

**The Florida Senate**  
**PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT**

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

Prepared By: Governmental Operations Committee

BILL: CS/CS/SB 2860

INTRODUCER: Governmental Operations Committee, Commerce Committee, and Senator Joyner

SUBJECT: Black Business Investment

DATE: April 18, 2007                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Earlywine	Cooper	CM	Fav/CS
2.	McKay	Wilson	GO	Fav/CS
3.			TA	
4.				
5.				
6.				

**I. Summary:**

This bill revises ss. 288.707 – 288.714, F.S., and redesignates these provisions as the Florida Black Business Investment Act. Major revisions include:

- Creating the Black Business Loan Program, under the administration of the Office of Tourism, Trade, and Economic Development (OTTED), to provide loans, loan guarantees, and investments through eligible recipients to black business enterprises;
- Requiring OTTED to annually certify program recipients, including regional Black Business Investment Corporations (BBICs);
- Requiring OTTED to contract with the entities certified to receive program funds, and specifies the conditions of such contracts, including provision for the recovery of disbursed funds when performance conditions are not met;
- Requiring the Florida Black Business Investment Board (FBBIB) to promote the expanded black business bonding program, which assists qualified black contractors in obtaining surety bonds and other credit instruments;
- Expanding the representation of the regional Black Business Investment Corporations (BBICs) on the board of the FBBIB;
- Making it unlawful for any person to hold itself out as a black business investment corporation without being certified as eligible to participate in the Florida Black Business Loan Program; and
- Requiring the Office of Program Policy and Government Accountability (OPPAGA) to prepare a status report and perform a program review on the implementation of the bill.

The bill appropriates \$3 million to OTTED from the General Revenue Fund for implementation and administration of the Black Business Loan Program, of which \$25,000 is for startup costs.

The bill substantially amends the following sections of the Florida Statutes: 14.2015; 288.702; 288.703; 288.706; 288.707; 288.708; 288.709; 288.7091; 288.712; 288.714; and 288.9015.

The bill amends the following sections of the Florida Statutes: 17.11; 287.055; 288.90151; 288.90151; 625.3255; 657.042; and 658.67.

The bill creates the following sections of the Florida Statutes: 288.7065; 288.7094; 288.7102; 288.71025; and 288.7103.

The bill repeals the following sections of the Florida Statutes: 288.7092; 288.7095; 288.71; 288.7101; 288.711; and 288.713.

## II. Present Situation:

### Background

In the early 1980s, the Florida Legislature enacted a number of laws to encourage state agencies to contract with minority-owned businesses for goods and services.<sup>1</sup>

In March 1984, Governor Graham created the Governor's Advisory Council on Minority Enterprise Development to advise the Governor on matters affecting minority business enterprises and minority economic development.<sup>2</sup> The council's report identified "several impediments to black business development in Florida: limited access to capital, limited access to technical assistance, and limited access to business opportunities."<sup>3</sup> One recommendation of the council was that the state create a program to develop black-owned enterprises, providing both capital and management support. Specifically, the council recommended that capital be provided to an authority governed by a board with substantial commercial or financial expertise, and that the authority should invest in "financial consortiums of regulated financial institutions designed to aid minority enterprises..."<sup>4</sup> In addition, the council stated that initial non-recurring needs for the authority are estimated at \$15 million.<sup>5</sup>

In response to the council's report, the Legislature enacted the Florida Small and Minority Business Assistance Act.<sup>6</sup> This act found that there were economic disparities between blacks and other minorities and the general population caused primarily by "the vestiges of racial discrimination" and that

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<sup>1</sup> Chapters 82-196, 83-3, and 83-333, L.O.F.

<sup>2</sup> Executive Order 84-58.

<sup>3</sup> June 17, 2005; <http://www.fbbib.com/about/history.htm>

<sup>4</sup> pp. 33-34, *Initial Report of the Governor's Advisory Council on Minority Enterprise Development* (Draft), December, 1984.

<sup>5</sup> pp. 38, *Initial Report of the Governor's Advisory Council on Minority Enterprise Development* (Draft), December, 1984.

<sup>6</sup> Ch. 85-104, L.O.F., which became Part IV, ch. 288, F.S., and reenacted by s. 28, ch. 94-322, L.O.F.

“assisting qualified blacks in obtaining adequate capital and management skills for business ventures, as well as eradicating existing market barriers, are essential elements of a strategy to advance business development among black Floridians.”<sup>7</sup>

This act created various mechanisms to assist small and minority businesses, including creation of the Florida Black Business Investment Board (FBBIB or board).<sup>8</sup> The act found that the public interest was served by:

- Increasing opportunities for employment of blacks, as well as the population in general;
- Providing role models and establishing business networks for the benefit of future generations of aspiring black entrepreneurs; and
- Strengthening the economy of the state by increasing the number of qualified black business enterprises and improving the welfare of economically depressed neighborhoods.<sup>9</sup>

This finding was later expanded to include:

Establishing a partnership between the public and private sector to leverage state fund resources from the private sector;<sup>10</sup> and  
Taking measures to increase access of black businesses to both debt and equity capital.<sup>11</sup>

In addition to establishing the FBBIB, the Legislature appropriated \$4,950,000 through a capitalization program to invest in regional Black Business Investment Corporations (BBICs), which are defined as not-for-profit subsidiaries of financial institutions or a consortium of financial institutions investing in or lending to black business enterprises.<sup>12</sup>

### **The Florida Black Business Investment Board**

Initially created within the Florida Department of Commerce, the FBBIB now contracts with OTTED to promote the creation and growth of black business enterprises.<sup>13</sup> The board consists of twelve members, which includes:<sup>14</sup>

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<sup>7</sup> Preamble, ch. 85-104, L.O.F.

<sup>8</sup> Additional mechanisms created by this act include establishing a Small and Minority Business Advisory Council within the Department of Commerce; requiring state agencies to consider the impact of proposed rules on Florida small and minority businesses; required the Division of Purchasing within the Department of General Services (DGS) to establish a system to record and measure the use of minority business enterprises in state contracting; requiring DGS to certify minority business enterprises; authorizing state agencies to reserve contracts for competitive bidding to minority business enterprises; and establishing the Minority Business Enterprise Assistance Office within DGS.

