

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 Budget Committee

BILL: CS/SB 444

INTRODUCER: Community Affairs Committee and Senator Bogdanoff

SUBJECT: Scrutinized Companies

DATE: March 13, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Naf	Roberts	GO	Fav/2 amendments
2.	Wolfgang	Yeatman	CA	Fav/CS
3.	Betta	Meyer, C.	BC	Pre-meeting
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This Committee Substitute (CS) prohibits a company on the Scrutinized Companies with Activities in Sudan List or on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of \$1 million or more.

The bill also:

- Requires public entities to have a contract provision that allows contracts to be terminated if the company submitted a false certification or is placed on either of the Scrutinized Companies list.
- Provides an exception to the prohibition.
- Requires a company seeking to enter into a contract of \$1 million or more to certify that it is not a scrutinized business operation.
- Provides a process by which an agency or local government can report a false certification and by which the relevant government attorney may bring civil suit.
- Specifies penalties for a company that makes a false certification.

- States that the act preempts any ordinance or rule of any local governmental entity involving public contracts for goods or services of \$1 million or more with a company engaged in scrutinized business operations.
- Requires the Department of Management Services must submit a written notice describing the act to the Attorney General of the United States within 30 days after July 1, 2011.
- States that the act becomes inoperative on the date that federal law ceases to authorize the state to adopt and enforce the contracting prohibitions of the type provided for in the act.

This bill creates section 287.135 of the Florida Statutes.

II. Present Situation:

International and federal law has been evolving to address concerns regarding Iran's policy of nuclear development as well as its state support of terrorism and human rights violations. The Congressional Research Service recently reported the following:

There appears to be a growing international consensus to adopt progressively strict economic sanctions against Iran to try to compel it to verifiably confine its nuclear program to purely peaceful uses. The U.S. view—shared by major allies—is that sanctions should target Iran's energy sector that provides about 80% of government revenues, and try to isolate Iran from the international financial system. Measures adopted since mid-2010 by the United Nations Security Council, the European Union, and several other countries target those sectors, and complement the numerous U.S. laws and regulations that have long sought to try to pressure Iran. U.S. efforts to curb international energy investment in Iran's energy sector began in 1996 with the Iran Sanctions Act (ISA), a U.S. law that mandates U.S. penalties against foreign companies that conduct certain business with Iran's energy sector. ISA represented a U.S. effort to persuade foreign firms to choose between the Iranian market and the much larger U.S. and other developed markets. In the 111th Congress, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA, P.L. 111-195) expanded ISA significantly to try to restrict Iran's ability to make or import gasoline, for which Iran depends heavily on imports. CISADA also adds a broad range of other measures further restricting the already limited amount of U.S. trade with Iran and restricting some high technology trade with countries that allow WMD-useful technology to reach Iran.

As indicators of the broadening international adoption of stricter sanctions against Iran, CISADA's enactment followed the June 9, 2010, adoption of U.N. Security Council Resolution 1929. That Resolution, the latest in a series of U.N. resolutions against Iran that began in 2006, imposes a ban on sales of heavy weapons to Iran, and authorized - but did not mandate - sanctions on Iran's energy or broad financial sector. European Union sanctions, imposed July 27, 2010, align the EU with the U.S. position, to a large extent, by prohibiting EU involvement in Iran's energy sector and restricting trade financing and banking relationships with Iran, among other measures. National measures announced by Japan and South Korea in early September 2010— both are large buyers of

Iranian energy—impose restrictions similar to those of the EU. Even India, perceived as highly hesitant to antagonize Iran, has begun to impose sanctions on Iran by refusing to use certain financial mechanisms to process payments to Iran. Because so many major economic powers have imposed sanctions on Iran, the sanctions are, by all accounts, having a growing effect. In January 2011, Secretary of State Clinton claimed that sanctions have accomplished a core objective of slowing Iran’s nuclear program. Economically, the sanctions are reinforcing the effects of Iran’s economic mismanagement and key bottlenecks. Among other indicators, there has been a stream of announcements by major international firms during 2010 that they are exiting the Iranian market. Iran’s oil production has fallen slightly to about 3.9 million barrels per day, from over 4.1 million barrels per day several years ago, although Iran now has small natural gas exports that it did not have before Iran opened its fields to foreign investment in 1996. Sales to Iran of gasoline have fallen dramatically since CISADA was enacted. U.S. officials say that the cumulative effect of sanctions could harm Iran’s economy to the point where domestic pressure compels Iranian leaders to accept a nuclear compromise, although nuclear talks in late January 2011 made virtually no progress. Possibly in an effort to accomplish the separate objective of promoting the cause of the domestic opposition in Iran, the Obama Administration and Congress are increasingly emphasizing measures that would sanction Iranian officials who are human rights abusers and facilitate the democracy movement’s access to information.¹

