquired.

(d) Any other information required by the form approved by

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the Department of Law Enforcement.

(6) If the appropriate law enforcement official ~~agency~~ supplies a secondhand dealer with appropriate software and the secondhand dealer has computer capability, the secondhand dealer must ~~transactions shall be~~ electronically transmit secondhand dealer transactions required by this section to such official ~~transferred~~. If a secondhand dealer does not have computer capability, the appropriate law enforcement official ~~agency~~ may provide the secondhand dealer with a computer and all equipment necessary to ~~equipment for the purpose of~~ electronically transmit ~~transferring~~ secondhand dealer transactions. The appropriate law enforcement official ~~agency~~ shall retain ownership of the computer, unless otherwise agreed upon, and~~.~~ the secondhand dealer shall maintain the computer in good working order, except for ordinary wear ~~and tear excepted~~. A ~~If the~~ secondhand dealer who transmits ~~transfers~~ secondhand dealer transactions electronically~~, the secondhand dealer~~ is not required to also deliver ~~to the appropriate law enforcement agency~~ the original or paper copies of the secondhand transaction forms to the appropriate law enforcement official. However, such official may, for purposes ~~the purpose~~ of a criminal investigation, ~~the appropriate law enforcement agency may~~ request ~~that~~ the secondhand dealer to deliver the ~~produce an~~ original ~~of a~~ transaction form that was ~~has been~~ electronically transmitted ~~transferred~~. The secondhand dealer shall deliver the ~~this~~ form to the appropriate law enforcement official ~~agency~~ within 24 hours after receipt of the request.

(7) If the original transaction form is lost or destroyed by the appropriate law enforcement official ~~agency~~, a copy may

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be used by the secondhand dealer as evidence in court. When an electronic image of a customer's identification is accepted for a transaction, the secondhand dealer must maintain the electronic image in order to meet the recordkeeping requirements applicable to the original transaction form. If a criminal investigation occurs, the secondhand dealer shall, upon request, provide a clear and legible copy of the image to the appropriate law enforcement official ~~agency~~.

Section 3. Section 538.18, Florida Statutes, is reordered and amended to read:

538.18 Definitions.—As used in this part, the term:

(1) "Appropriate law enforcement official" means the sheriff of the county in which a secondary metals recycler is located or, if the secondary metals recycler is located within a municipality, the police chief of the municipality in which the secondary metals recycler is located; however, the sheriff or police chief may designate as the appropriate law enforcement official for the county or municipality, as applicable, any law enforcement officer working within that respective county or municipality. This subsection does not limit the authority or duties of the sheriff.

(3) ~~(1)~~ "Ferrous metals" means any metals containing significant quantities of iron or steel.

(4) ~~(2)~~ "Fixed location" means any site occupied by a secondary metals recycler as owner of the site or as lessee of the site under a lease or other rental agreement providing for occupation of the site by the secondary metals recycler for a total duration of not less than 364 days.

(5) ~~(3)~~ "Money" means a medium of exchange authorized or

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adopted by a domestic or foreign government as part of its currency.

(6) ~~(4)~~ "Nonferrous metals" means metals not containing significant quantities of iron or steel, including, without limitation, copper, brass, aluminum, bronze, lead, zinc, nickel, and alloys thereof, excluding precious metals subject to regulation under part I.

(7) ~~(5)~~ "Personal identification card" means a valid Florida driver license, a Florida identification card issued by the Department of Highway Safety and Motor Vehicles, an equivalent form of identification issued by another state, a passport, or an employment authorization issued by the United States Bureau of Citizenship and Immigration Services that contains an individual's photograph and current address ~~any government-issued photographic identification card~~.

(8) ~~(6)~~ "Purchase transaction" means a transaction in which a secondary metals recycler gives consideration for regulated metals property.

(9) ~~(7)~~ "Regulated metals property" means any item composed primarily of any nonferrous metals. The term does~~, but shall~~ not include aluminum beverage containers, used beverage containers, or similar beverage containers; however, ~~,~~ the term includes ~~shall include~~ stainless steel beer kegs and items made of ferrous metal obtained from any restricted regulated metals property.

(11) ~~(8)~~ "Secondary metals recycler" means any person who:

(a) Is engaged, from a fixed location or otherwise, in the business of purchase transactions, gathering or obtaining ferrous or nonferrous metals that have served their original

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economic purpose, or ~~is in the business of~~ performing the manufacturing process by which ferrous metals or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value; or

(b) Has facilities for performing the manufacturing process by which ferrous metals or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value, other than by the exclusive use of hand tools, by methods including, without limitation, processing, sorting, cutting, classifying, cleaning, baling, wrapping, shredding, shearing, or changing the physical form or chemical content thereof.

A secondary metals recycler may not act as a secondhand dealer without also conforming to the requirements of a secondhand dealer pursuant to this part.

(2)~~(9)~~ "Department" means the Department of Revenue.

(10) "Restricted regulated metals property" means any regulated metals property listed in s. 538.26(4)(b) the sale of which is restricted as provided in s. 538.26(4)(a).

(12) "Utility" means a public utility or electric utility as defined in s. 366.02 or a person, firm, cooperative, association, or political subdivision, whether private, municipal, county, or cooperative, which is engaged in the sale, generation, provision, or delivery of heat, water, oil, sewer service, or telephone, telegraph, radio, telecommunications, or communications service.

Section 4. Paragraph (u) of subsection (1) of section

319.30, Florida Statutes, is amended to read:

319.30 Definitions; dismantling, destruction, change of identity of motor vehicle or mobile home; salvage.—

(1) As used in this section, the term:

(u) "Secondary metals recycler" means secondary metals recycler as defined in s. 538.18 ~~538.18(8)~~.

Section 5. Section 538.19, Florida Statutes, is amended to read:

538.19 Records required; limitation of liability.—

(1) A secondary metals recycler shall maintain a legible paper record of all purchase transactions to which such secondary metals recycler is a party. A secondary metals recycler shall also maintain a legible electronic record, in the English language, of all such purchase transactions. The appropriate law enforcement official may provide data specifications regarding the electronic record format, but such format must be approved by the Department of Law Enforcement. An electronic record of a purchase transaction shall be electronically transmitted to the appropriate law enforcement official no later than 10 a.m. of the business day following the date of the purchase transaction. A secondary metals recycler who transmits such records electronically is not required to also deliver the original or paper copies of the transaction forms to the appropriate law enforcement official. However, such official may, for purposes of a criminal investigation, request the secondary metals recycler to deliver the original transaction form that was electronically transmitted. The secondary metals recycler shall deliver the form to the appropriate law enforcement official within 24 hours after

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receipt of the request.

(2) The following information must be maintained on the ~~a~~ form approved by the Department of Law Enforcement for each purchase transaction:

(a) The name and address of the secondary metals recycler.

(b) The name, initials, or other identification of the individual entering the information on the ticket.

(c) The date and time of the transaction.

(d) The weight, quantity, or volume, and a description of the type of regulated metals property purchased in a purchase transaction.

(e) The amount of consideration given in a purchase transaction for the regulated metals property.

(f) A signed statement from the person delivering the regulated metals property stating that she or he is the rightful owner of, or is entitled to sell, the regulated metals property being sold. If the purchase involves a stainless steel beer keg, the seller must provide written documentation from the manufacturer that the seller is the owner of the stainless steel beer keg or is an employee or agent of the manufacturer.

(g) The distinctive number from the personal identification card of the person delivering the regulated metals property to the secondary metals recycler.

(h) A description of the person from whom the regulated metals property was ~~goods were~~ acquired, including:

1. Full name, current residential address, workplace, and home and work phone numbers.

2. Height, weight, date of birth, race, gender, hair color, eye color, and any other identifying marks.

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3. The right thumbprint, free of smudges and smears.

4. Vehicle description to include the make, model, and tag number of the vehicle and trailer of the person selling the regulated metals property.

5. Any other information required by the form approved by the Department of Law Enforcement.

(i) A photograph, videotape, or digital image of the regulated metals being sold.

(j) A photograph, videotape, or similar likeness of the person receiving consideration in which such person's facial features are clearly visible.

(3) ~~Any secondary metals recycler that maintains an electronic database containing the information required in paragraph (2)(h), along with an oath of ownership with a signature of the seller of the secondary metals being purchased by the secondary metals recycler and a right thumbprint that has no smudges and smears on the oath of ownership for each purchase transaction, shall be exempt from the records requirement of paragraph (2)(h).~~ A secondary metals recycler complies with the requirements of this section if it maintains an electronic database containing the information required by subsection (2) ~~paragraph (2)(h)~~ as long as the electronic information required by subsection (2) ~~paragraph (2)(h)~~, along with an electronic oath of ownership with an electronic signature of the seller of the secondary metals being purchased by the secondary metals recyclers and an electronic image of the seller's right thumbprint that has no smudges and smears, can be downloaded onto a paper form in the image of the form approved by the Department of Law Enforcement as provided in subsection (2).

