

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 341 H. Lee Moffitt Cancer Center and Research Institute  
**SPONSOR(S):** State Universities & Private Colleges Policy Committee, Coley and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1022

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	State Universities & Private Colleges Policy Committee	13 Y, 0 N, As CS	Thomas	Tilton
2)	Civil Justice & Courts Policy Committee	14 Y, 0 N	Bond	De La Paz
3)	Full Appropriations Council on Education & Economic Development		Howell	Leznoff
4)	Education Policy Council			
5)				

### SUMMARY ANALYSIS

The H. Lee Moffitt Cancer Center and Research Institute (Moffitt Cancer Center) is a leading cancer research and treatment center in Tampa created by the Legislature in 1987 and affiliated with the University of South Florida as well as other universities nationwide. This bill amends laws regarding the Moffitt Cancer Center to:

- Recognize that the Moffitt Cancer Center is a statewide resource for basic and clinical research and multidisciplinary approaches to patient care.
- Provide that the Moffitt Cancer Center and any approved not-for-profit subsidiary of it are corporations primarily acting as instrumentalities of the state for purposes of sovereign immunity.
- Require that the agreement between the Board of Governors and the not-for-profit corporation provide for the utilization of lands, facilities and personnel by the not-for-profit corporation and its subsidiaries for mutually approved teaching and research programs conducted by state universities, not just USF.
- Revise provisions relating to the control and sharing of technical and professional income from practice activities.
- Allow state university faculty to hold concurrent appointments at the Moffitt Cancer Center.

The fiscal impact of the bill on state government is indeterminate (see fiscal comments). This bill does not appear to have a fiscal impact on local governments.

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

## HOUSE PRINCIPLES

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

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **The H. Lee Moffitt Cancer Center and Research Institute**

The H. Lee Moffitt Cancer Center and Research Institute is a leading cancer research, education, and treatment center in Tampa that is affiliated with the University of South Florida (USF) as well as other universities nationwide.<sup>1</sup>

##### **History of the H. Lee Moffitt Cancer Center and Research Institute**

The 1982 Legislature provided for the transfer of \$45 million from the Cigarette Tax Collection Fund to complete a Cancer and Chronic Disease Research and Treatment Center (Cancer Center) at the USF College of Medicine.<sup>2</sup> The Board of Regents (BOR) and USF created a not-for-profit corporation to operate the Cancer Center medical facility.<sup>3</sup> State corporate records show the H. Lee Moffitt Cancer Center and Research Institute, Inc., was incorporated as a not-for-profit corporation in 1984.<sup>4</sup> The not-for-profit corporation was considered a direct support organization of USF and operated under a contract with the BOR. The Cancer Center was completed and officially opened in October 1986. The medical staff of the center was comprised of the faculty of the USF College of Medicine. The corporation had additional staff of approximately 500, who were not state employees but were paid from the corporation's state appropriated budget.<sup>5</sup>

Ch. 87-121, L.O.F., codified in law the relationship between the BOR and the not-for-profit organization created to operate the Cancer Center by establishing the H. Lee Moffitt Cancer Institute and Research Institute at USF and requiring the BOR to enter into an agreement for the utilization of the facilities on the USF campus known as the H. Lee Moffitt Cancer Center and Research Institute with a not-for-profit organization that was certified by the BOR as a direct support organization. The not-for-profit corporation, acting as an instrumentality of the state, was required to govern and operate the H. Lee Moffitt Cancer Center and Research Institute in accordance with the terms of the agreement between the BOR and the not-for-profit corporation. The agreement was required to provide for the following:

- Approval of the articles of incorporation of the not-for-profit corporation by the BOR.
- Certification of the not-for-profit corporation by the BOR as a university direct support organization.

<sup>1</sup> Moffitt Cancer Center analysis of HB 341 (January 27, 2010).

<sup>2</sup> Ch. 82-240, L.O.F.

<sup>3</sup> Staff analysis of HB 790 (April 21, 1987).

<sup>4</sup> State Corporation Records <http://www.sunbiz.org> (last visited February 10, 2010).

<sup>5</sup> Staff analysis of CS/SB 757 (May 22, 1987).