<sup>9</sup> Section 9, ch. 85-104, L.O.F., which became s. 288.704, F.S.

<sup>10</sup> Section 1 of ch. 2002-180, L.O.F.

<sup>11</sup> Section 47, ch. 99-251, L.O.F.

<sup>12</sup> Section 9 of ch. 85-104, L.O.F., which became s. 288.707(2)(b), F.S.

<sup>13</sup> A “black business enterprise” is defined as a business that is at least 51 percent owned by Black Americans and managed and controlled by such persons. Section 288.707(2)(a), F.S.

<sup>14</sup> Section 288.707(3)(a), F.S.

- Six members appointed by the Governor and subject to confirmation by the Senate, who must be experienced in investment finance and business development;
- One member each from the private sector appointed by the President of the Senate and the Speaker of the House of Representatives, who must be experienced in investment finance and business development;
- Three representatives of the BBICs, who must be selected from among and by the chairs of the BBICs;
- The vice chair of Enterprise Florida, Inc., or his or her designee, as an ex officio, nonvoting member; and
- The chair of the Florida Development Finance Corporation, as an ex officio, nonvoting member of the board.

The board is also authorized to appoint two at-large members to the board from the private sector, each of whom may serve a 1-year term. However, such members may not serve on an executive committee.<sup>15</sup>

One member of the board is appointed by the Governor as the chairperson of the board, and serves at the pleasure of the Governor. The board is required to meet at least four times each year, upon the call of the chair or the vice chair, or at the request of a majority of the membership. Board members serve without compensation, but members, the president of the board, and other board employees may be reimbursed for all reasonable, necessary, and actual expenses as determined by the board.<sup>16</sup>

The FBBIB is authorized to appoint a president to be the chief administrative and operational officer of the board to direct and supervise the administrative affairs and general management of the FBBIB. The board “may delegate to its president those powers and responsibilities it deems appropriate, except for appointment of the president.”<sup>17</sup> The board is authorized to adopt bylaws for the regulation of its affairs and the conduct of its business and adopt policies to implement the provisions of law conferring duties upon it.<sup>18</sup>

Over the past 20 years, the mission of the FBBIB has evolved. Initially, the FBBIB served “as a catalyst for the development of competitive black-owned businesses in Florida.”<sup>19</sup> Today, the FBBIB has expanded its “base of activities and services to include other minorities in order to connect diverse communities and grow the network of business partnerships and alliances.”<sup>20</sup>

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<sup>15</sup> Section 288.707(3)(h), F.S.

<sup>16</sup> Section 288.707(3), F.S.

<sup>17</sup> Section 288.708(1), F.S.

<sup>18</sup> Section 288.709(1), F.S.

<sup>19</sup> Page 1, 2003 Annual Report of the FBBIB.

<sup>20</sup> Page 1, 2003 Annual Report of the FBBIB. In 2002, the Legislature required the FBBIB to study the feasibility of including other minority business enterprises within the programs, services, and activities of the FBBIB and the regional BBICs. Section 11, ch. 2002-180, L.O.F. Over the past 2 years, the FBBIB has expanded services to other minorities through a strategic partnership with the Florida State Hispanic Chamber of Commerce – Access Florida, the Preferred Lender Financing Program (pilot), and its purchase of a controlling interest in Indigo Key, Inc.

The board also retains its historical commitment to serve the needs of the black-business community.<sup>21</sup>

### **FBBIB/BBIC Capitalization Program**

The capitalization program is the legislative mechanism for appropriating funds to be invested in the regional BBICs and the FBBSC, which is the statewide BBIC. Capitalization program funds are appropriated to the FBBIB through OTTED. Unless otherwise specified in the General Appropriations Act proviso, the FBBIB has the discretion to allocate the funds to the regional BBICs, under the conditions specified by contract.

As it relates to the capitalization program, the duties of the FBBIB include:<sup>22</sup>

- Establish certification criteria for BBICs and certify at least once every 5 years, each of the BBICs. Certification criteria must include administrative capacity, fiduciary controls, and, in the case of existing black business investment corporations, solvency and soundness of prior loan decisions;
- Ensure that any appropriations by the Legislature to the FBBIB on behalf of the BBICs are provided in the manner and amount prescribed by the Legislature;
- Include in the criteria for loan decisions, occupational forecasting results which target high growth jobs;<sup>23</sup>
- Facilitate the formation of BBICs in under-served communities and establish in these areas memoranda of understanding with local financial institutions that will provide loan guarantees for loans to black business enterprises;<sup>24</sup>
- Annually, prepare a report detailing the performance of each BBIC, addressing the number of jobs created and/or retained, success and failure rates among loan recipients, and the amount of funds leveraged from other sources;<sup>25</sup> and
- Annually, provide for a financial audit of its accounts and records by an independent certified public accountant.

FBBIB certification criteria, application and allocation process for capitalization program funds and minimum contract specifications with the BBICs are set forth in ch. 8K-2, F.A.C., which, subsequent to the dissolution of the Department of Commerce, has been adopted as policy by the FBBIB.<sup>26</sup>

<sup>21</sup> The 2002 FBBIB resolution to expand services to other minorities reiterated this commitment. October 24, 2002, FBBIB Minutes.

<sup>22</sup> Section 288.7091, F.S.

<sup>23</sup> As established by the Workforce Estimating Conference. See s. 216.136(9), F.S.

<sup>24</sup> FBBIB staff reports that the FBBIB Support Corporation, a subsidiary of FBBIB that operates as a state-wide BBIC, serves rural counties that are not served by regional BBICs and, statewide, provides franchise lending and other financing that the regional BBICs are incapable of providing.

<sup>25</sup> The annual report is compiled from information submitted by the regional BBICs. Section 288.714, F.S., created by the 1985 act, also requires the FBBIB to submit an annual report to the Governor and Legislature on the operation and accomplishments of the FBBIB, "including the specified outcome measures reporting the results of the service efforts of entities involved in accomplishing board goals and objectives." See page 33, Report No. 12393, State of Florida, Office of the Auditor General.