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(4) A secondary metals recycler shall maintain or cause to be maintained the information required by this section for not less than 3 ~~5~~ years from the date of the purchase transaction.

(5) ~~If a purchase transaction involves the transfer of regulated metals property from~~ A secondary metals recycler registered with the department who purchases a motor vehicle from a licensed salvage motor vehicle dealer as defined in s. 320.27 or ~~to~~ another secondary metals recycler registered with the department and uses a mechanical crusher to convert the vehicle to scrap metal must obtain a signed statement from the seller stating that the seller has surrendered the vehicle's certificate of title to the Department of Highway Safety and Motor Vehicles as provided in s. 319.30 or has otherwise complied with the titling requirements provided by law for conversion of the vehicle to scrap metal. A~~, the~~ secondary metals recycler is not liable for the seller's failure to comply with the titling requirements provided by law for conversion of a motor vehicle to scrap metal if the secondary metals recycler obtains and maintains the seller's signed statement ~~receiving the regulated metals property shall record the name and address of the secondary metals recycler from which it received the regulated metals property in lieu of the requirements of paragraph (2)(h)~~.

Section 6. Section 538.235, Florida Statutes, is amended to read:

538.235 Method of payment.—

(1) A secondary metals recycler may ~~shall~~ not enter into any cash transaction:

(a) In excess of $1,000 ~~in payment~~ for the purchase of

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regulated metals property; or

(b) In any amount for the purchase of restricted regulated metals property.

(2) Payment in excess of $1,000 for the purchase of regulated metals property shall be made by check issued to the seller of the metal and payable to the seller.

(3) Payment for the purchase of restricted regulated metals property shall be made by check issued to the seller of the metal and payable to the seller or by electronic payment to the seller's bank account or the seller's employer's bank account.

(a) Each check shall be mailed by the secondary metals recycler directly to the street address of the seller which is on file with the secondary metals recycler, unless otherwise provided in this part. A check may not be mailed to a post office box. Electronic payments shall be transmitted to an account for which the seller is listed as an account holder or an employee or agent of the seller.

(b) Each check or electronic payment shall be mailed or transmitted by the secondary metals recycler to the seller within 3 days after the purchase transaction, unless otherwise provided in this section.

(c) The secondary metals recycler may provide a check at the time of the purchase transaction rather than mailing the check as required in paragraph (a), if the seller is:

1. An organization, corporation, or association registered with the state as a charitable, philanthropic, religious, fraternal, civic, patriotic, social, or school-sponsored organization or association, or is a nonprofit corporation or association;

2. A law enforcement officer acting in an official capacity;

3. A trustee in bankruptcy or an executor, administrator, or receiver who has presented proof of such status to the secondary metals recycler;

4. A public official acting under judicial process or authority who has presented proof of such status to the secondary metals recycler;

5. A sheriff acting under the authority of a court's writ of execution, or by virtue of any process issued by a court, if proof thereof has been presented to the secondary metals recycler; or

6. A manufacturing, industrial, or other commercial vendor that generates regulated materials in the ordinary course of business.

Section 7. Section 538.26, Florida Statutes, is amended to read:

538.26 Certain acts and practices prohibited.—It is unlawful for a secondary metals recycler to do or allow any of the following acts:

(1) Purchase regulated metals property, restricted regulated metals property, or ferrous metals on weekdays before 7 a.m. or after 6 p.m., on Saturdays before 7 a.m. or after 1 p.m., or on Sundays. ~~between the hours of 9 p.m. and 6 a.m.~~

~~(2) Fail to pay any sales tax owed to the department or fail to have a sales tax registration number.~~

~~(3) Purchase regulated metals property at a location other than the place of business set forth on the registration.~~

(2)~~(4)~~ Purchase regulated metals property, restricted

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regulated metals property, or ferrous metals from any seller who presents such property for sale at the registered location of the secondary metals recycler when such property was not transported in a motor vehicle.

(3) ~~(5)~~ Purchase regulated metals property, restricted regulated metals property, or ferrous metals ~~in return for money~~ from ~~a trailer, a vehicle, or~~ any location other than a fixed location ~~or from any person who is required to prove ownership pursuant to subsection (4)~~. ~~However, regulated metals may be purchased from a nonfixed location, or from such person, with any negotiable or nonnegotiable instrument, including a check or draft or any other type of instrument purchased with money and sold for the purpose of making payments or transfers to others.~~

(4)(a) Purchase any restricted regulated metals property listed in paragraph (b), unless the secondary metals recycler obtains reasonable proof that the seller:

1. Owns such property. Reasonable proof of ownership may include, but is not limited to, a receipt or bill of sale; or

2. Is an employee, agent, or contractor of the property's owner who is authorized to sell the property on behalf of the owner. Reasonable proof of authorization to sell the property includes, but is not limited to, a signed letter on the owner's letterhead, dated no later than 90 days before the sale, authorizing the seller to sell the property.

(b) The purchase of any of the following regulated metals property is subject to the restrictions provided in paragraph (a):

1. A manhole cover.

2. An electric light pole or other utility structure and

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its fixtures, wires, and hardware that are readily identifiable as connected to the utility structure.

3. A guard rail.

4. A street sign, traffic sign, or traffic signal and its fixtures and hardware.

5. Communication, transmission, distribution, and service wire from a utility, including copper or aluminum bus bars, connectors, grounding plates, or grounding wire.

6. A funeral marker or funeral vase.

7. A historical marker.

8. Railroad equipment, including, but not limited to, a tie plate, signal house, control box, switch plate, E clip, or rail tie junction.

9. Any metal item that is observably marked upon reasonable inspection with any form of the name, initials, or logo of a governmental entity, utility company, cemetery, or railroad.

10. A copper, aluminum, or aluminum-copper condensing or evaporator coil, including its tubing or rods, from an air-conditioning or heating unit, excluding coils from window air-conditioning or heating units and motor vehicle air-conditioning or heating units.

11. An aluminum or stainless steel container or bottle designed to hold propane for fueling forklifts.

12. A stainless steel beer keg.

13. A catalytic converter or any nonferrous part of a catalytic converter unless purchased as part of a motor vehicle.

14. Metallic wire that has been burned in whole or in part to remove insulation.

15. A brass or bronze commercial valve or fitting, referred

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to as a "fire department connection and control valve" or an "FDC valve," that is commonly used on structures for access to water for the purpose of extinguishing fires.

16. A brass or bronze commercial potable water backflow preventer valve that is commonly used to prevent backflow of potable water from commercial structures into municipal domestic water service systems.

17. A shopping cart.

18. A brass water meter.

19. A storm grate.

20. A brass sprinkler head used in commercial agriculture.

Section 8. Section 538.28, Florida Statutes, is created to read:

538.28 Local government regulation; preemption.—

(1) The regulation of purchase transactions involving regulated metals property is preempted to the state. Except as provided in subsection (2), an ordinance or regulation adopted by a county or municipality relating to the purchase or sale of regulated metals property or the registration or licensure of secondary metals recyclers is void.

(2) This part does not preempt an ordinance or regulation originally enacted by a county or municipality before March 1, 2012, and which meets the requirements found in this part.

Section 9. For the purpose of incorporating the amendments made by this act to sections 538.19 and 538.235, Florida Statutes, in references thereto, paragraph (a) of subsection (1) of section 538.23, Florida Statutes, is reenacted and amended to read:

538.23 Violations and penalties.—

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(1)(a) Except as provided in paragraph (b), a secondary metals recycler who knowingly and intentionally:

1. Violates s. 538.20 or s. 538.21;

2. Engages in a pattern of failing to keep records required by s. 538.19;

3. Violates s. 538.26(2) ~~538.26(4)~~; or

4. Violates s. 538.235,

commits a misdemeanor of the first degree, punishable as provided in s. 775.082.

Section 10. Subsection (2) of s. 812.145, Florida Statutes, is amended to read:

812.145 Theft of copper or other nonferrous metals.—

(2) A person who knowingly and intentionally takes or assists with the taking of copper or other nonferrous metals from a utility or communications services provider, thereby causing damage to the facilities of a utility or communications services provider, interrupting or interfering with utility service or communications services, or interfering with the ability of a utility or communications services provider to provide service, commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 11. (1) A public or private owner of metal property is not civilly liable to a person who is injured during the theft or attempted theft of metal property.

