

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 Committee on Criminal Justice

BILL: CS/CS/SB 390

INTRODUCER: Criminal Justice Committee; Military Affairs, Space, and Domestic Security Committee; and Senator Dean

SUBJECT: Veterans' Organizations

DATE: February 19, 2013 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ryon	Ryon	MS	Fav/CS
2.	Clodfelter	Cannon	CJ	Fav/CS
3.			JU	
4.			RC	
5.				
6.				

Please see Section VIII. for Additional Information:

- A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes
- B. AMENDMENTS..... Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

CS/CS/SB 390 allows a veterans' organization to sue a business entity that holds itself out as a veterans' organization if it has reason to believe that the business entity does not operate primarily for the financial benefit and moral support of veterans and their families. The bill gives the business entity the burden of proof of showing, by clear and convincing evidence, that it does operate primarily for the financial benefit and moral support of veterans and their families. Upon an adverse adjudication, the court must issue an injunction ordering the business entity to cease and desist its business practices while holding itself out as a veterans' organization. In addition, the court may impose a civil penalty of up to \$500 and require payment of court costs and reasonable attorney fees incurred by the plaintiff.

The bill provides that a business entity that unlawfully holds itself out as a veterans' organization commits a misdemeanor of the first degree.

The bill also amends s. 817.312, F.S., which prohibits persons from misrepresenting themselves as a current member or veteran of the United States military and wearing a uniform, medal or insignia that is authorized for use by members or veterans of the U.S. military while soliciting for

charitable contributions. The bill amends the statute to apply when the person is either misrepresenting himself or herself as a servicemember or veteran or is wearing a military uniform, medal, or insignia which he or she is not authorized to wear. In addition, the prohibited activity is expanded to include misrepresentation or improper wear for the purpose of material gain.

The bill creates an unnumbered section and amends section 817.312 of the Florida Statutes.

II. Present Situation:

Veterans' organizations, also referred to as veterans' service organizations, are non-profit groups that advocate for and assist veterans, while also providing opportunities for veterans to get involved with the larger community. Their particular roles and activities vary. While the term "veterans' organization" is not defined in Florida Statutes in a broad context, these organizations are treated in much the same way as other charitable and non-profit organizations.

Congressionally-Chartered Veterans' Organizations

Title 36 of the U.S. Code lists national or patriotic non-profit corporations who have been granted corporate charters by act of Congress and whose primary purpose is to promote patriotic, charitable, educational, or other eleemosynary activities.¹ Many of these organizations are military veteran services oriented organizations. The corporations listed in Title 36 are not agencies of the United States, and the charter does not assign any governmental attributes.² The attraction of Title 36 status for national organizations is that it tends to provide an "official" imprimatur to their activities and, to the extent, it may provide them prestige and indirect financial benefit.

Currently, federal supervision of congressionally chartered non-profit organizations is limited. All "private corporations established under federal law," as defined and listed in Subtitle II,³ are required to have independent audits annually, and to have the reports of the audits submitted to Congress.⁴ Such organizations are also required to submit annual reports of their activities to Congress.

Nationally Recognized Veterans' Organizations

The U.S. Department of Veterans Affairs (USDVA) is authorized to recognize certain veterans' organizations as national organizations for the purpose of assisting claimants for USDVA benefits in the preparation, presentation, and prosecution of their claims.⁵ A veterans' organization may be recognized as a national organization if it satisfies specified criteria, which requires that a veterans' organization:

¹ These entities are referred to as "Title 36 corporations" because they are found in Title 36 of the U.S. Code.

² CRS Report for Congress, Congressionally Charters Non-profit Organizations ("Title 36 Corporations"): What They Are and how Congress Treats Them; Updated April 8, 2004; Ronald C. Moe, Consultant in American National Government. page 5.

³ 36 U.S.C. Subtitle II

⁴ 36 U.S.C. s. 10101

⁵ 38 U.S.C. s. 5902

- Has a primary purpose of serving veterans;
- Demonstrates a substantial service to veterans;
- Commits a significant portion of its assets to veterans' services and has adequate funding to properly perform those services; and
- Maintains capability of providing complete claims service to each claimant requesting representation.⁶

In addition, a nationally recognized organization must have the capability and resources to provide representation to a sizeable number of claimants, must be geographically diversified (i.e., one or more posts in at least 10 states), and in the case of membership organizations, must maintain a membership of 2,000 or more persons.⁷

The USDVA maintains a directory of congressionally chartered and non-chartered veterans' organizations recognized as national organizations.⁸ This directory also includes other congressionally chartered and non-chartered veterans' organizations that are not recognized by the USDVA as national organizations, but which represent the interest of American veterans.