<sup>26</sup> The substance of the ch. 8K-2, F.A.C., was last adopted as recertification criteria on June 29, 2004. FBBIB staff indicate that subsequent to the dissolution of the Department of Commerce in 1996, the FBBIB continued to rely on the provisions of

Since 1985, the Legislature has appropriated \$9.2 million in operating funds to FBBIB.<sup>27</sup> Over this same period, \$18.6 million has been appropriated through the capitalization program, \$10.85 million of which has been distributed to regional BBICs.

The FBBIB has additional obligations through an annual contract with OTTED.<sup>28</sup> The FBBIB must provide an annual report and a Quarterly Performance Measure Report that contains details of the performance of each BBIC and all other performance criteria required by the contract. These measures include:

- Number of jobs created or retained by regional and statewide BBICs;
- Dollar amount and procurement opportunities generated for black businesses;
- Matching dollars leveraged by the FBBIB; and
- Number of businesses provided assistance through the statewide BBIC.

### **Black Business and Investment Corporations**

Since 1985, the eight regional BBICs have worked independently and in concert with the FBBIB to advance business development among black Floridians. The BBICs are not-for-profit subsidiaries of financial institutions or consortia of financial institutions investing in or lending to black business enterprises.<sup>29</sup> BBICs provide loans, loan guarantees, and technical assistance to black business enterprises.<sup>30</sup> They are each governed by a board of directors consisting of representatives of participating financial institutions, local governments, and other members of the community.

Pursuant to contracts, the FBBIB has a non-voting investment interest in all of the regional BBICs.<sup>31</sup> This interest was established, and is periodically expanded, through the purchase of membership certificates, with state appropriated capitalization program funds. This purchase is conditioned upon matching investments made by local financial institutions, and the provision of technical assistance and loans or loan guarantees to local black businesses in the counties served by the BBICs, as provided by contract.

The only duties of the BBICs prescribed in the Florida Statutes is the requirement that they coordinate with Enterprise Florida, Inc., and OTTED to avoid duplication and to develop local business and the necessary infrastructure to support each BBIC.<sup>32</sup>

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the rule to guide FBBIB policy. This rule was also adopted by reference in the 1995 version of the contract between the FBBIB and the regional BBICs. However, it was not referenced in the 2002 version of the contract.

<sup>27</sup> The latest annual appropriation for operations was \$451,210. Specific Appropriation 2496, ch. 2005-70, L.O.F. Section 288.7092(4)(a), F.S., provides that the state's operation investment in the FBBIB is the budget contracted by OTTED, "less funding that is directed by the Legislature to be subcontracted to a specific recipient."

<sup>28</sup> 2005 contract between OTTED and the FBBIB. Also see s. 288.7092(6), F.S., which requires the FBBIB to "comply with the performance measures, standards, and sanctions in its contracts" with OTTED.

<sup>29</sup> Section 288.707(2)(b), F.S. Until 2003, the Metro-Broward BBIC was a for-profit corporation.

<sup>30</sup> Some of the BBICs also provide additional economic development related services to their communities.

<sup>31</sup> These contracts are also referred to as "Membership Agreements."

<sup>32</sup> Section 288.7095, F.S.

BBICs are accountable to their respective boards and to the FBBIB by contract. In addition, four BBICs are certified as Community Development Financial Institutions (CDFIs) by the US Department of the Treasury.<sup>33</sup>

State capitalization funding to the BBICs is provided through contracts with the FBBIB.<sup>34</sup> These contracts require the BBICs to:

- Repay to the FBBIB a pro-rata share of all capital, not to exceed the aggregate contribution, upon dissolution of the corporation;
- Maintain books, records, documents and other evidence according to Generally Accepted Accounting Principles (GAAP), procedures and practices which “sufficiently and properly” reflect all costs of any nature expended in the performance of the contract and all investments, loans, or loan guarantees made with proceeds from the capitalization program funds;
- Make available for inspection by the FBBIB all records and accounts of the BBICs relating in any manner to the FBBIB’s contribution or the contract;
- Establish procedures and maintain records, documents, and other evidence to demonstrate that the businesses assisted meet the requirements of law for financial assistance from the corporation (standards set forth in s. 288.71, F.S.);
- Report to the FBBIB at each quarter and annually its operations and accomplishments which must include the number of black business enterprises which have participated in the BBICs programs, the status of back enterprises, and the total number of jobs; and
- Offer products and services to businesses in surrounding areas.<sup>35</sup>

### **Major Legislative Changes**

In an effort to improve program accountability and address emerging issues, since 1994 the Legislature has made changes to the provisions governing the FBBIB, with implications for the BBICs and the capitalization program.

In 1993, the Legislature created the Florida Commission on Minority Economic and Business Development to affirm the purpose, accomplishments, and benefits of the Florida Small and Minority Business Assistance Act, and to recommend measures to increase the number of minority businesses and to ensure the “integrity, competency, and efficiency in the administration of ...business development services...”<sup>36</sup> In response to commission recommendations, the 1994 Legislature abrogated the scheduled repeal of the program,<sup>37</sup> thereby

<sup>33</sup> The four BBICs are Metro Broward Capital Corporation, BAC Funding Consortium, Inc., BBIF of Central Florida, and Tampa Bay BBIC. (<http://www.cdfifund.gov/docs/certification/cdfi/CDFI-state.pdf>)

CDFI certification is important because it provides access to financial and technical assistance from the program. To date, three BBICs have received funding: Tampa Bay BBIC (\$47,600, 1999); BAC (\$1m, 1999); and Metro-Broward (\$200,000, 2001). CDFI certification is also important because it attracts financial investments from banks, as they can obtain CRA credit that may not be available to them if they invest in non-CDFI certified institutions.

<sup>34</sup> Between 1985 and early 2002, \$9,150,000 in Capitalization Program funds have been distributed to BBICs for investment in local black business enterprises.

<sup>35</sup> These are as specified in the 2002 version of the contract between the FBBIB and the regional BBICs.

<sup>36</sup> Section 1 of ch. 93-290, L.O.F.