(2) A public or private owner of metal property is not civilly liable to a person for injuries caused by a dangerous condition created as a result of the theft or attempted theft of the owner’s metal property when the owner did not know, and

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could not have reasonably known, of the dangerous condition.

(3) This section does not create or impose a duty of care upon an owner of metal property which would not otherwise exist under common law.

Section 12. This act shall take effect July 1, 2012.

========== 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 transactions by secondhand dealers and secondary metals recyclers; amending s. 538.03, F.S.; requiring that a secondary metals recycler conform to the requirements for a secondhand dealer; defining the term "appropriate law enforcement official"; deleting exemptions from regulation as a secondhand dealer which relate to flea market transactions and auction businesses; conforming terminology; amending s. 538.04, F.S., relating to recordkeeping requirements; conforming terminology and clarifying provisions; amending s. 538.18, F.S.; revising and providing definitions; amending s. 319.30, F.S.; conforming a cross-reference; amending s. 538.19, F.S.; revising requirements for the types of information that secondary metals recyclers must obtain and maintain regarding purchase transactions, including requirements for the maintenance and transmission of electronic records of such

transactions; revising the period required for secondary metals recyclers to maintain certain information regarding purchase transactions involving regulated metals property; limiting the liability of secondary metals recyclers for the conversion of motor vehicles to scrap metal under certain circumstances; amending s. 538.235, F.S.; revising requirements for payments made by secondary metals recyclers to sellers of regulated metals property to prohibit certain cash transactions; providing penalties; providing methods of payment for restricted regulated metals property; requiring that purchases of certain property be made by check or by electronic payment; providing procedures; amending s. 538.26, F.S.; prohibiting secondary metals recyclers from purchasing regulated metals property, restricted regulated metals property, or ferrous metals during specified times or from certain locations; prohibiting the purchase of specified restricted regulated metals property without obtaining certain proof of the seller’s ownership and authorization to sell the property; providing penalties; creating s. 538.28, F.S.; preempting to the state the regulation of secondary metals recyclers and purchase transactions involving regulated metals property; exempting county and municipal ordinances and regulations enacted before March 1, 2012, from preemption; reenacting and amending s. 538.23(1)(a), F.S., relating to violations and penalties, to incorporate the amendments made by this act to ss.

538.19 and 538.235, F.S., in references thereto; correcting a cross-reference; amending s. 812.145, F.S.; including persons who assist in the taking of certain metals as a felony of the first degree; limiting the liability of a public or private owner of metal property for injuries occurring during the theft or attempted theft of metal property and for injuries occurring as the result of the theft or attempted theft; providing that no additional duty of care is imposed on the owner of metal property; providing an effective date.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Commerce and Tourism (Detert) recommended the following:

Senate Amendment to Amendment (197568)

Delete line 528

and insert:

2012. Such an ordinance or regulation may subsequently be amended to meet or exceed the requirements of this part.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Commerce and Tourism (Montford) recommended the following:

Senate Amendment to Amendment (197568)

In title, delete line 575
and insert:
An act relating to secondhand dealers

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LEGISLATIVE ACTION

Senate . House

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The Committee on Commerce and Tourism (Detert) recommended the following:

Senate Amendment

Delete lines 292 - 293
and insert:
2012, or any subsequent amendment to such ordinance or regulation so long as the ordinance, regulation or any subsequent amendment to such ordinance or regulation is no less restrictive than the requirements found in this part.

The Florida Senate

Committee Agenda Request

RECEIVED
NOV 04 2011
COMMERCE

To: Senator Nancy C. Detert, Chair
Committee on Commerce and Tourism

Subject: Committee Agenda Request

Date: November 3, 2011

I respectfully request that **Senate Bill # 540**, relating to Secondary Metals Recyclers, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Christopher L. "Chris" Smith
Florida Senate, District 29

posted 11/4/11
psh

File signed original with committee office

S-020 (03/2004)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce and Tourism Committee

BILL:	SB 222
INTRODUCER:	Senator Siplin
SUBJECT:	Domestic Corporations
DATE:	January 3, 2012
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tell	Hrdlicka	CM	**Pre-meeting**
2.			AG	
3.			BC	
4.				
5.				
6.				

I. Summary:

SB 222 provides for conversion of a limited agricultural association into a domestic not-for-profit corporation.

Specifically, the bill establishes requirements for conversion, including certain information that must be filed with the Department of State to convert into a domestic corporation. The conversion does not affect any obligation or liability of the association.

Additionally, the bill creates a fee of $35 for filing a certificate of conversion into a domestic corporation.

This bill amends s. 617.0122, F.S., and creates s. 617.1809, F.S.

II. Present Situation:

According to s. 604.09, F.S., the purpose of limited agricultural associations (LAA), is to promote, foster, and encourage more efficient and progressive agriculture and to enable farmers and growers of Florida to enjoy the manifold benefits of joint and collective effort without personal liability and without expense and technical involvements incident to corporate structure.

Furthermore, under s. 604.10, F.S., LAAs are granted and may use all powers granted by the laws of Florida to persons, partnerships, corporations for profit, and not-for-profit corporations. These powers are applicable to agriculture or livestock in all its phases and to any incidental

operations which may arise. These powers are effective unless they are inconsistent within the provisions of this law.

Under current law, there are no existing provisions providing LAAs the ability to convert to a domestic corporation.[1]

History of Limited Agricultural Associations

LAAs were created by statute in 1941, as a way to promote and encourage more efficient and progressive agriculture. Additionally, the statute was conceived as a way to enable agricultural producers in the state to benefit from a collective effort without the expenses imposed by a corporate structure.[2]

Currently, there are roughly 60 LAAs operating within the State of Florida. The majority of these LAAs are county farm bureaus which provide services to over 140,000 members.[3]

Non-Profit Domestic Corporations

The statutory framework allowing the existence of non-profit domestic corporations (NPDC) was codified by the Florida Legislature in 1990. The purpose of these statutes was to allow organizations whose primary interest was not pecuniary profit to exist under a corporate structure. A large contingency of these NPDCs have benevolent, charitable, educational, or civic purposes.[4] The Florida Statutes provide the NPDCs an opportunity to operate with full corporate powers.[5] Most importantly, the statutes allow NPDC members to avoid personal liability.[6]

III. Effect of Proposed Changes:

SB 222 provides for conversion of a limited agricultural association into a domestic not-for-profit corporation.

Section 1

This bill amends s. 617.0122, F.S., to include a $35 fee for documents delivered to the Department of State for filing a certificate of conversion.

Section 2

This bill creates s. 617.1809, F.S., which sets forth the statutory framework by which a LAA may be converted into a domestic corporation. This bill would not require any existing LAAs to convert to a non-profit domestic corporation. However, if a LAA voluntarily decides to convert to a NPDC, then the association must file with the Department of State the following:

[1] Sections 604.09-604.14, F.S.
[2] Section 604.09, F.S.
[3] The Florida Farm Bureau indicates that most Florida LAAs are the 60 county farm bureaus.
[4] Section 617.0301, F.S.
[5] Section 617.0302, F.S.
[6] Section 617.0604, F.S.

- a certificate of conversion into a domestic corporation which is executed by a person authorized by the rules governing the association; and
- articles of incorporation which comply with s. 617.0202, F.S.,[7] and which have been executed by the person authorized pursuant to s. 617.01201(6), F.S.[8]

The certificate of conversion must state:

- the date on which the association was first organized;
- the name of the association immediately before the filing of the certificate of conversion;
- the name of the domestic corporation as set forth in the articles of incorporation filed with the Department of State; and
- the effective date or delayed effective date of the conversion into a domestic corporation.

The conversion is effective upon the filing of the certificate of conversion and articles of incorporation, or a delayed effective date. Also, the existence of the corporation shall be deemed to have commenced when the association commenced its existence.[9]

This bill does not affect any existing obligations or liabilities of the association which were incurred prior to the conversion into a domestic corporation.

This bill does not require any existing LAAs to conclude its affairs, pay liabilities, or to distribute its existing assets. All, property, assets, and debts due to the association are vested with the NPDC.

This bill does not constitute dissolution of the converting LAA.

Prior to filing a certificate of conversion with the Department of State the conversion must be approved in the manner provided by the document governing the association, or by appropriate law. Additionally, the articles of incorporation must be approved by the same authorization that is required to approve a conversion to a domestic corporation.

