

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL: SB 1472

INTRODUCER: Senator Richter

SUBJECT: Capital Formation for Infrastructure Projects

DATE: February 1, 2012 REVISED: 2/6/2012

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Philo	Hrdlicka	CM	Favorable
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

SB 1472 creates the Florida Infrastructure Fund Partnership, a contingent tax credit program designed to leverage investment and private funding for state infrastructure projects, which may encourage private sector economic activity. The partnership is authorized to raise \$700 million in private funds for direct investment in infrastructure projects including water or wastewater systems, communication systems, power systems, transportation systems, renewable energy systems, ancillary or support systems, or other strategic infrastructure needs. Tax credits are available for redemption no earlier than 2024 and will be used only as a guarantee on an investment partner’s principal investment. The Florida Opportunity Fund will serve as the general partner of the program. A separate entity, the Florida Infrastructure Investment Trust, will administer the tax credit program.

The Revenue Estimating Conference has not yet determined the impact of this bill. However, the bill may have a recurring negative indeterminate impact on both state and local government revenues, possibly beginning in 2024, due to contingent tax credits. No more than \$150 million in credits may be utilized in any one state fiscal year.

The bill substantially amends ss. 213.053, 288.9621, 288.9622, and 288.9623, F.S., and creates ss. 288.9627 and 288.9628, F.S.

II. Present Situation:

The Florida Opportunity Fund¹

The Florida Opportunity Fund, Inc. (FOF) was created by the Florida Legislature in 2007 to mobilize and increase venture capital available to Florida businesses. Sections 288.9621 - 288.9625, F.S., collectively referred to as the Florida Capital Formation Act, provided for the authorization of the entity. Initially, FOF was set up as a “fund-of-funds” program that emphasized investment in seed capital and early stage venture capital funds. However in 2009, the Florida Legislature expanded FOF’s directive under the Florida Capital Formation Act to create direct investment programs that invest in individual businesses and infrastructure projects. FOF may not use its original appropriation of \$29.5 million to make direct investments but may raise private capital or utilize other public funding sources. In 2010, FOF launched a direct investment program with the Office of Energy, a state entity within the Department of Agriculture and Consumer Services. The progress of direct investments by FOF must be included in its annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

FOF is organized as a private, not-for-profit corporation under ch. 617, F.S., and administered by Enterprise Florida, Inc (EFI). EFI selects a five-person appointment committee which selects a board of directors for FOF. The board then selects an FOF investment manager. Currently, FOF is managed by Florida First Partners, a joint venture between the Credit Suisse Customized Fund Investment Group (CFIG) and Florida-based MILCOM Venture Partners (MVP). CFIG serves various client types including the states of Indiana and Oregon, endowments, family offices, and high net worth individuals. MVP is a venture capital firm focused on the intersection of the commercial and defense markets. MVP manages two venture capital funds: MILCOM Technologies, a seed-stage investment fund, and OnPointTechnologies, an early-stage venture capital fund.

Infrastructure Funding in Florida

For nearly six decades, Florida has been one of the fastest growing states in the nation, with population expanding from 5 million in 1960 to nearly 19 million in 2010.² Demand for energy, transportation, and communication systems expanded rapidly over the past several decades. Current projections suggest Florida may add an additional 5 million new residents by the year 2030.³ Employment, tourism, gross state product, and income will expand as well, contributing to growth in demand for strategic infrastructure. In order to meet future capacity over the next 20-25 years, it is estimated that Florida will need:

- \$47.0 billion for highway and rail infrastructure;⁴
- \$29.9 billion for water and wastewater facilities and infrastructure;⁵
- \$3.5 billion for aviation facilities and infrastructure;⁶

¹ See generally Florida Opportunity Fund website at <http://floridaopportunityfund.com/HomePage.asp>.

² Office of Economic & Demographic Research, *Florida Population by Age Group* (2010 Census), at 1 (available at http://edr.state.fl.us/Content/population-demographics/data/Pop_Census_Day.pdf).

³ *Id.*

⁴ Florida Department of Transportation, *Strategic Intermodal System Unfunded Needs Plan* (May 2006), at 1 (available at <http://www.dot.state.fl.us/planning/systems/mspi/sisnplan.shtm>).

⁵ United States Environmental Protection Agency, *Clean Watersheds Needs Survey 2008 Report to Congress*, at v-vii of Executive Summary (available at <http://water.epa.gov/scitech/datait/databases/cwns/2008reportdata.cfm>).