<sup>37</sup> Section 32 of ch. 85-104, L.O.F. With the scheduled repeal of the act, there would also be no mechanism to continue monitoring or funding the regional BBICs.

maintaining the provisions in the act.<sup>38</sup> The Legislature also created a new statutory section to set forth specific duties of the FBBIB, including:<sup>39</sup>

- Establishing certification criteria for the BBICs, encompassing such issues as administrative capacity, fiduciary controls, and, in the case of existing BBICs, solvency and soundness of prior loan decisions;<sup>40</sup>
- Establishing, in communities that are not currently served by an existing BBIC, memoranda of understanding with local financial institutions that will provide loan guarantees for loans to black business enterprises;
- Annually, preparing a report detailing the performance of each BBIC, addressing the number of jobs created and/or retained, success and failure rates among loan recipients, and the amount of funds leveraged from other sources;<sup>41</sup> and
- Adopting rules that prescribe criteria used by the board to evaluate applications for financial assistance to black business enterprises.<sup>42</sup>

In 1996, the Legislature abolished the Department of Commerce and created OTTED within the Executive Office of the Governor to assume many of the department responsibilities, including oversight of the FBBIB.<sup>43</sup> The Legislature also changed the composition of the FBBIB to require that at least one member of the FBBIB be a member of a BBIC.<sup>44</sup> In addition, the statute was amended to require that any proposed rules affecting the operation or administration of the financial well being of any of the BBICs must first be approved by a majority of the BBICs.<sup>45</sup>

In 2002, the Legislature substantially amended provisions relating to the FBBIB by establishing the board as a not-for-profit corporation in public/private partnership with the state. The membership appointment process was diversified and expanded to include three board chairs of regional BBICs and the vice chair of Enterprise Florida, Inc. The law provided criteria to measure Florida's return on investment from activities of the board. The law required the board to seek private sector support that will equal the state's support by July 1, 2007, and prescribed items constituting private sector support.<sup>46</sup> Additionally, board responsibilities were expanded to include:

- Facilitating the formation of BBICs in communities not currently served by such corporations;

<sup>38</sup> Section 28 of ch. 94-322, L.O.F. Also see recommendations from the Florida Commission on Minority Economic and Business Development, "Final Report", February 1994, and the House of Representatives Committee on Tourism and Economic Development, as presented in their "Report on Florida's Small and Minority Business Assistance Act," February 1994.

<sup>39</sup> Chapter 94-271, L.O.F.

<sup>40</sup> In 1995, the FBBIB's rule, ch. 8K-2, F.A.C., was amended to include certification criteria.

<sup>41</sup> Some of these performance requirements were also required, indirectly, in s. 288.714, F.S., and pursuant to the contracts between the FBBIB and the regional BBICs. In 1993 and 1994, audits by the Office of the Auditor General criticized the quality of the reporting by the BBICs to the FBBIB. See Reports No. 12066 and 12393, State of Florida, Office of the Auditor General.

<sup>42</sup> See ch. 8K-2, F.A.C.

<sup>43</sup> Chapter 96-320, L.O.F.

<sup>44</sup> Section 64 of ch. 96-320, L.O.F.

<sup>45</sup> Section 65 of ch. 96-320, L.O.F. This provision was repealed by ch. 2003-268, L.O.F.

<sup>46</sup> Chapter 2002-180, L.O.F.



- Ensuring that any appropriations by the Legislature to FBBIB on behalf of the BBICs are provided to FBBIB in the manner and amount prescribed by the Legislature;
- Providing for an annual financial audit report of its accounts and records to be conducted by an independent certified public accountant;
- Complying with the performance measures, standards, and sanctions in its contract with OTTED; and
- Reporting to the Governor, the President of the Senate, and the Speaker of the House of Representatives by February 1, 2003, on the feasibility of including all minority business enterprises within the scope of its duties.<sup>47</sup>

In 2003, the Legislature removed the requirement that bylaws of policies affecting the BBICs be approved by the majority of the BBICs, and required BBICs to be certified by the FBBIB every 5 years.<sup>48</sup>

### **Governor’s Chief Inspector General’s Audit of the FBBIB/BBIC**

In 2002, the FBBIB requested that the Office of Chief Inspector General (IG) conduct an audit of the FBBIB/BBICs to “assess the overall effectiveness and efficiency of the FBBIB and the BBICs operations and to determine whether the organizations were operating in accordance with the purposes for which they were statutorily created.”<sup>49</sup>

In October 2003, the IG issued its audit revealing “a breakdown in accountability” and finding that the BBICs were not meeting program objectives.<sup>50</sup>

Audit findings included, in part, that:

- The organizational structure of the FBBIB and BBICs should be restructured to provide more effective and efficient delivery of services;
- The BBICs performance measurement data was not reliable, properly collected, documented, verified, and reported;
- BBIC loan and loan guarantee portfolios could not be accurately determined and loan files frequently did not contain adequate documentation; and
- The FBBIB and BBICs did not adequately monitor sub-recipient auditing and reporting activities.

### **Recertification of BBICs**

In 1994, the Legislature mandated that the FBBIB establish certification criteria for the BBICs.<sup>51</sup> The criteria must include “administrative capacity, fiduciary controls, and, in the case of existing

<sup>47</sup> In response to this requirement, the FBBIB contracted with KPMG to conduct the feasibility study. In response to the study, the FBBIB expanded services to the minority community through a strategic partnership with the Florida State Hispanic Chamber of Commerce – Access Florida, the Preferred Lender Financing Program (pilot), and its purchase of a controlling interest in Indigo Key, Inc.

<sup>48</sup> Chapter 2003-268, L.O.F.

<sup>49</sup> *Current Issues Related to the Florida Black Business Investment Board*, FBBIB, January, 2005.

<sup>50</sup> Audit Number 2003-1, *Florida Black Business Investment Board/Black Business Investment Corporations Audit*, October 13, 2003. Executive Office of the Governor, Office of the Inspector General.

<sup>51</sup> Section 1, ch. 94-271, L.O.F. In 1995, the FBBIB’s rule, ch. 8K-2, F.A.C., was amended to include certification criteria.