Section 3

This bill provides that the act shall take effect upon becoming law.

[7] Section 617.0202, F.S., governs the content of articles of incorporation filed by not-for-profit companies.
[8] Section 617.01201, F.S., states that the articles of incorporation can be submitted by an officer or director of a corporation, by an incorporator, or by a court-appointed fiduciary.
[9] Section 617.0123, F.S., is the existing statutory provision for non-profit domestic corporations regarding a delayed effective date. This provision has a 90-day maximum for a delayed effective date from the time of filing. The new provision would allow converting LAAs to get around the existing statutory bar, by allowing the date of the commencement of the association as the date of commencement for the corporation.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

This bill creates a $35 fee for conversion to a NPDC. Additionally, LAAs who voluntarily decide to convert will also be assessed a $35 fee at the time of application for the required articles of incorporation.[10] If the estimated 60 LAAs were to opt to become a NPDC, the additional revenue from the conversion would be $4,200.

Furthermore, each year NPDCs are required to submit an annual report to the Department of State, along with a fee of $61.25.[11] Thus, if the estimated 60 LAAs were to convert to a NPDC, the Department of State would receive $3,675 in recurring yearly fees from the annual reports.

These fees will result in an increase to general revenue.

B. Private Sector Impact:

LAAs will have the ability to convert to NPDCs. Currently no LAAs are paying fees to the Department of State. However, if they voluntarily decide to convert to a NPDC, the fees stated above will apply.

C. Government Sector Impact:

"See Tax/Fee Issues above."

VI. Technical Deficiencies:

Staff recommends that s. 604.14, F.S., be amended to allow for LAAs to convert to NPDCs. This amendment would provide the "release mechanism," while newly created s. 617.1809, F.S., would provide the "creation mechanism."

[10] Section 617.022 (1)
[11] Section 617.022 (17)

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

704102

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Commerce and Tourism (Ring) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 604.14, Florida Statutes, is amended to read:

604.14 Limited agricultural association; dissolution; conversion to a corporation not for profit.—

(1) A ~~Any~~ limited agricultural association may be dissolved upon the presentation by its members of a petition for dissolution to a ~~the~~ circuit judge of the circuit in which the association's ~~wherein its~~ principal place of business is

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located. The ~~Such~~ judge may issue any ~~make all~~ orders necessary for ~~to the~~ preservation of the rights of the members and creditors and the winding up of the affairs of the association. ~~Such~~ Notice of hearing on the petition for dissolution must ~~shall~~ be given as ~~may by~~ the judge deems ~~be deemed~~ proper.

(2) A limited agricultural association may convert to a corporation not for profit in accordance with s. 617.1809.

Section 2. Present subsection (22) of section 617.0122, Florida Statutes, is renumbered as subsection (23), and a new subsection (22) is added to that section to read:

617.0122 Fees for filing documents and issuing certificates.—The Department of State shall collect the following fees on documents delivered to the department for filing:

(22) Certificate of conversion of a limited agricultural association to a domestic corporation: $35.

Any citizen support organization that is required by rule of the Department of Environmental Protection to be formed as a nonprofit organization and is under contract with the department is exempt from any fees required for incorporation as a nonprofit organization, and the Secretary of State may not assess any such fees if the citizen support organization is certified by the Department of Environmental Protection to the Secretary of State as being under contract with the Department of Environmental Protection.

Section 3. Section 617.1809, Florida Statutes, is created to read:

617.1809 Limited agricultural association; conversion to a

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domestic corporation not for profit.—

(1) As used in this section, the term "limited agricultural association" or "association" means a limited agricultural association formed under ss. 604.09-604.14.

(2) A limited agricultural association may convert to a domestic corporation not for profit by filing the following documents with the department in accordance with s. 617.01201:

(a) A certificate of conversion, which must be executed by a person authorized in s. 617.01201(6) and such other persons that may be required in the association's articles of association or bylaws.

(b) Articles of incorporation, which must comply with s. 617.0202 and be executed by a person authorized in s. 617.01201(6).

(3) The certificate of conversion must include:

(a) The date upon which the association was initially formed under ss. 604.09-604.14.

(b) The name of the association immediately before filing the certificate of conversion.

(c) The name of the domestic corporation as set forth in its articles of incorporation.

(d) The effective date of the conversion. If the conversion does not take effect upon filing the certificate of conversion and articles of incorporation, the delayed effective date for the conversion, subject to the limitation in s. 617.0123(2), must be a date certain and the same as the effective date of the articles of incorporation.

(4) When the certificate of conversion and articles of incorporation are filed with the department, or upon the delayed

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effective date, the association is converted to the domestic corporation, and the corporation becomes subject to this chapter. However, notwithstanding s. 617.0123, the existence of the corporation is deemed to have commenced when the association was initially formed under ss. 604.09-604.14.

(5) Conversion of a limited agricultural association to a domestic corporation does not affect any obligation or liability of the association which was incurred before the conversion.

(6) When a conversion takes effect under this section, all rights, privileges, and powers of the converting association, all property, real, personal, and mixed, and all debts due to the association, as well as all other assets and causes of action belonging to the association, are vested in the domestic corporation to which the association is converted and are the property of the corporation as they were of the association. The title to any real property that is vested by deed or otherwise in the converting association does not revert and is not impaired by the operation of this chapter, but all rights of creditors and all liens upon any property of the association are preserved unimpaired, and all debts, liabilities, and duties of the association attach to the domestic corporation and are enforceable against it to the same extent as if the debts, liabilities, and duties had been incurred or contracted by the corporation.

(7) The limited agricultural association is not required to wind up its affairs or pay its liabilities and distribute its assets. Conversion does not constitute a dissolution of the association but is a continuation of the association’s existence in the form of the domestic corporation.

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(8) Before a limited agricultural association may file a certificate of conversation with the department, unless otherwise specified in the association's articles of association or bylaws, the conversion must be approved by a majority vote of the association's members, and the articles of incorporation must be approved by the same authorization required for approval of the conversion. As part of the approval, the converting association may provide a plan or other record of conversion which describes the manner and basis of converting the membership interests in the association into membership interests in the domestic corporation. The plan or other record may also contain other provisions relating to the conversion, including, but not limited to, the right of the converting association to abandon the proposed conversion or an effective date for the conversion which is consistent with paragraph (3)(d).

Section 4. This act shall take effect upon becoming a law.

========== 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 limited agricultural associations; amending s. 604.14, F.S.; providing for the conversion of limited agricultural associations to corporations not for profit; conforming provisions; amending s. 617.0122, F.S.; specifying a fee for filing a limited agricultural association's certificate of conversion

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to a domestic corporation; creating s. 617.1809, F.S.; defining the term "limited agricultural association" for purposes of the act; providing procedures for conversion of a limited agricultural association to a domestic corporation not for profit; requiring the filing of a certificate of conversion and articles of incorporation with the Department of State; providing for the effective date of the conversion; providing that the conversion does not affect any obligation or liability of the association; providing that all rights, property, and obligations of the association are vested in the corporation; specifying that the association is not required to wind up its affairs or pay its liabilities and distribute its assets; providing for the association's approval before the certificate of conversion is filed; authorizing the association to provide a plan or other record of conversion; providing an effective date.

The Florida Senate

RECEIVED
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COMMERCE

Committee Agenda Request

To: Senator Nancy C. Detert, Chair
Committee on Commerce and Tourism

Subject: Committee Agenda Request

Date: September 21, 2011

I respectfully request that **Senate Bill #222**, relating to Domestic Corporations, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Senator Gary Siplin
Florida Senate, District 19

posted 9/22/11
psb

File signed original with committee office

S-020 (03/2004)

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce and Tourism Committee

BILL:	SB 432
INTRODUCER:	Senator Flores and others
SUBJECT:	Unauthorized Copying of Recordings
DATE:	January 6, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Juliachs	Hrdlicka	CM	**Pre-meeting**
2.			CJ	
3.			BC	
4.				
5.				
6.				

I. Summary:

SB 432 amends Florida statutes relating to the unauthorized copying of sound recordings, s. 540.11, F.S., and restitution, s. 775.089, F.S.

Specifically, the bill amends s. 540.11, F.S., by providing the remedy of restitution to any owner or lawful producer of a master recording or to their respective trade association for the violation of s. 540.11(3)(a)(3), F.S., otherwise known as Florida's "truth in labeling-law."

As such, s. 775.098, F.S., Florida's restitution statute, is amended to include a trade association under the definition of victim.

This bill amends ss. 540.11 and 775.089, F.S.