Annual Registration with Department of Agriculture and Consumer Services

Veterans' organizations that intend to solicit donations in Florida must register with the Florida Department of Agriculture and Consumer Services (DACS). Florida's Solicitation of Contributions Act requires charitable organizations that engage in solicitation activities in Florida to register with the DACS and provide certain financial and background information as well as pay initial and annual renewal fees.⁹ Registration statements must contain prescribed information¹⁰ and be accompanied by the appropriate fee.¹¹ Veterans' organizations that have been granted a federal charter under Title 36, U.S.C., are exempt from the DACS registration requirements.¹²

While the DACS does not oversee the activities of the organizations that are required to register with the DACS, it does monitor an organization's activities to ensure compliance with the requirements in the Solicitation of Contributions Act. In addition, the DACS provides information to the public on the organizations registered to solicit contributions in Florida via the DACS's Gift Givers' Guide.¹³

Federal and State Tax Exemptions for Veterans' Organizations

Depending on its organization or purpose, a veterans' organization may be recognized as tax exempt from federal income tax under the following sections of the Internal Revenue Code:

⁶ 38 CFR s. 14.628

⁷ *Id.*

⁸ U.S. Department of Veterans Affairs. *Veterans and Military Service Organizations (Directory)*. Available at: http://www1.va.gov/vso/VSO-Directory_2012-2013.pdf

⁹ Chapter 496, F.S.

¹⁰ Section 496.405(2), F.S.

¹¹ Section 496.405(4)(a), F.S.

¹² Section 496.406(3), F.S.

¹³ Florida Department of Agriculture and Consumer Services. *Florida Charities Gift Givers' Guide*. Available at: <https://csapp.800helpfla.com/cspublicapp/giftgiversquery/giftgiversquery.aspx>

- 501(c)(19) – veterans’ organizations
- 501(c)(4) – social welfare organizations
- 501(c)(7) – social clubs
- 501(c)(8) – fraternal beneficiary societies
- 501(c)(10) – domestic fraternal societies
- 501(c)(2) – title holding corporations¹⁴

Veterans’ organizations have to meet specified criteria in order to be granted tax exempt status under the Internal Revenue Code. For example, section 501(c)(19), I.R.C., provides for an exemption from federal income tax for an organization of past or present members of the United States Armed Forces if:

- It is organized in the United States;
- At least 75% of its members are past or present members of the U.S. Armed Forces;
- Substantially all of its other members are individuals who are cadets or are spouses, widows, widowers, ancestors or lineal descendants of past or present members of the U.S. Armed Forces or of cadets; and
- No part of the net earnings of which inures to the benefit of any private shareholder or individual.

Florida law exempts qualified veterans’ organizations from tax on sales and leases, when used in carrying out customary veterans’ organization activities.¹⁵ Veterans’ organizations that qualify for this exemption are those that are nationally chartered or nationally recognized as a veterans’ organization, which holds a current exemption under s. 501(c)(4) or (19) of the Internal Revenue Code. Additionally, under s. 220.22(4), F.S, certain veterans’ organizations are exempt from state corporate income tax in Florida.

Civil and Criminal Actions

Organizations that solicit contributions for charitable purposes, including veterans’ organizations, are subject to the requirements of chapters 496 and 501, F.S. Chapter 496, F.S., specifically governs solicitation of funds. Section 496.419, F.S., gives the DACS authority to investigate violations of chapter 496, F.S., and to bring administrative action against individuals and entities that violate the solicitation requirements. The DACS can issue cease and desist orders and assess fines of up to \$500 per act or omission for 501(c)(3) organizations and up to \$1000 per act or omission for other individuals or entities. In addition, the DACS is required to report criminal violations of Chapter 496, F.S., to the prosecuting authority. Willful and knowing violation of ss. 496.401-495.424, F.S., is a third degree felony for the first offense and a second degree felony for subsequent offenses.¹⁶

Section 496.416, F.S., provides that violation of any provision of ss. 496.401-495.424, F.S., is also an unfair or deceptive act or practice or an unfair method of competition in violation of chapter 501, part II of the Florida Statutes (the “Florida Deceptive and Unfair Trade Practices

¹⁴ Internal Revenue Service. *Tax Guide: Veterans’ Organizations*. Available at: <http://www.irs.gov/pub/irs-pdf/p3386.pdf>

¹⁵ Section 212.08(7)(n), F.S.

¹⁶ Section 496.417, F.S. A third degree felony is punishable by imprisonment for not more than 5 years and a fine of up to \$5000. A second degree felony is punishable by imprisonment for not more than 15 years and a fine of up to \$5000.