Black Business Investment Corporations, solvency and soundness of prior loan decisions.”<sup>52</sup> In 2003, this section was amended to require the FBBIB to certify each BBIC at least every 5 years.<sup>53</sup>

In 2003, the annual contract between the FBBIB and OTTED contained the following provision:

Pursuant to the terms of the Contract and, in particular, the terms of Article 5, FBBIB agrees to assist in the creation and growth of black business enterprises and in furtherance of such role agrees to ... establishment of the criteria for BBIC certification and recertification and initiation of the process mandated in Section 288.7091(1), Florida Statutes.<sup>54</sup>

In response, the FBBIB formed a special task force to develop recertification criteria<sup>55</sup> and review each of the regional BBICs to determine whether to recommend each BBIC for statutory recertification.<sup>56</sup> Additional documents state that the task force was formed to address “both legislative mandates and problems discovered in the IG audit.”<sup>57</sup>

The task force, which included accountants, bankers, economic developers, consultants, and an FBBIB member, met three times in March and April of 2004. The task force was provided a mission and goals statement to guide them in developing the recertification criteria. The mission of the task force was to evaluate each BBIC and “determine the ability of each of them to receive additional investments” from the FBBIB. In establishing the criteria, the task force was instructed to consider:

- The administrative capacity, fiduciary controls, financial solvency and soundness of prior loan decisions as outlined in ss. 288.7091(1), F.S.;
- Chapter 8K-2, Florida Administrative Code;
- The October 2003 audit findings and recommendations of the Office of the Chief Inspector General;
- The contract terms and conditions between the FBBIB and the BBICs; and
- The expanded mission of the FBBIB to serve other minorities.<sup>58</sup>

On June 29, 2004, the FBBIB adopted the task force recertification criteria and set a timeline for the recertification process with a deadline of July 31, 2004.<sup>59</sup>

<sup>52</sup> Section 288.7091(1), F.S.

<sup>53</sup> Section 3, ch. 2003-268, L.O.F. Arguably, this provision requires recertification of all BBICs under contract with the FBBIB by 2008. Also, Rule 8K-2.009(3), F.A.C., was amended in 1995 to require BBICs to “seek and receive recertification every five years for as long as the Board has an investment in the corporation.”

<sup>54</sup> Exhibit A to the Funding and Program Agreement, STATEMENT OF WORK, 2003/2004 Funding and Program Agreement between the FBBIB and OTTED, July 1, 2003.

<sup>55</sup> *Current Issues Related to the Florida Black Business Investment Board*, FBBIB, January, 2005.

<sup>56</sup> Also see FBBIB minutes for 2/5/04. It should be noted that the FBBIB’s Statewide Investment Corporation was not made subject to recertification.

<sup>57</sup> *Current Issues Related to the Florida Black Business Investment Board*, FBBIB, January, 2005. Additionally, in their response to the IG Report, the FBBIB stated that they would pursue recertification of the BBICs in response to the IG’s finding that the organizational structure of the FBBIB and regional BBICs should be restructured to provide more effective and efficient delivery of services.

<sup>58</sup> *Recertification Task Force Mission and Goals*, FBBIB, March 23, 2004.

The task force met on December 7, 2004, to review the applications and provided the following recommendation to FBBIB:

At the December 2004 Task Force meeting the quality of the applications submitted was discussed. The Task Force resolved that based on the recertification application and supporting documents submitted by the BBICs and reviewed and evaluated by the Task Force against the recertification criteria and other related considerations, it was unanimously recommended that the Board of Directors of FBBIB not to recertify any of the eight BBICs. FBBIB subsequently informed each of the BBIC presidents and the FBBIB Board of the Task Force's action.<sup>60</sup>

### **Persistence of Disparity**

Although the number of black-owned firms continues to increase, and in fact grow at a faster rate than all other businesses in Florida, the disparity between the proportion of black-owned and non-black-owned businesses persists. Recent U.S. Census figures indicate that while blacks historically make up around 14-15 percent of Florida's population, they own only between 3.5 percent and 4.5 percent of the businesses in Florida. The magnitude of the disparity gap has remained approximately the same since 1987.

### **Interim Project 2006-105**

In September 2005, the Senate Commerce and Consumer Services staff issued an interim project report which reviewed the Florida Black Business Investment Board and the eight regional Black Business Investment Corporations. The objective of this report was to review the responsibilities of the FBBIB, the BBICs, and OTTED in implementing the FBBIB/BBIC capitalization program; to summarize legislative changes to the program; to identify relevant findings from the 2003 audit of the FBBIC/BBIC by the Chief Inspector General in the Executive Office of the Governor; to review the recent BBIC recertification efforts; and to offer recommendations to resolve the recertification impasse and restructure the program.

### **OPPAGA Report 07-05**

In January 2007, OPPAGA issued a report that found:

- The black business investment corporations have implemented reasonable controls for providing loans and loan guarantees. However, there has been considerable ongoing controversy regarding the relationship between the board and the investment corporations.
- To address this controversy, the Legislature should consider several options including maintaining the board's current role; refocusing its role to serving as a statewide advocacy and networking entity; or eliminating the board.

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<sup>59</sup> FBBIB Minutes, June 29, 2004, and e-mail from Hilmon Sorey to BBICs Presidents, July 1, 2004.

<sup>60</sup> Memo from James Carras, Consultant to FBBIB Recertification Task Force, to Hilmon Sorey, dated July 15, 2005, regarding FBBIB Recertification Process. A recording from the task force meeting indicates that the "other considerations" were the BBICs efforts to terminate or amend their contractual relationship with the FBBIB.

- If the Legislature continues to provide financial assistance for black businesses, it could earmark funds for the investment corporations or provide grants to minority business development organizations.

The OPPAGA report concluded that the best combination of options would be to:

- Change the board's role to serving as a statewide advocacy and networking entity for the various entities that assist qualified black-owned businesses.
- Make the Department of Community Affairs or OTTED responsible for awarding grants to minority business development organizations, distributing funds, and monitoring grant recipient performance.