- Utilization of hospital facilities and personnel for mutually approved teaching and research programs conducted by USF.

The 1990 Legislature enacted specific provisions regarding the membership of the board of directors of the not-for-profit corporation; expanded the teaching and research programs for which the facilities could be used to include other accredited medical schools or research institutes; provided for the center to be administered by a director who served at the pleasure of the board of directors of the H. Lee Moffitt Cancer Center and Research Institute, Inc.; and prescribed the powers and duties of the center director.<sup>6</sup>

In 1993, the Legislature granted the not-for-profit corporation the ability to create not-for-profit subsidiaries to provide it the flexibility necessary to compete in the health care industry.<sup>7</sup> The legislative intent section of Ch. 93-167, L.O.F., includes the following statement:

“Whereas, the Legislature considers the not-for-profit corporation that governs and operates the H. Lee Moffitt Cancer Center and Research Institute to be performing a statewide function and to be a corporation primarily acting as an instrumentality of the state, and, therefore, considers any subsidiaries created by virtue of this act to be corporations acting primarily as instrumentalities of the state...”

The 2002 School Code Rewrite replaced references to the Board of Regents with references to the State Board of Education (SBE).<sup>8</sup>

In 2004, the Legislature authorized the not-for-profit corporation, with prior approval of the SBE, to create for-profit corporate subsidiaries as well as not-for-profit corporate subsidiaries.<sup>9</sup>

The responsibilities of the SBE with regard to the H. Lee Moffitt Cancer Center and Research Institute, including the agreement between the SBE and the not-for-profit corporation, were transferred to the Board of Governors in 2007.<sup>10</sup>

*Current status of the H. Lee Moffitt Cancer Center and Research Institute (Moffitt Cancer Center)*

Today, the Moffitt Cancer Center is an NCI Comprehensive Cancer Center that employs over 3,800 people and its facilities cover over 1.6 million square feet. The Moffitt Cancer Center currently admits approximately 7,500 patients per year and treats approximately 272,500 outpatients per year. The Moffitt Cancer Center also receives approximately \$59.7 million in grant funding per year. The Moffitt Cancer Center is licensed to operate 206 inpatient beds, plus a 36-bed blood and marrow transplant unit. The Moffitt Cancer Center also has 12 operating rooms; a diagnostic radiology department with MRI, PET/CT, digital mammography, and other imaging capabilities; and a radiation therapy with seven linear accelerators.<sup>11</sup>

The not-for-profit corporation has created three not-for-profit subsidiaries which were approved by the Board of Regents and two for-profit subsidiaries which were approved by the Board of Governors.<sup>12</sup>

State corporation records identify three not-for-profit corporations that were formed in 1994: the H. Lee Moffitt Cancer Center and Research Hospital, Inc.; the H. Lee Moffitt Cancer Center and Research Institute Lifetime Cancer Screening Center, Inc.; and the H. Lee Moffitt Cancer Center and Research Institute Foundation, Inc.<sup>13</sup> In 2006, the center announced that it was forming M2GEN, a for-profit

<sup>6</sup> Ch. 90-56, L.O.F.

<sup>7</sup> Ch. 93-167, L. O. F.

<sup>8</sup> Ch. 2002-387, L.O.F.

<sup>9</sup> Ch. 2004-2, L.O.F.

<sup>10</sup> Ch. 2007-217, L.O.F.

<sup>11</sup> Moffitt Cancer Center’s analysis of HB 341 (January 27, 2010).

<sup>12</sup> The Florida Senate, *Open Government Sunset Review of Section 1004.43(8)10. and 12., F.S., H. Lee Moffitt Cancer Center and Research Institute Trade Secrets and Information Exempt or Confidential Under the Laws of Another State, National or the Federal Government*, 3, Interim Report 2010-221, September 2009.