II. Present Situation:

Unauthorized Copying of Sound Recordings

The Copyright Clause found in Article 1, Section 8, Clause 8 of the United States Constitution authorizes Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] Until 1976, the power to regulate copyright was shared concurrently by both the federal and state government. Congress, however, enacted the Copyright Act of 1976, which expressly preempted the rights and remedies available under state copyright law with respect to sound recordings fixed[2] *after* February 15, 1972.[3]

In an effort to curtail music piracy, states continue to regulate the unauthorized copying of recordings in primarily two ways. First, states control copyright infringement through the use of "unauthorized duplication" statutes. Under the federal copyright law, states can only regulate the unauthorized duplication of any fixed sound recording created prior to February 15, 1972. Accordingly, the application of such state statutes is limited to sound recordings fixed prior to the federally mandated cut-off date.

Second, states have also enacted "truth in labeling" laws or "true name and address" statutes. "In states that have enacted these laws, it is illegal to manufacture, sell, distribute, or possess a variety of items and commodities, with intent to sell, re-sell, distribute, or rent, that do not bear the name and address of the manufacturer."[4] With these statutes, application is much broader, seeing that they regulate *all* sound recordings. Federal preemption is not at issue because the objective of these statutes is to protect the consumer and public at large as opposed to protecting the rights of artists and recording companies, who are protected exclusively under federal copyright law.

Section 540.11, F.S., regulates the unauthorized copying of sound recordings in this state. Specifically, s. 540.11(3)(a)(1), F.S., refers to Florida's "unauthorized duplication" statute regarding the unlawful sale, advertisement, rent, or transportation of a fixed sound recording. Section 540.11(3)(a)(3), F.S., is Florida's "true name and address statute" and provides as follows:

> It is unlawful . . . [k]nowingly, for commercial advantage or private financial gain to sell or resell, offer for sale or resale, advertise, cause the sale or resale of, rent, transport or cause to be rented or transported, or possess for such purposes, any

[1] U.S. CONST. art. I, s. 8, cl.8.
[2] 17 U.S.C. s. 101 (2006) ("A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.").
[3] 17 U.S.C. s. 301 (2006)
[4] David Goldstone, PROSECUTING INTELLECTUAL PROPERTY CRIMES, 123 (2001).

> phonograph record, disk, wire, tape, film, or other article on which sounds are recorded, unless the outside cover, box, or jacket clearly and conspicuously discloses the actual name and address of the manufacturer thereof, and the name of the actual performer or group.[5]

Restitution

Section 775.089, F.S., deals with restitution. Florida courts have repeatedly provided that "the purpose of restitution is twofold: (1) to compensate the victim and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system."[6] The objective is to make the victim whole;[7] thus, restitution must be ordered absent a finding by the court of "clear and compelling reasons not to order restitution."[8] As stipulated by the Florida Supreme Court, "restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused."[9]

Presently, under the restitution statute, a victim is defined as follows:

> [A] person who suffers property damage or loss . . . as a result of the defendant's offense or criminal episode, and also includes the victim's estate if the victim is deceased, and the victim's next of kin if the victim is deceased as a result of the offense. . .[10]

In short, those entitled to restitution are the victim or, if deceased, the victim's estate and next of kin.

III. Effect of Proposed Changes:

Section 1 requires those who violate s. 540.11(3)(a)(3), F.S., to make restitution to any owner or lawful producer of a master recording[11] that has suffered injury resulting from the offense, or to the authorized trade association representing that owner or lawful producer. Restitution will be based on the aggregate wholesale value of lawfully manufactured and authorized recordings corresponding to the number of nonconforming recordings involved in the offense unless a greater value can be proven. The order of restitution must also include investigative costs.

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[5] Section 540.11(3)(a)(3), F.S. (2011)
[6] *Kirby v. State*, 863 So. 2d 238, 243 (Fla. 2003); *State v. Castro*, 965 So. 2d 216, 218 (Fla. 3d DCA 2007); *L.H. v. State*, 803 So. 2d 862, 863-864 (Fla. 4th DCA 2002); *Kolie v. State*, 902 So. 2d 822, 827 (Fla. 5th DCA 2005).
[7] *Santana v. State*, 795 So. 2d 1112, 1113 (Fla. 5th DCA 2001).
[8] Section 775.089(1)(a), F.S. (2011)
[9] *Kirby*, 863 So. 2d at 243.
[10] Section 775.089 (1)(c), F.S. (2011)
[11] Section 540.11(1), F.S., defines the term "master recording" as "the original fixation of sounds upon an article from which copies can be made."

Section 2 amends the definition of the term "victim" in s. 775.089, F.S., to include a victim's trade association if the offense is in violation of s. 540.11(3)(a)(3), F.S., and the victim has granted the trade association written authorization to represent the victim's interests in criminal legal proceedings and to collect restitution on the victim's behalf.

Section 3 provides that this act shall take effect October 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There will be a fiscal impact on any persons or entities that violate s. 540.11(3)(a)(3), F.S., and are ordered to pay restitution.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill uses the terms "lawful producer" and "trade association" without providing definitions. Given that this bill relates to the music industry, "lawful producer" may have a particularly confusing interpretation because "producer" is a music industry-specific term.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Judiciary, *Chair*
Budget
Budget - Subcommittee on Education Pre-K - 12 Appropriations
Commerce and Tourism
Communications, Energy, and Public Utilities
Governmental Oversight and Accountability
Reapportionment
Rules

SENATOR ANITERE FLORES
Majority Whip
38th District

November 3, 2011

The Honorable Nancy C. Detert
Chair of Committee on Commerce and Tourism
318 Senate Office Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Dear Chairwoman Detert:

I respectfully request that you place SB 432, regarding unauthorized copying of recordings, on the next Committee on Commerce and Tourism. This proposed legislation requires restitution by persons who knowingly commit certain violations relating to recordings for commercial advantage or private financial gain.

I look forward to presenting this bill before your committee.

Please do not hesitate to contact me should you have any questions. Thank you for your consideration.

Sincerely,

Anitere Flores

Anitere Flores

CC: Ms. Jennifer Hrdlicka, Committee on Commerce and Tourism, 310 Knott Building

Posted 11/3/11
psh

REPLY TO:
❒ 10691 North Kendall Drive, Suite 309, Miami, Florida 33176 (305) 270-6550
❒ 316 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5130

Senate's Website: *www.flsenate.gov*

MIKE HARIDOPOLOS
President of the Senate

MICHAEL S. "MIKE" BENNETT
President Pro Tempore

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce & Tourism Committee

BILL:	SB 562
INTRODUCER:	Senator Lynn
SUBJECT:	Community Based Development Organizations
DATE:	January 3, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hinton	Yeatman	CA	**Favorable**
2.	Tell	Hrdlicka	CM	**Pre-Meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

In 2000, the Legislature established the Community-Based Development Organization Assistance Act for the purpose of providing community-based development organizations (CBDOs) with administrative and operating funds to retain project staff to plan, implement, and manage job-generating and community revitalization developments in distressed neighborhoods.

SB 562 eliminates the Community-Based Development Organization Assistance Act, which has not been funded or implemented since it was created by the Legislature in 2000.

This bill repeals the following sections of the Florida Statutes: 163.455, 163.456, 163.457, 163.458, 163.459, 163.460, 163.461, and 163.462.

II. Present Situation:

In 2000,[1] the Legislature established the Community-Based Development Organization Assistance Act for the purpose of providing community-based development organizations (CBDOs) with administrative and operating funds to retain project staff to plan, implement, and manage job-generating and community revitalization developments in distressed neighborhoods.[2]

The Community- Based Development Organization Assistance Act authorized the Department of Community Affairs (DCA) to award core administrative and operating grants used for staff

[1] Chapter 2000-351, L.O.F. codified at ss. 163.455-163.462, F.S.
[2] Section 163.456(2), F.S.

salaries and administrative expenses for eligible CBDOs selected using a competitive three-tiered process for housing and economic development projects.[3] DCA is required to adopt by rule[4] a set of criteria for three-tiered funding that ensures equitable statewide geographic distribution of the funding. The plan must include emerging, intermediate, and mature CBDOs recognizing the varying needs of the three tiers. Each eligible CBDO may apply for a grant of up to $50,000 per year for a period of 5 years.[5] When the act was created, the Legislature appropriated $1 million to be distributed as grants to CBDOs. Subsequently, the appropriation[6] was vetoed by the Governor and as a result, no grants were awarded.