### **Prohibited Names**

Statutes have been enacted limiting the use of certain terms in the name of a business entity such as, for example, ss. 636.033 and 641.33, F.S., which limit the use of the following words in the name of a business: "insurance," "casualty," "surety," and "mutual." Statutes limiting the use of certain terms in the name of a business have been upheld against attack under the First Amendment of the U.S. Constitution and under the Equal Protection Clause of the U.S. Constitution when the purpose of the statute is to prevent consumers from being misled. *See, Baker v. Registered Dentists of Oklahoma*, 543 F. Supp 1177 (W.D. Oklahoma 1982)(holding dentist's use of a trade name impermissible and not protected by the First Amendment right to free speech where consumers would likely be misled by the name); *Greater Miami Fin. Corp. v. Dickinson*, 214 So. 2d 874 (Fla. 1968)(holding that a corporation's use of the term "savings" in its fictitious name could not be protected under the First Amendment given its potential to mislead the public; and finding that prohibitions of the challenged name statute which restricted name usage by corporations, but not individuals, did not offend Equal Protection law since its association of the term "savings" with corporations was a reasonable classification).

### **III. Effect of Proposed Changes:**

**Section 1** amends s. 14.2015, F.S., to provide that OTTED is to administer the Black Business Loan Program for the purpose of leveraging state, local and private funds to provide loans and loan guarantees to black business enterprises that are unable to obtain capital through conventional lending sources.

**Section 2** amends s. 288.702, F.S., to change a statutory reference.

**Section 3** amends s. 288.703, F.S., to change the definition of a "minority person" to state that an "African American" is a person of any "black" racial group of African decent "regardless of cultural origin."

**Section 4** amends s. 288.706, F.S., to delete an unnecessary reference to the FBBIB and the regional corporations and requires the Department of Management Services (DMS) to collaborate with the FBBIB and OTTED to assist in the development and enhancement of black business enterprises.

**Section 5** amends s. 288.7065, F.S., to provide that this section and ss. 288.707 through 288.714, F.S., may be cited as the "Florida Black Business Investment Act."

**Section 6** amends s. 288.707, F.S., to revise the mission of the FBBIB to assist in the development and expansion of black business enterprises by:

- Advising OTTED in its oversight of the Black Business Loan Program;
- Evaluating the amount of unmet need for capital by black business enterprises in Florida;
- Creating partnerships with state and local governments and private enterprise; and
- Providing a network of information resources and technical assistance for black business enterprises.

The board is required to contract with OTTED to implement the Florida Black Business Investment Act, as designated by this bill.

This section also revises the membership requirements for the FBBIB by:

- Specifying that the Governor appoint five members, rather than six as in current law (these appointments are not subject to confirmation by the Senate, as is required in current law); and
- Deleting the requirements that the appointments by the Senate and the House of Representatives be “from the private sector.”

In addition, this provision expands the participation of the BBICs by specifying that four presidents of participating BBICs be included on the board. These presidents must be appointed by the Executive Director of OTTED upon the recommendation of the Florida Consortium of Black Business Investment Corporations, Inc. Current law requires that the BBICs be represented by three appointments from among and by the chairs of the BBICs. These appointees are to serve for terms of 3 years each, rather than 2 years each under current law. Each is eligible for reappointment to one additional term of 3 years, rather than reappointment on a rotating basis with other representatives of the BBICs.

This section of the bill provides that the members of the board must have experience in business, including financial services, banking, or economic development, and at least one of the Governor’s appointees must have experience in venture capitalism.

This section also deletes the authority of the board to appoint two at-large members to the board from the private sector, each of whom may serve a 1-year term.

Board members will serve without compensation, and are entitled to reimbursement of expenses pursuant to s. 112.061, F.S.

**Section 7** amends s. 288.708, F.S., to remove redundant language and to provide that the Department of Management Services must establish a lease-agreement program to provide state employee status to an employee of the board. This provision is the substance of s. 288.7101, F.S., which is repealed in Section 24 of this bill.

In addition, it deletes a provision requiring the board to be “responsible for the prudent use of all public and private funds and shall ensure that the use of such funds is in accordance with all applicable laws, bylaws, or contractual requirements.”

**Section 8** amends s. 288.709, F.S., to revise the powers of the FBBIB to be consistent with its advisory mission. The revised powers of the FBBIB include the authority to:

- Adopt bylaws;
- Enter into agreements or other transactions with any federal, state, local agency, or private entity;
- Invest any funds held in reserves not required for immediate disbursement as authorized by law;
- Appear on its own behalf before other local, state, or federal government agencies;
- Apply for, accept, and disburse from any state or nonstate source grants, loans, or advances for, or in aid of, the purposes of the Florida Black Business Investment Act, and to receive and accept contributions from any source of either money, property, labor, or other things of value, to be held, used, and applied for said purposes;
- Provide and pay for advisory services and technical assistance as may be necessary or desirable to carry out the purposes of the Florida Black Business Investment Act;
- Engage in special programs to enhance the development of black business enterprises as authorized by the act;
- Indemnify, purchase and maintain insurance on behalf of, directors, officers, and employees of the board and its boards against any personal liability or accountability by reason of actions taken while acting within the scope of their authority; and
- Provide in its bylaws that, upon the dissolution of the board, all of its assets acquired through the use of state funds, after payment of all legal debts and liabilities, revert to the state. (Current law does not qualify that reversion only applies to assets “acquired through the use of state funds.”)

**Section 9** amends s. 288.7091, F.S., to revise the duties of the board to require it to serve as an advisory board to OTTED to “assist in the implementation” of the requirements of this bill.

Specific duties *deleted* include:

- The responsibility to recertify of the regional BBICs every 5 years and to ensure funds appropriated to the BBICs are provided as prescribed by the Legislature;
- The requirement to include occupational forecasting results in the criteria for loan decisions;
- The specific responsibility to “intensify efforts” to increase the number of franchises owned by black businesses; and
- The responsibility to annually prepare a report detailing the performance of each BBIC.

*New duties include to:*

- Serve as the clearinghouse for information and technical assistance;
- Market the Black Business Loan Program;
- Collaborate, rather than develop memoranda of understanding, with key state, local and education entities;
- Develop strategies to increase financial institution investment in black business enterprises; and
- Provide a 5-year projection of the need for capital once every 5 years.