<sup>13</sup> State Corporation Records <http://www.sunbiz.org> (last visited February 10, 2010). The search was limited to a search of the name "H. Lee Moffitt." The apparent related corporations are: H. Lee Moffitt Cancer Center and Research

subsidiary with drug manufacturer Merck & Co., to develop personalized cancer treatments for patients using molecular technology.<sup>14</sup> The Moffitt Technologies Corporation is a for-profit corporation formed in 2005 to develop biotechnology.<sup>15</sup>

#### Current Role of the Board of Governors

The Board of Governors must provide for the following in the agreement with the not-for-profit corporation:<sup>16</sup>

- Approval of the articles of incorporation of the not-for-profit corporation and any not-for-profit subsidiary;
- Use of lands, facilities, and personnel by the not-for-profit corporation and its subsidiaries for mutually approved teaching and research programs conducted by the University of South Florida or other accredited medical schools or research institutes;
- Preparation of an annual financial audit of the accounts and records of the not-for-profit corporation and all subsidiaries and submittal of the annual audit report and a management letter to the Auditor General and the Board of Governors for review. The Board of Governors, the Auditor General, and the Office of Program Policy Analysis and Government Accountability are authorized to require and receive any detail or supplemental data relative to the operation of the not-for-profit corporation or subsidiary; and
- Provision by the not-for-profit corporation and its subsidiaries of equal employment opportunities to all persons regardless of race, color, religion, sex, age, or national origin.

The Board of Governors is authorized to secure comprehensive general liability protection, including professional liability protection, for the not-for-profit corporation and its subsidiaries pursuant to s. 1004.24, F.S.<sup>17</sup>

In the event that the agreement between the not-for-profit corporation and the Board of Governors terminates, the Board of Governors resumes governance and operation of the facilities.<sup>18</sup>

#### Administration of the Moffitt Cancer Center

A not-for-profit corporation governs and operates the Moffitt Cancer Center in accordance with the terms of the agreement between the BOG and the not-for-profit corporation.<sup>19</sup> The not-for-profit corporation is managed by a board of directors consisting of the President of the University of South Florida, the chair of the Board of Governors or his/her designee, 5 representatives of the state universities, and between 10-14 additional directors who are not medical doctors or state employees.<sup>20</sup>

The Moffitt Cancer Center is administered by a chief executive officer who serves at the pleasure of the board of directors of the not-for-profit corporation.<sup>21</sup> The duties of the chief executive officer include control over the budget and the dollars appropriated or donated to the institute from private, local, state, and federal sources, as well as technical and professional income that is generated or derived from the medical practice activities of the institute. Professional income generated by USF faculty from practice activities at the institute must be shared between the institute and USF as determined by the chief executive officer and the appropriate university dean or vice president.<sup>22</sup>

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Hospital, Inc.; H. Lee Moffitt Cancer Center and Research Institute Lifetime Cancer Screening Center, Inc.; and H. Lee Moffitt Cancer Center and Research Institute Foundation, Inc.

<sup>14</sup> <http://www.moffitt.org/Site.aspx?spid=C54AF116F69244D49BACE202F69BC2A6> (last visited February 10, 2010).

<sup>15</sup> State Corporation Records <http://www.sunbiz.org> (last visited February 10, 2010) and Moffitt Cancer Center 2005 Annual Report 5, <http://www.moffitt.org/Site.aspx?spid=CD60BED02BAC4E9299664B0F4AE463F1> (last visited February 10, 2010).

<sup>16</sup> Section 1004.43(2), F.S.

<sup>17</sup> Section 1004.43(3), F.S.

<sup>18</sup> Section 1004.43(4), F.S.

<sup>19</sup> Section 1004.43(1), F.S.

<sup>20</sup> Section 1004.43(1), F.S.

<sup>21</sup> Section 1004.43(5), F.S.

<sup>22</sup> Section 1004.43(5)(b), F.S.

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The chief executive officer also appoints members to carry out the research, patient care, and educational activities of the institute and determines compensation, benefits, and terms of service. Members of the institute are eligible to hold concurrent appointments at affiliated academic institutions. University faculty are eligible to hold concurrent appointments at the institute.

### **Sovereign Immunity**

The term "sovereign immunity" originally referred to the English common law concept that the government may not be sued because "the King can do no wrong." Sovereign immunity bars lawsuits against the government or its political subdivisions for the torts of officers or agents of such governments unless such immunity is expressly waived.