Eligible activities include, but are not limited to:[7]

- Preparing grant and loan applications, proposals, fundraising letters, and other documents essential to securing additional administrative or project funds.
- Monitoring and administering grants and loans, providing technical assistance to businesses, and any other administrative tasks essential to maintaining funding eligibility or meeting contractual obligations.
- Developing local programs and home ownership housing projects to encourage the participation of financial institutions, insurance companies, attorneys, architects, planners, developers, and other professional firms and individuals providing services beneficial to redevelopment efforts.
- Providing technical, accounting, and financial assistance and information to businesses and entrepreneurs interested in locating, expanding, or operating in the service area.
- Coordinating with state, federal, and local governments and nonprofit organizations to ensure that activities meet local plans and ordinances to avoid duplication of tasks.
- Assisting service area residents in identifying and determining eligibility for state, federal, and local housing programs including rehabilitation, weatherization, home ownership, rental assistance, or public housing programs.
- Developing, selling, owning, and managing subsidized affordable housing designed for persons with very low incomes or low incomes, or for WAGES recipients, or developing, selling, owning, and managing subsidized affordable industrial parks providing jobs to such persons.
- Obtaining technical assistance to build capacity to support community-based development organization projects.

In order to be eligible for assistance, a CBDO must be a nonprofit corporation under state law and s. 501(c)(3) of the Internal Revenue Code; maintain a service area in which economic and housing development projects are located; and meet other specific criteria as provided by law. In addition, a majority of the CBDO's board members must be elected by those members of the nonprofit corporation who are stakeholders, comprising a mix of service area residents, area business property owners, area employees, and low-income residents.[8]

[3] Section 163.458, F.S.
[4] The Department of Community Affairs was granted rulemaking authority for the purposes of administering the Community-Based Development Organization Assistance Act pursuant to s. 163.462, F.S.
[5] *See supra* note 3.
[6] Section 9, ch. 2000-351, L.O.F.
[7] Section 163.459, F.S.
[8] Section 163.457, F.S.

A CBDO applying for a core administrative and operating grant must also submit a proposal to DCA.[9] Those CBDOs receiving funds must submit an annual report providing information specified by law and other information as may be required by DCA.[10]

DCA was abolished by the Legislature during the 2011 legislative session and several of its programs and functions including the Division of Housing and Community Development, which manages grant programs, were incorporated into the newly created Department of Economic Opportunity.[11]

III. Effect of Proposed Changes:

SB 562 eliminates the Community-Based Development Organization Assistance Act.

Section 1

This bill repeals ss. 163.455, 163.456, 163.457, 163.458, 163.459, 163.460, 163.461, and 163.462, F.S., removing the Community-Based Development Organization Assistance Act, which has not been funded or implemented since it was created by the Legislature in 2000.

Section 2

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[9] Section 163.460, F.S.
[10] Section 163.461, F.S.
[11] See s. 3, ch. 2011-142, L.O.F.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

Committee Agenda Request

To: Senator Nancy C. Detert, Chair
Committee on Commerce and Tourism

Subject: Committee Agenda Request

Date: December 5, 2011

I respectfully request that **Senate Bill #562**, relating to Community-based Development Organizations, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Evelyn Lynn

Senator Evelyn J. Lynn
Florida Senate, District 7

Posted 12/5/11
psh

File signed original with committee office

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce and Tourism Committee

BILL:	SB 170
INTRODUCER:	Senator Altman
SUBJECT:	Transfer of Tax Liability
DATE:	January 6, 2012
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Yeatman	CA	**Favorable**
2.	Hrdlicka	Hrdlicka	CM	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

SB 170 consolidates and revises statutes governing the transfer of tax liabilities when businesses or business assets are transferred to successor owners. In general, a person who buys a business (transferee) assumes the tax liabilities of the seller (transferor), unless an exception applies. Current law provides three different statutes governing tax liability related to the transfer of a business to new ownership. This bill repeals two specific tax statutes (sales and communications)[1] and amends the statute relating to taxes owed.[2]

The bill revises the requirements for a transferee to take possession of a business without assuming any outstanding tax liabilities of a transferor. Under current law, if the transferor provides a certificate from the Department of Revenue showing that no taxes are owed, and the department conducts an audit finding no liability for taxes, the transferee can take possession without assuming any tax liability. This bill allows the transferee to take the business without assuming the transferor's liabilities under either of the following two circumstances:

- The transferee receives a certificate of compliance from the transferor showing that the transferor has not received notice of audit, has filed all required tax returns, has paid the tax due from those returns, and there are no insiders in common between the transferor and the transferee; or
- The Department of Revenue conducts an audit, at the request of the transferee or transferor, and finds that the transferor is not liable for any taxes.

[1] Sections 212.10 and 202.31, F.S., respectively.
[2] Section 213.758, F.S.

The bill amends sections 213.758 and 213.053, Florida Statutes, and repeals sections 212.10 and 202.31, Florida Statutes.

II. Present Situation:

Transfer of Tax Liability

Three sections of the Florida Statutes outline what is required with regard to tax liability when a business is transferred or sold.

- Section 212.10, F.S., governs sales and use tax liability when a business is quit or sold.[3]
- In 2000, the Legislature enacted s. 202.31, F.S., to govern the transfer of communications services tax liability related to communications services businesses.[4]
- In 2010, the Legislature enacted s. 213.758, F.S., as a comprehensive statute to govern the transfer of tax liability for all taxes administered by the Department of Revenue (DOR or department), excluding the corporate income tax.[5]

Section 213.758, F.S.: Tax Liability when Quitting, Selling, or Acquiring a Business

A taxpayer who quits a business without selling, assigning, or transferring the business must make a final return and full payment for any taxes due, excluding corporate income tax, within 15 days of quitting the business.[6] Similarly, a taxpayer who transfers a business must make a final return and full payment for any taxes due, excluding corporate income tax, within 15 days of the date of transfer.[7]

The transferee, or group of transferees, of more than 50 percent of a business is liable for the taxes due by the transferor, *unless*:

- the transferor provides the transferee a receipt or certificate from DOR showing that the transferor is not liable for taxes, *and*
- DOR conducts an audit and finds that the transferor is not liable for taxes.[8]

The maximum liability for a transferee is the greater of the fair market value of the business or the purchase price paid. The transferee may withhold a portion of the consideration to pay the taxes to DOR within 30 days of the date of transfer. A transferee becomes liable for outstanding taxes only for voluntary transfers. [9]

[3] This statute has been in Florida law in some form since 1949. Section 10, ch. 26319, 1949.
[4] Sections 23, 58, ch. 2000-260, L.O.F. See also s. 38, ch. 2001-140, L.O.F.
[5] Chapter 2010-166, L.O.F. For a list of all taxes administered by DOR, see s. 213.05, F.S. Section 220.829, F.S., governs the transfer of tax liability for corporate income taxes.
[6] Section 213.758(2), F.S., refers to taxes, interest, penalties, surcharges, or fees pursuant to ch. 443, F.S., or described in s. 72.011(1), F.S., excluding the corporate income tax.
[7] Section 213.758(3), F.S., refers to taxes, interest, or penalties levied under ch. 443, F.S., or specified in s. 213.05, F.S., excluding the corporate income tax.
[8] Section 213.758(4)(a), F.S. DOR is permitted to charge a fee to perform these audits.
[9] Section 213.758(1)(a), F.S., defines an "involuntary transfer" as a transfer due to the foreclosure by a non-insider, that results from eminent domain or condemnation actions, pursuant to a bankruptcy proceeding, or to satisfy a debt to a financial institution.

Taxpayers who quit a business without paying all taxes due are prohibited from engaging in any business in Florida until the tax liability is paid. Transferees acquiring a business who fail to pay all taxes due face the same ban. In each of the previous cases, DOR may request the Department of Legal Affairs to seek an injunction to prevent further business activity until all taxes due have been paid, and the injunction may be granted without notice.

Sections 202.31 and 212.10, F.S.: Tax Liability for Communications Services and Sales and Use

Sections 202.31 and 212.10, F.S., govern the transfer of tax liability for communications services tax and sales and use tax, respectively. The procedures pursuant to those statutes are substantially similar to those in s. 213.758, F.S. However, ss. 202.31 and 212.10, F.S., do provide for misdemeanor criminal penalties for violations of the tax transfer provisions.[10]

III. Effect of Proposed Changes:

Section 1 amends s. 213.758, F.S., to clarify, consolidate, and revise the statutes that deal with the transfer of tax liabilities.