On February 7, 2011, “the U.S. Department of State recognized the Southern Sudan referendum results and the creation of the Government of Southern Sudan. Secretary of State Clinton also declared that the United States is ‘initiating the process of withdrawing Sudan’s State Sponsor of Terrorism designation, the first step of which is initiating a review of that designation.’”²

State Sponsors of Terrorism

Countries which are determined by the United States Secretary of State to have repeatedly provided support for acts of international terrorism are designated as “State Sponsors of Terrorism” and are subject to sanctions under the Export Administration Act³, and the Arms Export Control Act.⁴ The four main categories of sanctions resulting from designations under these acts are: restrictions on U.S. foreign assistance, a ban on defense exports and sales, certain controls over exports of dual use items, and miscellaneous financial and other restrictions.⁵ Some

¹ CONGRESSIONAL RESEARCH SERVICE, IRAN SANCTIONS RS20871 (Feb. 3, 2011). *See also* CONGRESSIONAL RESEARCH SERVICE REPORT, IRAN SANCTIONS RS20871 (Feb 2, 2010).

² FLORIDA STATE BOARD OF ADMINISTRATION, PROTECTING FLORIDA’S INVESTMENTS ACT (PFIA); QUARTERLY REPORT (February 22, 2011) *available at* <http://www.sbafla.com/fsb/LinkClick.aspx?fileticket=YY6ZTOCV0qO%3D&tabid=751&mid=2408> (last visited March 4, 2011).

³ U.S. Export Administration Act, Pub. L. No. 96-72 § 6(j) (1979) expired in 1994 but is periodically revived by executive order through the International Emergency Economic Powers Act, 50 U.S.C. 1701. *See generally*, CONGRESSIONAL RESEARCH SERVICE, THE EXPORT ADMINISTRATION ACT: EVOLUTION, PROVISIONS, AND DEBATE (July 15, 2009).

⁴ U.S. Arms Export Control Act, 22 U.S.C. 2778.

⁵ U.S. DEPARTMENT OF STATE, OFFICE OF COORDINATOR FOR COUNTERTERRORISM, STATE SPONSORS OF TERRORISM, <http://www.state.gov/s/ct/c14151.htm> (last visited Feb. 28, 2011).

of the miscellaneous restrictions include opposition to loans by the World Bank and other financial institutions, removal of diplomatic immunity to allow victims of terrorism to file civil lawsuits, denial of tax credits to companies and individuals for income earned in named countries, authority to prohibit U.S. citizens from engaging in transactions without a Treasury Department license, and prohibition of Department of Defense contracts above \$100,000 with companies controlled by terrorist-list states.⁶

The four countries currently designated by the U.S. Secretary of State as “State Sponsors of Terrorism” are Cuba, Iran, Sudan, and Syria.⁷

The Voice Act

In addition, Congress directed the President of the United States to submit a report on non-Iranian persons, including corporations with United States subsidiaries, that have knowingly or negligently provided hardware, software, or other forms of assistance to the Government of Iran that has furthered Iran’s efforts to filter online political content, disrupt cell phone and Internet communications, and monitor the online activities of Iranian citizens.⁸

State Law Pertaining to Foreign Trade

Section 288.855, F.S., prohibits the export or sale of any goods or services to a foreign country in violation of federal law and restricts interference with foreign export except as otherwise prohibited by law.

State Agency Procurement of Commodities and Services

The comprehensive process contained in ch. 287, F.S., for the procurement of commodities and contractual services by executive agencies⁹ sets forth numerous requirements for fair and open competition among vendors, agency maintenance of written documentation that supports procurement decisions, and implementation of monitoring mechanisms. Legislative intent language for the chapter explains that the process is necessary in order to:

- Reduce improprieties and opportunities for favoritism;
- Ensure the equitable and economical award of public contracts; and
- Inspire public confidence in state procurement.¹⁰

The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include: overseeing agency

⁶ U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM, 181-82 (2008), *available at* <http://www.state.gov/documents/organization/122599.pdf> (last visited Feb. 28, 2011).

⁷ *See supra* n. 4.

⁸ VOICE Act, Pub. L. No. 111-84, § 1265, 123 Stat. 2190 (2009).

⁹ Section 287.012(1), F.S., provides that the term “agency” for purposes of ch. 287, F.S., “. . . means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. ‘Agency’ does not include the university and college boards of trustees or the state universities and colleges.”