Article X, s. 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the right to waive such immunity in part or in full by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state. Subsection (5) limits the recovery of any one person to \$100,000 for one incidence and limits all recovery related to one incidence to a total of \$200,000. Where the state's sovereign immunity applies, subsection (9) provides that the officers, employees and agents of the state that were involved in the commission of the tort are not personally liable to an injured party.

The term "state agencies or subdivisions" includes the executive departments, the Legislature, the judicial branch, and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.<sup>23</sup>

It is common for the state to create corporations and authorize subsidiary corporations. Whether such corporations are instrumentalities of the state is dependent upon the degree of control over the corporation or subsidiary. Where the subsidiary corporation is significantly controlled by government, it is an instrumentality of the state<sup>24</sup>, but where the subsidiary acts with significant autonomy, it is not.<sup>25</sup>

One circuit court in Hillsborough County has ruled that the "H. Lee Moffitt Cancer Center and Research Institute of Tampa, Inc.", is an instrumentality of the State of Florida and therefore the corporation is "entitled to the protections of sovereign immunity and the limited waiver set forth in Section 768.28, Florida Statutes."<sup>26</sup> The ruling did not consider whether any subsidiary corporation of the Moffitt Cancer Institute would similarly be considered an instrumentality of the state.

An entity that is an "instrumentality of the state" falls within the state's sovereign immunity. Section 1004.43(1), F.S., provides the H. Lee Moffitt Cancer Center and Research Institute is an instrumentality of the state, and thus it is clear that it is covered by sovereign immunity. The legislative intent of the bill allowing non-profit subsidiaries stated that any non-profit entity is an instrumentality of the state.<sup>27</sup> Such intent language is not law, but will be considered by any court that would be called upon to determine whether the non-profits are covered by sovereign immunity. On the issue of control, all of the subsidiaries appear to provide medical care and services for cancer research and treatment,

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<sup>23</sup> Section 768.28(2), F.S.

<sup>24</sup> *Pagan v. Sarasota County Hospital Board*, 884 So.2d 257 (Fla. 2nd DCA 2004); *Prison Rehabilitative Industries & Diversified Enterprises v. Betterson*, 648 So.2d 778 (Fla. 1st DCA 1994).

<sup>25</sup> In *Shands Teaching Hospital & Clinics, Inc. v. Lee*, 478 So.2d 77, 79 (Fla. 1st DCA 1985), the court concluded that the nonprofit corporation to which the State Board of Education leased the Shands Teaching Hospital was not entitled to the benefit of sovereign immunity because the corporate entity was determined to be "an autonomous and self-sufficient entity, one not primarily acting as an instrumentality on behalf of the state."

<sup>26</sup> *McBride v. H. Lee Moffitt Cancer Center & Research Institute of Tampa, Inc.*, Case No. 95-CA-007231 (13th Judicial Circuit, February 2, 1996), at paragraph 1.b., recorded in OR Book 8039, Page 927, of the Public Records of Hillsborough County, Florida; *affirmed without opinion*, 683 So. 2d 122 (Fla. 2nd DCA 1996).

<sup>27</sup> Chapter 93-167, L.O.F., provided in part: "Whereas, the Legislature considers the not-for-profit corporation that governs and operates the H. Lee Moffitt Cancer Center and Research Institute to be performing a statewide function and to be a corporation primarily acting as an instrumentality of the state, and, therefore, considers any subsidiaries created by virtue of this act to be corporations acting primarily as instrumentalities of the state..."

operate out of the same campus next the University of South Florida, share corporate officers, and are controlled by the H. Lee Moffitt Cancer Center and Research Institute, Inc. It appears that the current subsidiaries are protected by sovereign immunity, although this is not specifically provided for in statute.

### **Effect of Proposed Changes**

CS/HB 341 recognizes the expansion of the Moffitt Cancer Center's teaching and research programs to other state universities, including USF. The bill also notes the Moffitt Cancer Center's statewide mission by removing the initial reference to USF and providing that the Moffitt Cancer Center is a "statewide resource for basic and clinical research and multidisciplinary approaches to patient care."