Definitions
The bill creates definitions for the terms "business," "financial institution," "insider," "stock of goods," and "tax" for the purposes of s. 213.758, F.S., consistent with current administration. Of note, the bill defines "business" to require that a discrete division of a larger business be aggregated with all other divisions. Also, the definition of "insider" includes a manager of, a managing member of, or a person who controls a limited liability company or a relative thereof as defined in s. 726.102(11), F.S.

The bill also clarifies that a "transfer" includes the transfer of the assets of the business and that a transfer of more than 50 percent of a business, the assets of the business, or the stock of goods of the business is a transfer of the business.

Transfer of Tax Liabilities
This bill allows the transferee to take possession of a business without assuming the transferor's outstanding tax liabilities under either of the following two circumstances:

- The transferee receives a certificate of compliance from the transferor showing that the transferor has not received notice of audit, has filed all required tax returns, and has paid the tax due from those returns, and there are no insiders in common between the transferor and the transferee; or
- DOR conducts an audit and finds that the transferor is not liable for any taxes. Either the transferee or transferor may request that the department conduct an audit, and, if requested, the department must complete the audit within 90 days if the audit is not a certified audit done pursuant to s. 213.285, F.S.

[10] Sections 202.31(5) and 212.10(5), F.S.

In addition, the bill provides that s. 213.758, F.S., does *not* impose liability on a transferee of a business, assets of a business, or stock of goods of a business when:

- The transfer is an involuntary transfer; or
- The transferee is not an insider; and
    - The asset transferred is a 1- to 4-family residential real property, real property that has not been improved with any building, or owner-occupied commercial real property; and
    - No other assets of the business are included in the transfer.

The bill amends s. 213.758(6), F.S., to clarify that the maximum tax liability of the transferee is the fair market value or purchase price paid for the business, whichever is greater, net of any unassumed liens or liabilities to non-insiders.

Injunctions

Under the bill, a circuit court shall issue a temporary injunction to enjoin further business activity by the taxpayer on the grounds of failure to pay taxes if DOR has provided the taxpayer with 20 days' written notice. Under current law and the bill, the Department of Legal Affairs is authorized to seek an injunction from a circuit court at the request of DOR. Current law does not require notice before a court issues an injunction.

For transferees, the bill permits the Department of Legal Affairs, at the request of DOR, to seek an injunction from a circuit court to enjoin further business activity by the transferee on the grounds of failure to pay taxes if:

- The assessment against the transferee is final and either the time for contesting the assessment under s. 72.011, F.S., has passed or such a contest was filed and resulted in a final and nonappealable judgment sustaining the assessment; and
- DOR has provided at least 20 days' written notice of intention to seek an injunction.

Current law does not require a 20-day notice before a court issues an injunction against a transferee.

Section 2 amends s. 213.053, F.S., to correct a cross-reference.

Section 3 repeals s. 202.31, F.S., which relates to the transfer of communications services tax liability. With the creation of s. 213.758, F.S., in 2010 and the changes proposed in **Section 1** of the bill, this statute is no longer necessary. The repeal eliminates the misdemeanor penalty provisions for violations of this statute.

Section 4 repeals s. 212.10, F.S., which relates to the transfer of sales and use tax liability. With the creation of s. 213.758, F.S., in 2010 and the changes proposed in **Section 1** of the bill, this statute is no longer necessary. The repeal eliminates the misdemeanor penalty provisions for violations of this statute.

Section 5 provides for an effective date upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18 of the Florida Constitution, excuses counties and municipalities from complying with laws requiring them to spend funds or to take an action unless certain conditions are met.

Subsection (b) of the provision prohibits the Legislature from enacting, amending, or repealing any general law if the anticipated effect is to reduce county or municipal aggregate revenue generating authority as it existed on February 1, 1989. The exception to this prohibition is if the Legislature passes such a law by two-thirds of the membership of each chamber.

Subsection (d) provides an exemption from this prohibition. Laws determined to have an "insignificant fiscal impact," which means an amount not greater than the average statewide population for the applicable fiscal year times $0.10 (which is $1.88 million for FY 2011-12), are exempt.

The Revenue Estimating Conference estimated that the bill would have had an indeterminate negative fiscal impact.[11] It is unknown at this time if the bill would meet the exemption provided in subsection (d); however, the bill may be exempt from the mandates prohibition if the Legislature were to pass the bill by two-thirds of the membership of each chamber.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference met on October 25, 2011, and estimated that the bill would have had an indeterminate negative fiscal impact.[12]

B. Private Sector Impact:

The bill clarifies the conditions under which a transferee may be liable for unpaid tax of a transferor.

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[11] Office of Economic and Demographic Research, The Florida Legislature, *Revenue Estimating Conference for 2012 Regular Session – Transfer of Tax Liability, HB 103/SB 170* (October 25, 2011), available at http://edr.state.fl.us/content/conferences/revenueimpact/archives/2012/pdf/page30-32.pdf (last visited December 14, 2011).
[12] *Id.*

C. Government Sector Impact:

According to DOR, during the last five years, the department has averaged 20 audits regarding the transfer of tax liabilities annually. DOR expects the number of audits that it performs to decrease because the bill limits when an audit is required.[13]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[13] Department of Revenue, *2012 Bill Analysis – SB 170* (September 16, 2011) (on file with the Senate Commerce and Tourism Committee).

The Florida Senate

Committee Agenda Request

To: Senator Nancy C. Detert, Chair
Committee on Commerce and Tourism

Subject: Committee Agenda Request

Date: October 4, 2011

I respectfully request that **Senate Bill #170**, relating to Transfer of Tax Liabilities, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Thad Altman

Senator Thad Altman
Florida Senate, District 24

Posted 10/4/11
psh

File signed original with committee office

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Military Affairs, Space, and Domestic Security, *Chair*
Budget - Subcommittee on Finance and Tax, *Vice Chair*
Budget
Budget - Subcommittee on Higher Education Appropriations
Communications, Energy, and Public Utilities
Education Pre-K - 12
Higher Education
Reapportionment
Regulated Industries

SENATOR THAD ALTMAN
24th District

January 6, 2012

The Honorable Nancy Detert, Chair
Senate Committee on Commerce and Tourism
310 Knott Building
404 South Monroe Street
Tallahassee, FL 32399

Dear Chairman Detert:

SB 170, related to *Transfer of Tax Liability,* is on the Committee on Commerce and Tourism agenda for Monday, January 9th, 2012. Because of a conflict with the Regulated Industries committee, I will be unable to attend. Please recognize my legislative assistant Tres (pronounced Tray) Holton to present SB170 on my behalf. Please feel free to contact me if you have any questions.

Sincerely,

Thad Altman

Thad Altman

Cc: Jennifer Hrdlicka, Staff Director; Patty Blackburn, Committee Administrative Assistant

REPLY TO:
❒ 6767 North Wickham Road, Suite 211, Melbourne, Florida 32940 (321) 752-3138
❒ 314 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5053

Senate's Website: *www.flsenate.gov*

MIKE HARIDOPOLOS
President of the Senate

MICHAEL S. "MIKE" BENNETT
President Pro Tempore

Overview Testimony

FLORIDA SENATE COMMERCE AND TOURISM COMMITTEE

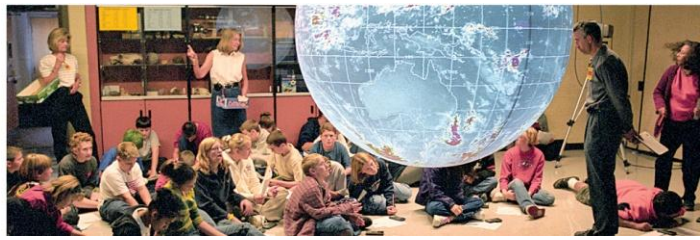
Frank DiBello, President
Space Florida

January 9, 2012

Launch Systems and Support

OVERVIEW TOPICS

- ***Recent Space Industry Developments***
- ***Florida's Recent Achievements***
- ***Future Plans***



2011 Space Industry Developments

- ***Shuttle Retirement***

- ***Commercial Crew & Cargo***
- ***NASA Congressional Appropriations***

Adventure Tourism

RECENT ACHIEVEMENT S – AAR, Others

AAR Airlift Group - Relocation (275 jobs in 2011)

RECENT ACHIEVEMENT - CASIS

CASIS – Award by NASA ($15 million annually 10 yrs)

RECENT ACHIEVEMENT – Boeing CST-100

Commercial Crew Program Headquarters

(550 jobs by 2015)

RECENT ACHIEVEMENT – Lockheed

Autonomous Underwater Vehicle (50 new jobs by 2016)

