

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 201 Flags

SPONSOR(S): Government Operations Subcommittee; Workman and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1334

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N, As CS	Stramski	Williamson
2) Criminal Justice Subcommittee			
3) Local & Federal Affairs Committee			
4) State Affairs Committee			

SUMMARY ANALYSIS

State law requires the display of the United States flag and state flag in certain public fora. However, there is no state law or regulation relating to the origin of United States or state flags procured by state or local governments in Florida.

The bill provides that a United States or state flag purchased by the state, a county, or a municipality for public use must be manufactured in the United States from materials grown, produced, and manufactured in the United States. The bill applies to purchases of such flags on or after January 1, 2015.

The bill may have a fiscal impact on state and local governments. See FISCAL COMMENTS section.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Display of the United States Flag and State Flag

State law requires the display of the United States flag in certain public fora. For example, the United States flag must be displayed at the state capitol and at each county courthouse,¹ at each polling place during all days when an election is held,² at each public auditorium,³ and at each K-20 educational institution provided for or authorized under Florida law, including in each classroom of such institution.⁴

The Governor has the authority to adopt a protocol on the display of the state flag.⁵ The state flag must be displayed, among other locations, at every elementary and secondary school, with such flags to be furnished by the appropriate school board.⁶

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency⁷ procurement of personal property and services. The Department of Management Services (department) is responsible for overseeing state purchasing activity, including professional and construction services, as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.⁸ The department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.⁹

Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods.¹⁰ Purchases with a value of \$35,000 or below may be carried out informally, though may involve receipt of written and telephonic quotations and informal bids.¹¹ For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.¹²

Local governments are not subject to the provisions of chapter 287, F.S., and procure commodities and services pursuant to local procurement ordinances.

*Florida In-state Preference*¹³

State agencies, universities, colleges, school districts, and other political subdivisions are required to grant a preference in the award for contracts for the purchase of personal property, when competitive solicitation is required and when the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is in another state, or political subdivision of that state.¹⁴ The

¹ Section 256.01, F.S.

² Section 256.011(1), F.S.

³ Section 256.11, F.S.

⁴ Section 1000.06, F.S.

⁵ Section 256.015, F.S.

⁶ Section 256.032, F.S.

⁷ Section 287.012(1), F.S., defines agency as "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."

⁸ See ss. 287.032 and 287.042, F.S.

⁹ *Id.*

¹⁰ See ss. 287.012(6) and 287.057, F.S.

¹¹ Rule 60A-1.002(2), Fla. Admin. Code.

¹² Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid.

¹³ Florida's preference law does not apply to transportation projects for which federal aid funds are available, or to counties or cities. It also does not apply in the award of contracts for the purchase of construction services. Section 287.084(1), F.S.

¹⁴ Section 287.084(1)(a), F.S.

preference is mandatory and is utilized by the procuring entity to award a preference to the lowest responsible and responsive vendor having a principal place of business in this state. The preference awarded is the same preference provided by the out-of-state bidder's home state.

If the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is another state, or political subdivision of that state, and that state does not award a preference for in-state vendors, state agencies, universities, colleges, school districts, and other political subdivisions must award a 5 percent preference to Florida based vendors.¹⁵

Florida Flag Procurement

Currently, there is no state law specifically relating to the origin of United States or state flags procured by state or local governments in Florida. As such, the procurement would be conducted in accordance with the laws and rules applicable to state or local government procurements.

Flags purchased for public use may be manufactured overseas; however, the quantity of foreign-made United States flags purchased by state and local governments is likely to be relatively small.¹⁶

The Department of Management Services has indicated that of the 772 flags purchased by 13 agencies through the MyFloridaMarketPlace web portal, 682 were produced by RESPECT of Florida¹⁷ from materials fabricated in the United States.¹⁸

Flag Procurement in Other States

Other states have passed legislation in recent years related to the purchase of United States flags. The most restrictive law was passed in Minnesota, and prohibits the sale of any United States flag in the state unless the flag was made in the United States.¹⁹ Most states to consider the issue have not gone so far. Oklahoma, for example, requires flags purchased by the state and its subdivisions to be manufactured in the United States.²⁰ Massachusetts requires all flags on display at public institutions to be manufactured in the United States.²¹ Missouri law provides that all state and American flags flown on state property must be manufactured in the United States.²² Other states also have similar provisions related to the origin of flags displayed at public locations.²³