The bill replaces the remaining reference to the State Board of Education with "Board of Governors" to conform to other references in s. 1004.43, F.S.

The bill specifically provides that the H. Lee Moffitt Cancer Center and Research Institute, Inc., and any not-for-profit subsidiary of the H. Lee Moffitt Cancer Center and Research Institute, Inc., are corporations primarily acting as instrumentalities of the state, and thus entitled to the sovereign immunity protection of s. 768.28, F.S.

The bill requires that the agreement between the Board of Governors and the not-for-profit corporation provide for the utilization of lands, facilities and personnel by the not-for-profit corporation and its subsidiaries for mutually approved teaching and research programs conducted by state universities, not just USF. The Moffitt Cancer Center indicates that this will allow for greater flexibility in creating programs statewide that will benefit institutions and attract high quality professionals and students to Florida in furtherance of the Moffitt Cancer Center's mission.<sup>28</sup>

The bill provides that the chief executive officer will have control over income generated or derived from practice activities of the "not-for-profit corporation" rather than the "institute." Technical and professional income generated from practice activities may be shared between the not-for-profit corporation and its subsidiaries as determined by the chief executive officer. However, professional income generated by any state university employee from practice activities at the not-for-profit corporation and its subsidiaries must be shared between the employee's university and the not-for-profit corporation and its subsidiaries only as determined by the chief executive officer and the appropriate university dean or vice president. Representatives of the Moffitt Cancer Center indicate that these changes clarify the permissibility of sharing professional income generated between the not-for-profit corporation and its subsidiaries. Historically, the vast majority of the physicians on the medical staff at the Moffitt Center were employees of USF. On January 1, 2008, as part of the realignment of the affiliation between the Institute and USF, a majority of these physicians previously employed by USF transferred employment to the Moffitt Cancer Center. The changes proposed in the bill recognize the change in the employment status of these physicians.<sup>29</sup>

The bill permits all state university faculty, rather than just USF faculty, to hold concurrent appointments at the Moffitt Cancer Center in recognition of the Moffitt Center's state-wide role and function. Representatives of the Moffitt Cancer Center indicate that this change will permit more meaningful affiliations between the Moffitt Center and other state universities as well as with USF<sup>30</sup>

#### **B. SECTION DIRECTORY:**

Section 1. Amends s. 1004.43, F.S., revising provisions relating to the establishment of the institute and specifying primary responsibilities of the institute; conforming provisions relating to the agreement by the Board of Governors and the not-for-profit corporation for the use of facilities on the campus of the University of South Florida, specifying that the not-for-profit corporation and its not-for-profit subsidiaries shall conclusively act as

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<sup>28</sup> Moffitt Cancer Center analysis of HB 341 (January 27, 2010).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

instrumentalities of the state for purposes of sovereign immunity; authorizing the use of land, facilities, and personnel for teaching and research program conducted by state universities; revising provisions relating to the control and sharing of certain income.

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

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

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

None.

### D. FISCAL COMMENTS:

The fiscal impact of the bill is indeterminate. According to the Board of Governors, there appears to be minimal potential fiscal impact to the State University System resulting from this legislation.

There is the potential for increased revenues for the state university system from faculty member practice activity if other universities in addition to USF choose to partner with Moffitt in the future and receive a portion of any additional practice activity income that is generated. The potential revenue amount cannot be determined at this time.<sup>31</sup>

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

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<sup>31</sup> Board of Governors analysis of CS/HB 341 (February 18, 2010).

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On February 17, 2010, the State Universities & Private Colleges Policy Committee adopted an amendment to HB 341 and reported the bill favorably as a Committee Substitute (CS). The amendment clarifies how technical and professional income from practice activities will be shared. The amendment:

- Allows technical and professional income generated from practice activities to be shared between the not-for-profit corporation and its subsidiaries as determined by the chief executive officer; and
- Requires professional income generated by state university employees from practice activities at the not-for-profit corporation and its subsidiaries to be shared between the university and the not-for-profit corporation and its subsidiaries only as determined by the chief executive officer and the appropriate university dean or vice president.