**Section 10** creates s. 288.7094, F.S., to define a “black business investment corporation” as a corporation that provides loans, loan guarantees, or investments to black business enterprises pursuant to the provisions of this bill. This section provides black business investment corporations meeting the criteria in the Black Business Loan Program (as created in section 11 of this bill) will receive priority consideration by OTTED for participation in the Black Business Loan Program.

**Section 11** creates s. 288.7102, F.S., to create the Black Business Loan Program within OTTED. OTTED is required to disburse funds to eligible recipients, who in turn provide loans and loan guarantees to, or investments in, black business enterprises that cannot otherwise obtain capital through conventional lending institutions but who could otherwise compete successfully in the private sector. OTTED is required to establish an open, competitive, and uniform application and annual certification process; and to develop an equitable allocation policy. The FBBIB is required to receive applications and make recommendations for certification to OTTED.

This section provides eligibility requirements for potential program funding recipients that seek to provide loans or loan guarantees to, or investments in black business enterprises under the Black Business Loan Program. A recipient must be a Florida corporation and have the experience, a business plan, the technical skills, and “established viable partnerships” to provide services under the program. A recipient must agree to meet all statutory requirements and demonstrate that it can provide a private match of 20 percent of state funds it receives.

Each recipient must be certified by OTTED each year as meeting the requirements of law and applicable contracts. No recipient may receive funds absent such annual certification.

OTTED, in consultation with the board, is required to adopt rules to implement the requirements of this section. The board is required to adopt policies and procedures to implement the requirements of this section.

The duties also include a modified version of those currently contained in ss. 288.711(2)-(4), F.S. Sections 288.7102(7)-(9), F.S., authorize a BBIC to use funds received from the loan program to:

- Purchase stock in a black business enterprise, provided no more than 40 percent of the funds may be used for direct investments in black business enterprises;
- Provide loans or loan guarantees; and

- Provide technical support to black business enterprises, not to exceed 7 percent of the funds received, and direct administrative costs, not to exceed 10 percent of the funds received.

Current law does not allow capitalization funds be used for administrative costs or to finance technical assistance programs offered by or through BBICs.

**Section 12** creates s. 288.71025, F.S., to provide that it is unlawful for any person to claim to be a BBIC without being certified by the FBBIB as eligible to participate in the Florida Black Business Loan Program. The FBBIB is authorized by this section to file a civil complaint in a court of competent jurisdiction. The court is authorized to impose a \$500 fine for each violation. The fines collected will go to the FBBIB.

**Section 13** creates s. 288.7103, F.S., to require that to be eligible for a loan from funds disbursed through the Black Business Loan Program, a black business enterprise must demonstrate that the proposed loan or loan guarantee is economically sound and will assist the enterprise in entering the conventional lending market, increasing opportunities for employment in Florida and strengthening the state's economy. In addition, the black business enterprise must demonstrate that it will be able to compete successfully in the private sector if it receives the requested financial assistance and has or will obtain technical or managerial support through an organization approved by the respective BBIC.

**Section 14** amends s. 288.712, F.S., which relates to the Black Contractors Bond Trust Fund, to

- Delete the authority of the FBBIB to pledge the assets of the Black Contractors Bond Trust Fund;
- Delete the Black Business Loan Guaranty Program Administrative and Loss Reserve Fund;
- Delete the authority of the board to pledge the assets of the Black Contractors Bond Trust Fund as collateral for bonds;
- Delete the authority of the board to establish a loan guaranty program; and
- Delete the authority of the board to establish a program to develop a secondary market for loans to black business enterprises.

This section also imposes new requirements on the board related to the Black Contractors Bonding program.

- The FBBIB is required to conduct outreach, marketing, and recruitment of black contractors;
- Provide assistance to the Office of Supplier Diversity to certify new black business enterprises and train staff;
- Develop a mentor program;
- Prepare and submit no later than December 31, 2007, to the Governor, a report outlining and evaluating the implementation of the black contractors bonding program; and



- Establish a process by which black contractors may apply for contract, financial, and technical assistance along with mentoring opportunities.

**Section 15** amends s. 288.714, F.S., to revise reporting requirements related to the Florida Black Business Investment Act.

Current law requires the FBBIB to submit an annual report setting forth the activities of the board and activities relating to funds disbursed by the board. Annual contracts between the board and the corporations require the corporations to submit the related information to the board, which the board then compiles and submits to OTTED, pursuant to the contract between the board and OTTED.

This section is amended to require recipients of Black Business Loan Program funds to provide quarterly reports that include “a detailed summary of the recipient’s performance of the duties imposed” by the Florida Black Business Investment Act, including but not limited to:

- The dollar amount of all loans or loan guarantees made to black business enterprises, the percentages of the loans guaranteed, and the names and identification of the types of businesses served;
- Loan performance information;
- The amount and nature of all other financial assistance provided to black business enterprises;
- The amount and nature of technical assistance provided to black business enterprises, including technical assistance services provided in areas in which such services are otherwise unavailable;
- A balance sheet for the recipient, including an explanation of all investments and administrative and operational expenses;
- A summary of all services provided to non-black business enterprises, including the dollar value and nature of such services and the names and identification of the types of businesses served; and
- Any other information as required by the board by rule.

Quarterly, the FBBIB is required to submit to OTTED compilations of the quarterly reports submitted by certified entities that have received funds from the Black Business Loan Program.

Annually, the board is required to provide to the Governor, the President of the Senate, and the Speaker of the House of Representatives a detailed report of the performance of the Black Business Loan Program, including:

- A cumulative summary of quarterly report data submitted by program recipients;
- A description of the strategies implemented by the board to increase private investment in black business enterprises;
- A summary of the board’s performance of its duties under Florida Black Business Investment Act;
- The most recent 5-year projection of the need for capital by black business enterprises;

- Recommendations for legislative or other changes to enhance the development and expansion of black business enterprises in the state; and
- A projection of the program's activities during the next 12 months.

**Section 16** amends s. 288.9015, F.S., to amend the responsibilities of Enterprise Florida, Inc. (EFI), with regard to the FBBIB to require that EFI collaborate with the FBBIB and OTTED to create and expand black businesses.