¹⁰ Section 287.001, F.S.

implementation of the ch. 287, F.S., competitive procurement process;¹¹ creating uniform agency procurement rules;¹² implementing the online procurement program;¹³ and establishing state term contracts.¹⁴ The agency procurement process is partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through the DMS.

Protecting Florida's Investments Act: Scrutinized Companies

On June 8, 2007, the Protecting Florida's Investments Act (PFIA) was signed into law. The PFIA requires the State Board of Administration (SBA), acting on behalf of the Florida Retirement System Trust Fund (the FRSTF), to assemble and publish a list of Scrutinized Companies that have prohibited business operations in Sudan and Iran. Once placed on the list of Scrutinized Companies, the SBA and its investment managers are prohibited from acquiring those companies' securities and are required to divest those securities if the companies do not cease the prohibited activities or take certain compensating actions. The implementation of the PFIA by the SBA will not affect any FRSTF investments in U.S. companies. The PFIA will solely affect foreign companies with certain business operations in Sudan and Iran involving the petroleum or energy sector, oil or mineral extraction, power production or military support activities.¹⁵

The definition of scrutinized companies in Sudan and Iran is in s. 215.473(1)(t), F.S., and the SBA website retains a complete list of scrutinized companies and companies that are under continuing examination. Scrutinized companies are judged according to whether they meet the following criteria:

Sudan:

1. Have a material business relationship with the government of Sudan or a government-created project involving oil related, mineral extraction, or power generation activities, or
2. Have a material business relationship involving the supply of military equipment, or
3. Impart minimal benefit to disadvantaged citizens that are typically located in the geographic periphery of Sudan, or
4. Have been complicit in the genocidal campaign in Darfur.

¹¹ Sections 287.032 and 287.042, F.S.

¹² Sections 287.032(2) and 287.042(3), (4), and (12), F.S.

¹³ Section 287.057(23), F.S.

¹⁴ Sections 287.042(2), 287.056 and 287.1345, F.S.

¹⁵ FLORIDA STATE BOARD OF ADMINISTRATION, PROTECTING FLORIDA'S INVESTMENTS ACT (PFIA); QUARTERLY REPORT (February 22, 2011) *available at* <http://www.sbafla.com/fsb/LinkClick.aspx?fileticket=YY6ZTOCV0qQ%3D&tabid=751&mid=2408> (last visited March 4, 2011).

Iran:

1. Have a material business relationship with the government of Iran or a government-created project involving oil related or mineral extraction activities, or
2. Have made material investments with the effect of significantly enhancing Iran's petroleum sector.¹⁶

State and Local Government Authority to Prohibit Contracts

In the past, state and local governments have proposed or enacted measures restricting their agencies' economic transactions with firms that do business with or in foreign countries whose conduct the jurisdictions find objectionable. However, there is case law that indicates that the dormant federal foreign affairs power may preempt state and local governments from enacting these restrictions. For example, in 2000, the U.S. Supreme Court unanimously held in *Crosby v. National Foreign Trade Council* that a Massachusetts law restricting state transactions with firms doing business in Burma was preempted by a federal Burma statute.¹⁷ Therefore, in the absence of a grant of federal authority statutes that prohibit contracting with companies on the scrutinized companies list may be unconstitutional.

With respect to Sudan¹⁸ and Iran,¹⁹ the federal government has expressly given state and local governments the authority to divest from companies directly invested in certain Sudanese or Iranian sectors. The statutes, authorizing state and local governments to prohibit the investment of assets in these countries, define "investment" to include the "entry into or renewal of a contract for goods or services."²⁰ The statutes require that:

- The state or local government shall provide written notice to each person to which a measure is to be applied.
- The measure shall apply to a person not earlier than 90 days after the date on which written notice is provided.
- The state or local government shall provide an opportunity to comment in writing to each person to which a measure is to be applied. If the person demonstrates to the State or local government that the person does not engage in investment activities in Iran, the measure shall not apply to the person.
- The state or local government enacting such a measure must send notice to the U.S. Attorney General within 30 days after adopting a measure.

III. Effect of Proposed Changes:

The CS provides the following definitions for the created section of law:

¹⁶ *Id.*

¹⁷ 530 U.S. 363 (2000). *See also*, *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003); *but see Faculty Senate of Fla. Int'l Univ. v. Winn*, 616 F.3d 1206 (11th Cir. 2010) (upholding a university prohibition on using state or nonstate funds on activities related to travel to a terrorist state).

¹⁸ The Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, §§ 1 to 12, Dec. 31, 2007, 121 Stat. 2516, as amended Pub. L. No. 111-195, Title II, § 205(a), July 1, 2010, 124 Stat. 1344.