- \$2.8 billion for seaport facilities and infrastructure;⁷ and
- \$2.5 billion for storm water management.⁸

Due to the large size and cost, and often monopolistic characteristics of these assets, infrastructure projects have historically been financed, built, owned, and operated by state and local governments. Today, public entities solicit grants, borrow capital, or issue bonds to pay for public infrastructure projects. However, projected infrastructure funding from all public sources – federal, state, and local – is not sufficient to pay for all needed improvements.

Contingent Tax Credit Programs

Contingent tax credits help to raise money for state-affiliated venture capital initiatives without immediately affecting state revenues. Contingent tax credit programs are statutory state guarantees established to incentivize venture capital investment into state target industries. At least seven states (Arkansas, Iowa, Michigan, Ohio, Oklahoma, South Carolina, and Utah) have adopted programs authorizing the issuance of contingent tax credits to investors in state-sponsored fund of funds.⁹ However, it does not appear that any state has created an infrastructure funding program similar to the one proposed in this bill.

III. Effect of Proposed Changes:

SB 1472 broadens the Capital Formation Act in Part X of ch. 288, F.S., to create the Florida Infrastructure Fund Partnership (partnership) and the Florida Infrastructure Investment Trust (trust) as a means to attract private capital to finance large-scale infrastructure improvements in this state. The bill provides up to \$700 million in tax credits, which are equal to the investors' net capital losses and are available to investors at the investment's designated maturity date. The credits cannot be claimed prior to 12 years from the date of the investment; based on the bill's effective date, credits may not be claimed before July 1, 2024.

Section 1: Amends s. 288.9621, F.S., to modify the short title, Florida Capital Formation Act, in Part X of ch. 288, F.S.

Section 2: Amends s. 288.9621, F.S., to broaden legislative intent with respect to the need for more seed capital and early-stage venture capital to include infrastructure projects.

Section 3: Amends s. 288.9623, F.S., to add several definitions relevant to the proposed Florida Infrastructure Fund Partnership. Key definitions are:

- **Certificate** means a contract between the trust and an investment partner which guarantees the availability of transferable tax credits for use by the partner in order to guarantee the partner's capital investment in the partnership.

⁶ Strategic Intermodal System Unfunded Needs Plan, at 1.

⁷ *Id.*

⁸ Clean Watersheds Needs Survey 2008 Report to Congress, at vii of Executive Summary.

⁹ As a sample, see State Venture Capital Symposium presentation "Building a Regional Venture Capital Industry with Contingent Tax Credits" (May 2006), available at <http://www.cdfa.net/cdfa/cdfaweb.nsf/ordredirect.html?open&id=nasvf-taxcredits.html>; Utah's Fund of Funds program, available at <http://www.utahfundoffunds.com/>; and Invest Iowa's Fund of Funds program, available at <http://www.investiowa.com/icic/web.nsf/pages/fundoffunds.html>.

- Commitment agreement means a contract between the partnership and an investment partner under which the partner commits to providing a specified amount of investment capital in exchange for an ownership interest in the partnership.
- Infrastructure project means a capital project in this state for a facility or other infrastructure need in the state with respect to any of the following: water or wastewater system, communication system, power system, transportation system, renewable energy system, ancillary or support system for any of these types of projects, or other strategic infrastructure located within the state.
- Investment partner or partner means a person, other than the partnership, the FOF, or the trust, who purchases an ownership interest in the partnership or who is a transferee of such interests.
- Net capital loss means an amount equal to the difference between the total investment capital advanced by the investment partner and the amount of aggregate actual distributions received by the investment partner.
- Tax credit means a credit issued against the taxes specified in s. 288.9628(7)(c), F.S.

Section 4: Creates s. 288.9627, F.S., the Florida Infrastructure Fund Partnership. This section details how the partnership is created, its purposes, and how it operates.

Governance

The FOF is authorized to facilitate the creation of the partnership, which will be organized and operated under ch. 620, F.S., as a private, for-profit, limited partnership or limited liability partnership. The partnership is not an instrumentality of the state.

The FOF is identified as the general partner for the partnership, and is authorized to loan up to \$750,000 to the partnership for use in paying initial organizational expenses and to solicit investment partners. The FOF also is responsible for managing the partnership's business affairs, including, but not limited to:

- Hiring one or more investment managers to assist with the management of the partnership;
- Soliciting and negotiating the terms, contracting, and receipt of the investment capital;
- Receiving investment returns, paying investment partners, and approving investments; and
- Engaging in other activities necessary to operate the partnership.