**Section 17** provides that OPPAGA must prepare a status report on the initial implementation of the Florida Black Business Investment Act by OTTED, the FBBIB and certified entities that have received funds from the Black Business Loan Program. The report must be provided to the Governor, the Senate President, and the Speaker of the House of Representatives by December 1, 2008. Also, OPPAGA must conduct a program review of the performance of OTTED, the FBBIB and certified entities that have received funds from the Black Business Loan Program, in meeting the goals of the Florida Black Business Investment Act and provide a report to the Governor, the Senate President, and Speaker of the House of Representatives by December 1, 2009.

**Sections 18 through 23** amend ss. 17.11, 287.055, 288.90151, 625.3255, 657.042, and 658.67 F.S., to correct cross references.

**Section 24** repeals ss. 288.7092, 288.7095, 288.71, 288.7101, 288.711, and 288.713, F.S.

Section 288.7092, F.S., requires, in part, that the FBBIB maximize private sector support ... as an endorsement of its value and as an enhancement of its efforts..." and requires a 1:1 private sector match of the state's public investment in the board. It also requires the board to adopt an operating budget, specifying a plan to secure private sector support for the organization. This section also requires the board to "fully comply with the performance measures, standard, and sanctions in its contracts" with OTTED.

Section 288.7095, F.S., requires the board to coordinate with EFI and OTTED to avoid duplication and to develop local business and the necessary infrastructure to support it. The requirement to coordinate with EFI is specified in s. 288.7091, F.S., as amended by this bill.

Section 288.71, F.S., establishes criteria for participation in programs offered by the board. Similar requirements are imposed by s. 288.7102, F.S., as created in Section 11 of this bill.

Section 288.7101, F.S., requires the Department of Management Services to establish a lease-agreement program to provide state employee status to an employee of the board. This provision is included in Section 7 of this bill.

Section 288.711, F.S., creates the Florida Investment Incentive Trust Fund. The bill recreates the program as the Black Business Loan Program in section 11 of this bill.

Section 288.713, F.S., authorizes the board to issue capital participation instruments in the form of stock or equity investments repayable solely from revenues derived from underlying equity or loans made to black business enterprises and any payments from an insurer or guarantor of loans.

In addition, it authorizes the board to authorize counties and municipalities to issue bonds to finance loan pools under s. 288.712, F.S., which is amended by section 15 of this bill.

**Section 25** provides legislative findings related to past appropriations for capitalization of the FBBIB and the eight regional BBICs, finding that the public interest of the state has been served with respect to the use of such funds.

**Section 26** provides an appropriation of \$3 million from the General Revenue Fund to OTTED for FY 2007-08 to implement and administer the Black Business Loan Program. Of these funds, \$300,000 is for operations and administration of the board of the FBBIB, and \$25,000 for startup costs for OTTED.

**Section 27** provides an effective date of July 1, 2007.

#### 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:

The Equal Protection Clause of the 14th amendment of the U.S. Constitution prohibits states from denying any person within its jurisdiction the equal protection of the laws. Generally, the question of whether the equal protection clause has been violated arises when a state grants a particular class of individuals the right to engage in activity yet denies other individuals the same right. Racial classifications reviewed under the Equal Protection Clause are subject to strict scrutiny constitutional standard.<sup>61</sup> Strict scrutiny requires that race-based programs, to not violate the Equal Protection Clause, must be based on a compelling governmental interest and narrowly tailored to achieve that interest.<sup>62</sup>

Courts have further held that the compelling interest must be supported by “significant statistical disparity.”<sup>63</sup> In *Croson*, the Supreme Court struck down the City of Richmond’s affirmative action contracting program. The city required contractors to subcontract at least 30 percent of the value of each contract to one or more “Minority

<sup>61</sup> *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097 (1995); *Grutter v. Bollinger*, 539 U.S.244, 123 S.Ct. 2325 (2003); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 109 S.Ct. 706 (1989).

<sup>62</sup> *Grutter*, 539 U.S. at 308.

<sup>63</sup> *Croson*, 488 U.S. at 509.

Business Enterprises.” Instead, the court said the correct statistical evaluation would be to compare the percentage of MBEs in the relevant market that are qualified to bid for city subcontracting work with the percentage of total city construction dollars awarded to minority subcontractors at the time. A general assertion that there has been past discrimination provides no guidance to determine the scope of the injury that the race classification seeks to remedy so there is no logical end to the program.<sup>64</sup>

When racial classifications are determined permissible, the program must still be narrowly tailored to meet the specific objectives of the program to ensure that the means chosen to meet the objectives have little or no possible “illegitimate racial prejudice or stereotype.”<sup>65</sup> Although this does not require exhaustion of all race neutral alternatives, narrowly tailoring does require a good faith consideration of whether alternatives could serve the governmental interest.<sup>66</sup> If no such alternatives are available then some form of discrimination may be permissible. However, the discriminatory act may only be permissible to the extent that it directly redresses the specific instance of discrimination the state identified as a compelling interest.

If this program is challenged as violating the Equal Protection Clause, it is unclear whether the courts will uphold the program. However, it should be noted that although the number of black-owned firms continues to increase, and in fact grow at a faster rate than all other businesses in Florida, the disparity between the proportion of black-owned and non-black-owned businesses persists.

## **V. Economic Impact and Fiscal Note:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

Black businesses may be eligible for loans or loan guarantees offered by certified recipients of funds from the Black Business Loan Program, as created in this bill.

### **C. Government Sector Impact:**

The bill provides an appropriation of \$3 million from the General Revenue Fund to OTTED for FY 2007-08 to implement and administer the Black Business Loan Program. Of these funds, \$300,000 is for operations and administration of the board of the FBBIB, and \$25,000 for startup costs for OTTED.

## **VI. Technical Deficiencies:**

None.

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<sup>64</sup> *Croson*, 488 U.S. at 497.

<sup>65</sup> *Croson*, 488 U.S. at 493.

<sup>66</sup> *Croson*, 488 U.S. at 509-10; *Grutter*, 539 U.S. at 339.

**VII. Related Issues:**

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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