Act”). Violations of the Florida Deceptive and Unfair Trade Practices Act are enforced by either the appropriate state attorney or the Department of Legal Affairs (Attorney General’s Office). Available civil remedies include cease and desist orders and civil penalties of up to \$10,000 per violation.¹⁷

In addition to action taken by an enforcing authority, s. 501.211, F.S., authorizes anyone who has been aggrieved by a practice that is in violation of the Florida Deceptive and Unfair Trade Practices Act to bring a civil action against the violator. In such an action, the aggrieved party can obtain injunctive relief, recover any actual damages, and be awarded attorney fees and court costs. However, the defendant may be awarded attorney fees and court costs if it prevails in defending the claim.

Section 817.312, F.S., provides that it is a third degree felony for a person to solicit for charitable contributions while both: (1) misrepresenting himself or herself as a member or veteran of the United States Air Force, United States Army, United States Coast Guard, United States Marine Corps, United States Navy, or National Guard (hereinafter referred to as “the United States military”); and (2) wearing the uniform of or any medal or insignia authorized for use by members or veterans of the United States military.

III. Effect of Proposed Changes:

Section 1: This section of the bill defines a veterans’ organization as “an organization which exists primarily to benefit veterans or their families.” It allows a veterans’ organization whose membership is limited to veterans and their families to bring a civil action for an injunction against a business entity that holds itself out as a veterans’ organization but does not operate primarily for the financial benefit and moral support of veterans and their families. The bill places the burden of proof on the business entity to show by clear and convincing evidence that it does in fact operate primarily for the financial benefit and moral support of veterans and their families.

In addition to issuing an injunction prohibiting the business entity from continuing its business practices while holding itself out as a veterans’ organization, the court may impose a civil penalty of up to \$500 and award court costs and reasonable attorney’s fees to the plaintiff.

In many cases, actions that are proscribed in the bill would also violate chapters 496 or 501, F.S., but the violation might not prompt action by government entities charged with enforcing those chapters. It is also not clear that a veterans’ organization would be an “aggrieved party” which could bring an individual action under s. 501.211, F.S. The bill provides a legal mechanism for legitimate veterans’ organizations to stop misrepresentation and solicitation by purported veterans’ organizations.

The bill also provides that it is a first degree misdemeanor for a business entity to hold itself out as a veterans’ organization if it does not in fact operate primarily for the financial benefit and

¹⁷ Section 501.2077, F.S., provides for an enhanced civil penalty of up to \$15,000 per violation if the illegal practice victimized senior citizens or handicapped persons.

moral support of veterans and their families. First degree misdemeanors are punishable by a fine of up to \$1000 and, if the defendant is a natural person, imprisonment for up to one year.

It is possible that a business entity's actions that violate this bill's provisions could also violate other statutes of more general applicability, such as the criminal provisions of Chapter 496, F.S. The bill includes language to ensure that the new statute does not preclude bringing any civil or criminal action that may be available under an existing statute.¹⁸

Section 2: This section of the bill amends s. 817.312, F.S., in several ways:

- It prohibits soliciting for charitable contributions while either misrepresenting that one is a member or veteran of the United States military or while wearing the uniform of or any medal or insignia that is authorized for wear by members or veterans of the United States military. Currently, the statute prohibits a person from soliciting for charitable contributions while misrepresenting military or veteran status if the person is wearing a US military uniform, medal, or insignia at the time.
- It expands the scope of the criminal offense to include misrepresenting military status or wearing a United States military uniform, medal or insignia “for the purpose of material gain.”
- It provides that a person does not violate the statute for wearing a US military uniform, medal, or insignia that he or she is authorized to wear, or if the person is an actor engaged in a theatrical production.

Unlike s. 250.43, F.S., which prohibits the wear of a United States military uniform, any part of such uniform, or any similar uniform, s. 817.312, F.S., does not prohibit the wear of part of a uniform (except for medals or insignia which the person is not authorized to wear) or a uniform that is similar to a United States military uniform. In *State v. Montas*, 993 So.2d 1127 (Fla. 5th Dist. 2008), the court pointed out that these provisions of s. 250.43, F.S., would prohibit a child from wearing his parent's Army boots or a person wearing an imitation military uniform for Halloween.¹⁹

Effective date: The bill provides an effective date of July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹⁸ See *State v. Maloy*, 823 So.2d 815 (Fla. 1st Dist. 2002), which recognized “the principle of criminal law which ordinarily gives controlling effect to the particular and specific statutory proscriptions addressing acts which otherwise might also be circumscribed by more general criminal provisions.”