Infrastructure Investments

The partnership is authorized to make direct investments in Florida-based infrastructure projects that foster economic development and meet an important infrastructure need of the state. Eligible infrastructure projects include: water or wastewater systems, communication system, power system, transportation system, renewable energy system, ancillary or support system for any of these types of projects, or other strategic infrastructure located within the state.

Capital for these investments must be raised by the partnership through "commitment agreements" with investment partners, and the terms of the commitment agreements must be approved by the FOF's board. Investments can be accepted by the partnership beginning July 1, 2012. SB 1472 provides for the concurrent issuance of certificates by the trust (*described in*

Section 5 below) for future tax credits that guarantee the return of only the equity portion of the investments to the partners.

SB 1472 requires that the total principal investment payable to the partnership and the total amount of tax credits to be issued by the Department of Revenue (DOR) may not exceed \$700 million. However, if the partnership fails to obtain investment commitments totaling at least \$100 million by December 1, 2013, then the partnership must cancel all agreements and return the equity investments to the partners.

Investment decision-making

Additionally, the partnership may only invest in infrastructure projects which:

- Fulfill an important infrastructure need in the state;
- Raise funding from other sources so that the total amount invested in the project is at least twice the amount invested by the partnership, inclusive of the partnership's investment; and
- Have appropriate legal controls in place to ensure that no infrastructure project will be fraudulently closed.

The partnership must evaluate potential infrastructure projects based on the following factors:

- The written business plan for the project, including all expected revenue sources;
- The likelihood of the project attracting operating capital through grants or from investors or other lenders;
- The management team for the proposed project;
- The project's job creation potential in Florida;
- The financial resources of the entity proposing the project;
- The presence of reasonable safeguards to ensure the project provides a continuing benefit for residents of the state; and
- Other factors deemed by the partnership to be relevant to the likelihood of the success of the project.

Additionally, the partnership may not invest more than 20 percent of its total capital in any single infrastructure project. The partnership is prohibited from investing in any infrastructure project authorized under the Florida Rail Enterprise Act, related to high-speed rail projects;¹⁰ with any financial institution or company identified in s. 215.472, F.S., that engages in commerce with Cuba; or with any "scrutinized company," as that term is defined in s. 215.473, F.S., relating to companies that engage in commerce with Iran and Sudan.

Provisions related to the Credit of the State

SB 1472 prohibits the partnership from pledging the credit or taxing power of the state or any political subdivision thereof and may not make its debts payable from any moneys or resources except those of the partnership. An obligation of the partnership is not an obligation of the state or any political subdivision thereof but is an obligation of the partnership, payable exclusively from the partnership's resources.

¹⁰ Sections 341.8201 – 341.842, F.S.

Reporting Requirements

The partnership must submit an annual report December 1 of each year to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The annual report, at a minimum, must include:

- An accounting of the amount of investment capital raised and disbursed by the partnership.
- The progress of the partnership's activities, including the progress of infrastructure projects that have received direct investments.
- A description of the costs and benefits to the state resulting from the partnership's investments, including:
 - A list of infrastructure projects;
 - The costs and benefits of each project to the state, county, and municipality, as applicable;
 - The number of businesses and associated industries affected;
 - The number, types, and average annual wage of jobs created or retained; and
 - The impact of the program on the state's economy.
- Independently audited financial statements, including statements that show receipts and expenditures during the preceding fiscal year for the partnership's operating costs.

Section 5: Creates s. 288.9628, F.S., the Florida Infrastructure Investment Trust, a state beneficiary public trust, to be governed by an independent board of trustees (board).

Governance

The board is comprised of the executive director of DOR, executive director of the Department of Economic Opportunity, and the vice chair of EFI, or their designees. The bill allows an administrative officer to act on behalf of the trust under the direction of the board. The board members and the administrative officer are prohibited from receiving compensation from, and having a financial interest in, any investment partner. They serve without compensation, but are entitled to reimbursement of their expenses. SB 1472 specifies that each board member and staff "has a duty of care to the trust." The trust and the FOF may seek reimbursements for expenses by charging a fee for the issuance of certificates to investment partners. The fee may be no more than .25 percent of the aggregate investment capital committed to the partnership.