Federal Flag Procurement

The Buy American Act of 1933 requires federal agencies to procure flags manufactured domestically if the relevant contract exceeds a specific threshold.²⁴ However, the Trade Agreements Act of 1979²⁵ authorizes the President of the United States to waive this purchasing requirement for the purpose of entering into trade agreements with other countries.²⁶ According to the Congressional Research Service, the Buy American Act requirements are significantly limited in application by the waiver

¹⁵ *Id.*

¹⁶ Foreign-made United States flags constitute only a few percent of the total number of United States flags purchased in the United States. The Flag Manufacturers Association of America estimates that 95 percent of United States flags are manufactured entirely in the United States. Frequently Asked Questions, available at <http://www.fmaa-usa.com/info/faq.php> (last visited March 10, 2013). The United States Census Bureau estimates that in 2012, the total dollar value of imports of United States flags was \$3.8 million. In 2007, the most recent year for which data is available, the Census estimated the total value of shipments of flags, banners, and similar emblems by the nation's manufacturers to be \$302.7 million. *Profile America Facts for Features*, available at http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb13-ff14.html (last visited December 6, 2013).

¹⁷ RESPECT of Florida is a state-established non-profit organization designated to administer programs set up to provide employment to handicapped individuals. Sections 413.032-413.037, F.S.

¹⁸ HB 201 Bill Analysis by the Department of Management Services, March 6, 2014 (on file with the Government Operations Subcommittee).

¹⁹ Minn. Stat. Ann. Sec. 325E.65 (2008).

²⁰ 25 Okl. Stat. Ann. Sec. 158 (2008).

²¹ Mass. Gen. Laws Ann. 2 sec. 6.

²² Mo. Rev. Stat. s. 8.922 (2008).

²³ Among those states are Arizona, Connecticut, Kentucky, Michigan, New Hampshire, New Jersey, and North Dakota.

²⁴ 41 U.S.C. s. 8301, *et seq.*

²⁵ 19 U.S.C. s. 2501, *et seq.*

²⁶ 19 U.S.C. s. 2511.

provisions of the Trade Agreements Act. As a result, federal agencies must treat offers from many designated foreign countries in the same manner as domestic offers.²⁷

An exception to these general procurement procedures is established by the Berry Amendment,²⁸ which requires the United States Department of Defense to purchase certain supplies, including American flags, which are grown, reprocessed, reused, or produced in the United States.²⁹

International Free Trade Agreements and Government Procurement

The United States is a party to numerous multilateral and bilateral free trade agreements (FTAs). Many of these FTAs address practices for government procurement.

General Agreement on Tariffs and Trade

The General Agreement on Tariffs and Trade (GATT) is one FTA that addresses government procurement practices.³⁰ During the negotiations that led to the establishment of the World Trade Organization (WTO), certain parties negotiated a Government Procurement Agreement (GPA) to address access to government procurement markets. The GPA is binding on those WTO member countries that opt into the agreement, among whom is the United States.³¹

Article III of the GPA requires a party undertaking procurement covered by the GPA to treat the products of all other parties equally, and to accord products from other parties the same treatment³² that it accords to its domestic products and producers.³³ Article IV of the GPA prohibits a party to the GPA from applying rules of origin on products supplied for covered government procurement which are different from the rules of origin applied to goods in the normal course of trade.³⁴

The GPA applies to any law, regulation, procedure, or practice regarding any procurement that meets a certain value threshold for those government units of member countries that are included in the applicable annex to the agreement.³⁵ For the procurement of goods such as flags, the threshold for the application of GPA requirements to states has been set by the United States Trade Representative at \$558,000 for 2014 and 2015.³⁶

²⁷ Kate Manuel, *et al. Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law*, p. 7, Congressional Research Service, January 6, 2014. Available at www.hsdl.org/?view&did=749327 (last viewed March 7, 2013).

²⁸ 10 U.S.C. s. 2533a.