RECENT ACHIEVEMENT – Cella Energy

Alternative Energy – 10 jobs in 2011; 25 planned

OTHER FUTURE ACTIVITY

Rivian - Energy efficient vehicle (1,200 jobs by 2015)

Space X – Launching to ISS on February 7, 2012

UAS TestBed – FAA designation for the entire state

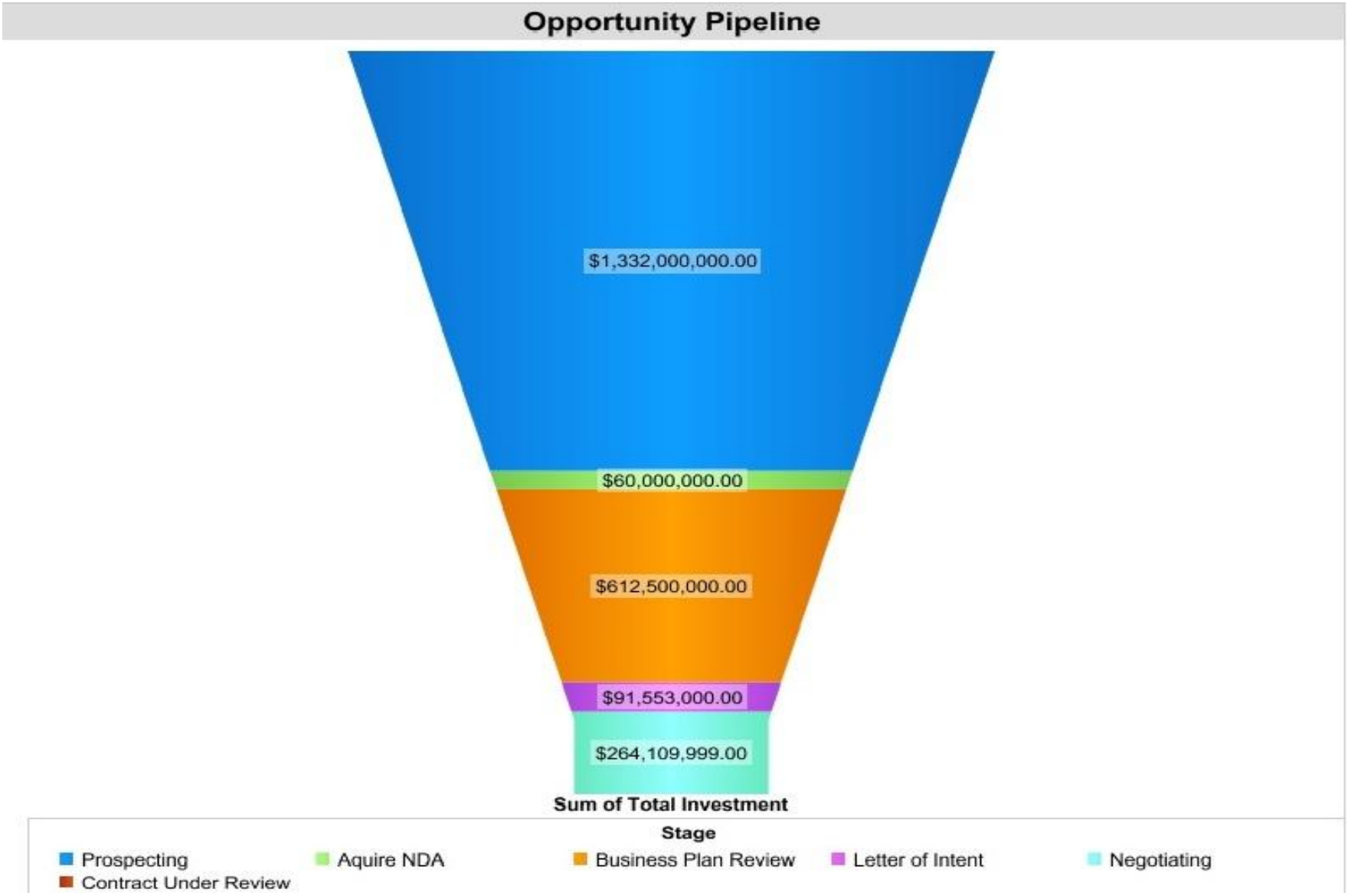
UKTI / ESA – International MOUs (300 jobs by 2014)

Masten Space Systems – LOI, Demo Flight SLC-36

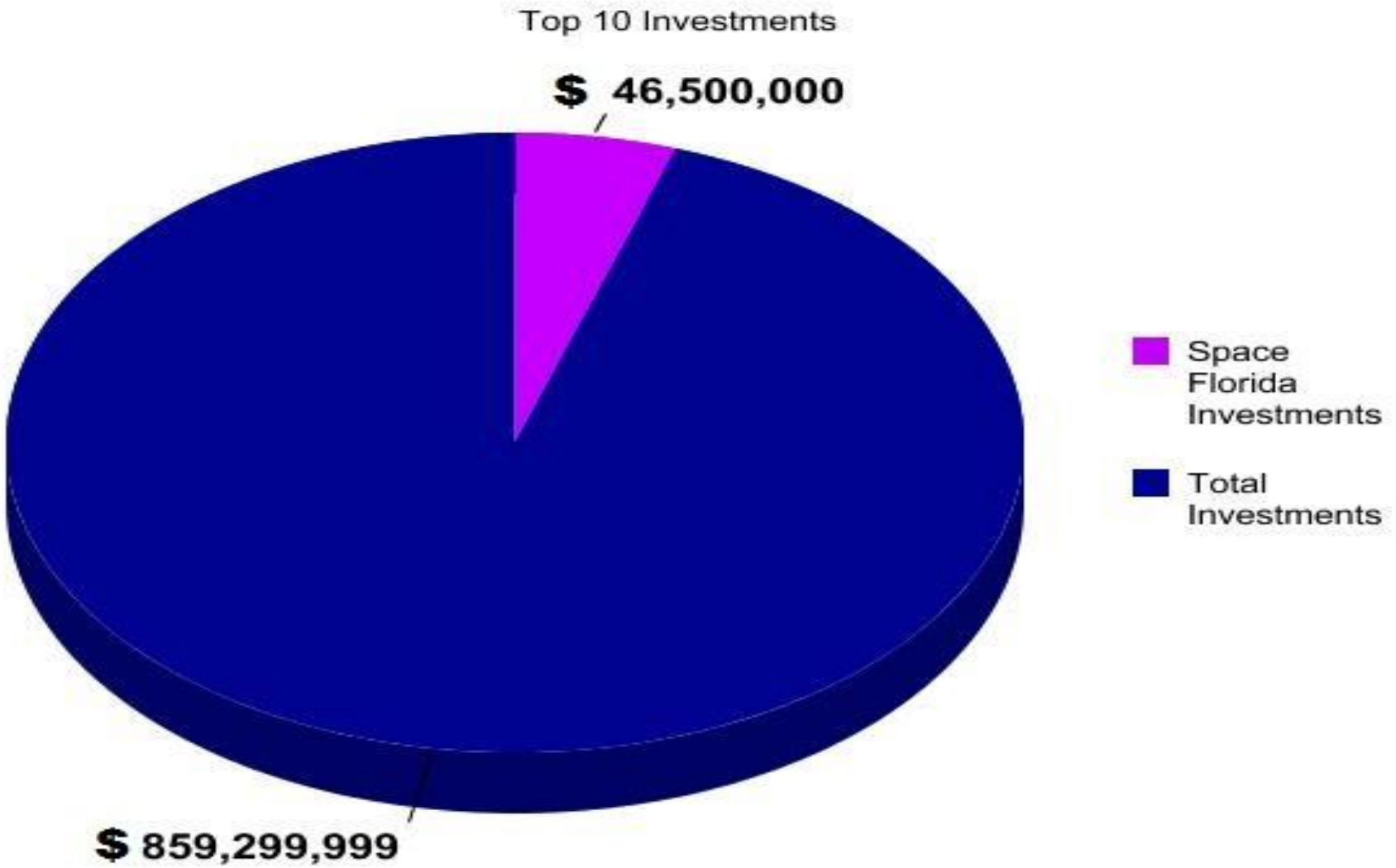
Starfighters – Space Act Agreement (20 jobs)

Others … … Athena, XCOR, Liberty, Strato-launch … …

PIPELINE ACTIVITY



INVESTMENT POTENTIAL



Overview Testimony

FLORIDA SENATE COMMERCE AND TOURISM COMMITTEE

Frank DiBello, President
Space Florida

January 9, 2012

Launch Systems and Support