Powers and duties of the trust

SB 1472 authorizes the trust to:

- Engage consultants and retain professional services;
- Issue tax certificates to the investment partners, redeemable for tax credits;
- Sell the tax credits;
- Expend funds and invest funds; and
- Enter into contracts, and bond or insure against loss.

As mentioned above, the trust may issue certificates, redeemable against the state tax credits, to partners that make equity investments in the partnership. A certificate issued to a partner guarantees the availability of tax credits equal to the principal investment specified in the partner's commitment agreement with the partnership. Certificates issued by the trust may not exceed a total aggregate of \$700 million of tax credits. Further, a certificate issued by the trust

must have a specific calendar year maturity date designated by the trust of no earlier than 12 years after the date of issuance. A partner's certificate and related tax credits can be transferred to a new owner in whole or in part.

SB 1472 specifies that the provisions of ch. 517, F.S., dealing with regulation of securities, do not apply to the certificates and tax credits transferred or sold under this program.

Notification and Election of Tax Credits

If, on the maturity date of a certificate, a partner's principal investment has suffered a "net capital loss," the partnership must provide written notification of this circumstance to the partner. As defined earlier, "net capital loss" is defined to mean an amount equal to the difference between the total investment capital made by the investment partner to the partnership and the amount of the aggregate actual distributions received by the investment partner. The notification must include, at a minimum, the following information as of the date of the notice:

- A good-faith estimate of the fair-market value of the partnership's assets;
- The total capital investment of all partners;
- The total amount of distributions received by the partners; and
- The amount of the tax credit(s) for which the partner is entitled to be issued by DOR.

Upon receipt of notice from the partnership, each affected partner may elect to:

- Have the tax credits issued in its name;
- Authorize the trust to sell the tax credits on its behalf, with the proceeds of the sale paid to the partner; or
- Maintain its investment in the partnership.

An affected partner has 30 days, after receiving notification, to provide written notification to the partnership and the trust which option it has chosen. This election is final, except if the trust is unable within 90 days to sell enough tax credits to reimburse an affected partner who elected to have the trust sell tax credits for reimbursement of a net capital loss. Failing to provide a timely notice will result in the investment partner being deemed to have elected to maintain investment in the partnership.

Issuance and Sale of Tax Credits

In the event that a partner becomes eligible for tax credits and elects to claim tax credits under the program, the trust will, on behalf of the partner, apply to DOR for the issuance of tax credits. The tax credits certified by DOR may not exceed the partner's net capital loss. The partner must agree in writing to transfer its interest in the partnership to the FOF before receiving the tax credits.

Alternatively, the trust may sell tax credits on behalf of a partner, in an amount no more than the lesser of the maximum amount of tax credits available under the terms of the certificate issued to the partner, or the amount necessary to repay a partner's net capital loss. Again, before receiving the proceeds from the trust's sale of tax credits, the partner must agree in writing to transfer its interest in the partnership to the FOF.

Within 30 days following receipt of a partner's election or the trust's sale of the tax credits, the trust must notify the partnership and then apply to DOR for issuance of the tax credits in the name of the partner or purchaser. The application must include the following information:

- The partnership's certification of the amount of credits to be issued;
- Identification of the applicable taxpayer; and
- The state tax against which the credits can be applied.

Within 30 days of the receipt of an application, DOR must issue tax credits to the partner or purchaser in the amount designated by the trust in the application. If the trust is unable to sell the partner's tax credits within 90 days, the partner may modify its election choice, to include having the unsold credits issued such partner, less the proceeds of any sold tax credits, or direct the trust to continue trying to sell the credits until the partner's investment is made whole.

The tax credits issued by DOR can be used to offset state sales, corporate, or premium insurance tax liability, or as refund of taxes paid; such credits must be applied to tax liability, or taken as a refund within 7 years after the credits are issued. As mentioned earlier, the credits also can be sold or transferred to another taxpayer.

SB 1472 specifies that the tax credits, when issued to a partner, are an obligation of the state, secured exclusively by the ownership interest transferred to the FOF by the partner whose investment generated the tax credits. In that case, the state's recovery is limited to the forfeited ownership interest. The FOF is not liable to the state for repayment of the used tax credits.

DOR is directed to account for the tax credits used pursuant to the provisions of SB 1472 and to make that information available to the partnership.

Section 6: Amends s. 213.053, F.S., to authorize DOR to enter into a written agreement with the partnership and the trust to make available to those entities information related to the tax credits available under this program.