¹⁹ 22 U.S.C. § 8532.

²⁰ The Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, § 3(f), 121 Stat. 2516 (2007); 22 U.S.C. § 8532(g)(2)(C).

- “Awarding body” for purposes of state contracts, an agency or department, and for purposes of local contracts, means the governing body of the local governmental entity.
- “Local governmental entity” means a county, municipality, special district, or other political subdivision of the state.

The CS prohibits a company on the Scrutinized Companies with Activities in Sudan List or on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency²¹ or local governmental entity for goods or services of \$1 million or more.

The CS provides that any contract with an agency or local governmental entity for goods or services of \$1 million or more entered into or renewed on or after July 1, 2011, must contain a provision that allows for the termination of such contract at the option of the awarding body if the company is found to have submitted a false certification or has been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List.

The bill allows an agency or local governmental entity to make a case-by-case exception to the prohibition if:

- The scrutinized business operations²² were made before July 1, 2010;
- The scrutinized business operations have not been expanded or renewed after July 1, 2010;
- The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company;
- The company has adopted, has publicized, and is implementing a formal plan to cease scrutinized business operations and to refrain from engaging in any new scrutinized business operations; *and*
- *One* of the following occurs:
 - The local governmental entity makes a public finding that, absent such an exemption, the local governmental entity would be unable to obtain the goods or services for which the contract is offered.
 - For a contract with an executive agency, the Governor makes a public finding that, absent such an exemption, the agency would be unable to obtain the goods or services for which the contract is offered.
 - For a contract with an office of a state constitutional officer other than the Governor, the state constitutional officer makes a public finding that, absent such an exemption, the office would be unable to obtain the goods or services for which the contract is offered.

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

²¹ As defined in s. 287.012(1), F.S.

²² S. 215.473(1)(s), F.S., defines “scrutinized business operations” to mean “business operations that have resulted in a company becoming a scrutinized company.”

If an agency or local governmental entity determines that a company has submitted a false certification that it is not a scrutinized business operation and has provided the company with written notice and 90 days to respond in writing to such determination, and the company fails to demonstrate that it has ceased its engagement in scrutinized business operations, then:

- The awarding body *must* report the company to the Attorney General and provide information demonstrating the false certification. The Attorney General must determine whether to bring a civil action against the company. The awarding body *may* report the company to the municipal attorney, county attorney, or district attorney and provide information demonstrating the false certification. Such attorney may determine whether to bring a civil action against the company. If a civil action is brought and the court determines that the company submitted a false certification, the company shall pay all reasonable attorney's fees and costs (including costs for investigations that led to the finding of false certification) and a civil penalty equal to the greater of \$2 million or twice the amount of the contract for which the false certification was submitted. A civil action to collect the penalties must commence within 3 years after the date the false certification is made.
- The bill specifies that only the awarding body may cause a civil action to be brought, and that the section does not create or authorize a private right of action or enforcement of the provided penalties. An unsuccessful bidder, or any other person other than the awarding body, may not protest the award or contract renewal on the basis of a false certification.
- An existing contract with the company shall be terminated at the option of the awarding body.
- The company is ineligible to bid on any contract with an agency or a local governmental entity for 3 years after the date of determining that the company submitted a false certification.

The bill specifies that the act preempts any ordinance or rule of any local governmental entity involving public contracts for goods or services of \$1 million or more with a company engaged in scrutinized business operations.

In accordance with the requirements of federal law,²³ the Department of Management Services must submit a written notice describing the act to the Attorney General of the United States within 30 days after July 1, 2011.

The act becomes inoperative on the date that federal law ceases to authorize the state to adopt and enforce the contracting prohibitions of the type provided for in the act.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²³ The Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, §§ 1 to 12, Dec. 31, 2007, 121 Stat. 2516, as amended Pub. L. No. 111-195, Title II, § 205(a), July 1, 2010, 124 Stat. 1344.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Without Congressional authorization, it might be possible that this bill would be an unconstitutional preemption of federal authority (see present situation discussion). However, Congress has authorized the contractual restrictions included in this bill and the bill contains a provision that specifically makes it inoperative if Congress ever rescinds that authority. Therefore, this bill should not violate the Supremacy Clause of the U.S. Constitution.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill will adversely affect companies on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List that seek to enter into contracts with Florida governmental entities.

C. Government Sector Impact:

Indeterminate.

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.)

CS by the Community Affairs Committee on March 7, 2011:

The CS requires public entities to have a contract provision that allows contracts to be terminated if the company submitted a false certification or is placed on either of the Scrutinized Companies list.

B. Amendments:

None.

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