¹⁹ In *Montas*, s. 250.43, F.S., was found to be unconstitutional because its provisions banned both protected and unprotected speech. The constitutional implications of this bill are discussed in Section IV, Constitutional Issues.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill amends s. 817.312, F.S., to prohibit misrepresentation of military status or wearing a United States military uniform, medal, or insignia without authorization while soliciting for charitable contributions or for the purpose of material gain. This raises questions of whether such restrictions violate the Free Expression Clause of the First Amendment of the United States Constitution. For the reasons discussed below, it appears that the restrictions are constitutional.

The issue of misrepresentation of military service was recently considered by the United States Supreme Court. In *United States v. Alvarez*, 132 S. Ct. 2537 (2012), the Court considered the case of an official who was convicted of violating the Stolen Valor Act, 18 U.S.C. § 704(b), for falsely stating at a public meeting that he was a recipient of the Congressional Medal of Honor. The Court found that the Stolen Valor Act, which made it a crime to lie about receiving military medals or honors, violated the First Amendment's guarantee of the right to free speech. In considering whether the conduct prohibited by the statute was protected speech, the Court noted that "The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain." *Alvarez* at 2547. The Court also noted: "Where false claims are made to effect a fraud or secure moneys or other valuable considerations, . . . , it is well established that the Government may restrict speech without affronting the First Amendment." *Alvarez* at 2547. Because this portion of s. 817.312, F.S., will prohibit misrepresentation of military status only in connection with soliciting for charitable contributions or for the purpose of material gain, it does not impermissibly infringe on First Amendment rights.

The prohibition against unauthorized wear of a military uniform, medal, or insignia is subject to similar analysis. As previously noted, the Fifth Circuit Court of Appeals found that the prohibition in s. 250.43, F.S., against wearing a United States military uniform, any part of such uniform, or any similar uniform was unconstitutionally broad.²⁰ The court focused on the fact that s. 250.43, F.S., did not include specific intent to deceive as an element of the offense, and that there was no way for it to narrowly interpret the statute to include such an element. This focus on "intent to deceive" is consistent with the reasoning in *United States v. Perelman*, 695 F.3d 866 (9th Cir. 2012) which upheld 18 U.S.C. § 704(a) against a challenge that its prohibition against unauthorized wear of United States military medals or decorations was overbroad on its face and thus unconstitutional. In that case, the federal appellate court found that it could interpret the statute to reflect Congressional intent that it required "intent to deceive," even though such intent was not explicitly stated.

²⁰ See *State v. Montas*, 993 So.2d 1127 (Fla. 5th Dist. 2008).

Unlike s. 250.43, F.S., the bill's amendment to s. 817.312, F.S., would prohibit unauthorized wear of a United States military uniform, medal, or insignia only in limited circumstances. The restriction of the prohibition to times when the wearer is soliciting for charitable contributions or is seeking material gain indicates that it is intended to prevent deception of potential donors or benefactors. It is likely that this portion of the statute would be upheld against a First Amendment challenge because it regulates an implicit misrepresentation for the purpose of material gain. However, addition of specific "intent to deceive" language would clarify the purpose of the statute.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Organizations that misrepresent themselves as operating primarily for the benefit of veterans and their families are subject to a civil penalty of up to \$500 and payment of the plaintiff's attorney's fees and court costs. If found guilty of the newly created first-degree misdemeanor offense, they are subject to a potential fine of up to \$1,000.

The impact of the amendments to s. 817.312, F.S., on prison bed space needs has not yet been considered by the Criminal Justice Estimating Conference.

C. Government Sector Impact:

The Office of the State Courts Administrator notes a probable, though indeterminate, increase in judicial time and court workload associated with the new civil and criminal processes.²¹

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

²¹ Office of State Courts Administrator. 2013 Judicial Impact Statement for SB 390.

VIII. Additional Information:

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

CS/CS by Criminal Justice on February 19, 2013:

- Clarifies that Section 1 of the bill applies to any business entity falsely holding itself out as a veterans' organization and that it is intended to be additional to existing statutory remedies.
- Reorganizes Section 1 to combine the elements of the criminal offense and the criminal penalties in the same subsection of the new statute.
- Amends s. 817.312, F.S., to expand the scope of the existing criminal offense that prohibits misrepresentation of military or veteran status and wear of a military uniform, medal, or insignia while soliciting for charitable contributions.

CS by Military Affairs, Space, and Domestic Security on February 6, 2013:

The Committee Substitute reorganizes and modifies the bill to address technical issues.

- B. **Amendments:**

None.