Section 7: Provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference (REC) determined the impact of the bill. Specifically, after its meeting on February 3, 2012, the REC adopted a consensus estimate of “0 cash, negative indeterminate recurring for the four years [through 2016]. This bill exposes the state to contingent future tax credits ranging from \$0 to \$700 million, beginning in 2024 at the earliest.”¹¹ DEO additionally submits that the impact of the bill is indeterminate because of contingent tax credits. No more than \$150 million in tax credits may be utilized in any one fiscal year.¹²

B. Private Sector Impact:

The program has potential for encouraging the funding of state infrastructure projects. DEO submits that projects with a positive return will have a positive impact on the private sector and growth.¹³ If the program invests in successful projects, the economic impact on the private sector will be positive. EFI and FOF suggest that the program could:

- Attract up to \$6+ billion of private capital to Florida;
- Create thousands of Florida jobs;
- Create permanent infrastructure assets in Florida;
- Alleviate budget pressure, by leveraging private capital to solve government needs;
- Generate results with potentially no costs to the state; and
- Accelerate the deployment of infrastructure funds and speed recovery of the Florida economy.¹⁴

In a different vein, DOR notes that some taxes may be credited against other taxes, such as when the corporate income tax of an insurer is credited against the insurer’s insurance premium tax liability. It warns that, if taxpayers are not careful with their application of this credit, they may not receive any overall financial benefit from it.¹⁵

C. Government Sector Impact:

DOR advises that tax returns will need to be revised in time for claiming credits on 2024 returns. Under its current environment, extensive system modifications would be

¹¹Revenue Estimating Conference Report for HB 1491 (Feb. 3, 2012) (available at <http://edr.state.fl.us/Content/conferences/revenueimpact/archives/2012/pdf/page361.pdf>).

¹² DEO, *2012 Bill Analysis for HB 1491* (Jan. 23, 2012), at 5.

¹³ *Id.*

¹⁴EFI, *2011 Legislative Priorities: Florida Infrastructure Fund-House Bill 943* by Rep. Eisnaugle; FOF, *Proposed Addition of Sections 288.9627-288.9638*; and FOF, *Proposed Florida Infrastructure Program* (Jan. 2012). All three of these documents are on file with the Senate Committee on Commerce and Tourism.

¹⁵ DOR, *2012 Bill Analysis (Revised): SB 1472-Capital Formation for Infrastructure Projects* (Jan. 24, 2012), at 9 (on file with the Senate Committee on Commerce and Tourism).

necessary to administer this credit. A process for issuing the refunds will need to be developed, and system modifications for data capture will be needed.¹⁶

VI. Technical Deficiencies:

DOR identifies several technical issues that it says cannot be resolved by rulemaking:

- On page 5, lines 128-30 state that the partnership shall manage its business affairs, while lines 135-37 state that FOF, as a general partner of the partnership, “shall manage the partnership’s business affairs.” It is unclear what entity is vested with the management responsibilities of the partnership.
- On pages 15 and 16, lines 431-42 provide the state with the possibility of recovery of amounts provided to designated investors as tax credits or refunds. However, the bill does not address to whom recovered amounts will be paid, where such recovered amounts shall be deposited, or when the partnership is required to make such payments.
- On page 16, lines 447-50 require DOR to issue assurances to the trust that its certificates will be honored by DOR. It is unclear what assurances DOR could provide over and above the statutory provisions.¹⁷

VII. Related Issues:

DOR explains that a trustee of the trust (one of which is the executive director of DOR) is required to perform two major functions: (1) issue the certificates to the investment partner, and (2) sell the investment partner’s credit certificate in certain situations. The executive director of DOR may have a conflict of interest between her current responsibilities administering the enforcement and collection of taxes as head of DOR and her role as a trustee of the trust, which is authorized to sell tax credit certificates. The same taxpayers whose tax liabilities are enforced by DOR are the ones that would be purchasing the tax credit certificates. DOR states that this issue cannot be resolved by rulemaking.¹⁸

VIII. Additional Information:

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

None.

B. Amendments:

None.

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

¹⁶ DOR, *Fiscal Impact Analysis-2012 Session: SB 1472-Capital Formation of Infrastructure Projects* (Jan. 13, 2012), at 2 (on file with the Senate Committee on Commerce and Tourism).

¹⁷ DOR Bill Analysis, at 7-8.

¹⁸ DOR Bill Analysis, at 8.