²⁹ Valerie Bailey Grasso, *The Berry Amendment: Requiring Defense Procurement to Come from Domestic Sources*, Congressional Research Service, February 24, 2014. Available at <http://www.fas.org/sgp/crs/natsec/RL31236.pdf> (last visited March 7, 2013).

³⁰ To be precise, the GATT has set forth certain rules governing trade in goods among party countries since 1948. Over the course of its existence, various rounds of negotiations were held to modify the GATT. The Uruguay Round, which concluded in 1994, resulted in the formation of the World Trade Organization (WTO). In addition to trade in goods, WTO agreements set forth general governing principles for trade in services (the General Agreement on Trade in Services, or GATS) and intellectual property (the Agreement on Trade Related Aspects of Intellectual Property Rights, or TRIPS). WTO agreements also have established a more formal and binding trade dispute resolution mechanism than existed under the original version of the GATT. 158 countries are party to the GATT/WTO. See *Understanding the WTO* available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm (last visited March 10, 2013). As the GATT continues to provide the foundation for WTO rules related to the trade in goods, the agreement and the organization will be referred to as one entity (GATT/WTO) for the purpose of this bill analysis.

³¹ *Parties and observers to the GPA*, available at http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties (last visited December 30, 2013).

³² This is generally known as most-favored nation status. Most favored nation status (MFN) is a treaty status that means that goods originating from a nation with such status will not be treated any worse by the receiving nation, for example by being subject to higher import duties than goods originating from the nation that has the most favorable trade arrangement with the receiving nation. BLACK'S LAW DICTIONARY 1035 (8th ed. 2004).

³³ Agreement on Government Procurement (GPA), Art. III, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm (last visited March 10, 2013); see also Amol Mehra, Comment, *Federalism and International Trade: The Intersection of the World Trade Organization's Government Procurement Act and State "Buy Local" Legislation*, 4 B.Y.U. INT'L L. & MGMT. REV. 179, 179-181 (Spring 2008).

³⁴ *Id.* at Art. IV.

³⁵ *Id.* at Art. I.

³⁶ Procurement Thresholds for the Implementation of the Trade Agreements Act of 1979, 78 Fed. Reg. 76700 (December 17, 2013).

Exceptions to the GPA apply in certain cases.³⁷ State and local entities are not required to abide by the GPA, though they may opt to do so. Florida executive branch agencies have opted to do so and are covered by the GPA.³⁸

A dispute that arises under the GPA is generally subject to the dispute resolution process set up in the GATT/WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.³⁹ A party to the GPA whose rights under the agreement are being impaired by another party may seek remedies under the GPA from that party.⁴⁰

The federal government has provided that no state law can be declared invalid by the courts as violating GATT/WTO agreements except in an action initiated by the United States.⁴¹

Dominican Republic-Central American-United States Free Trade Agreement

The Dominican Republic-Central American-United States Free Trade Agreement (CAFTA-DR) also addresses government procurement.⁴² Florida executive agencies are covered by CAFTA-DR procurement requirements applicable to sub-central governments.⁴³ Parties to CAFTA-DR are required to treat goods originating from other parties no less favorably than domestic goods for procurement purposes. Covered entities also may not treat local suppliers less favorably based on degree of foreign affiliation or because such a supplier offers goods of another party.⁴⁴ The provisions of CAFTA-DR apply to sub-central government procurement of goods where the value of procurement is estimated to be equal to or greater than \$558,000.⁴⁵ A party to CAFTA-DR whose rights under the agreement are being impaired by another party may seek remedies under the CAFTA-DR from that party.⁴⁶

The federal government has provided that no state law can be declared invalid by the courts as violating CAFTA-DR except in an action initiated by the United States.⁴⁷

Other Trade Agreements

Various other bilateral trade agreements between the United States and foreign countries also similarly address government procurement. Florida executive agency procurement is subject to seven such FTAs in addition to the GATT/WTO GPA and CAFTA-DR.⁴⁸ These agreements contain provisions similar to those discussed above, in that they provide for national treatment and non-discrimination in government procurement for those covered entities engaging in covered transactions, and permit the suspension of trade concessions in the event that an offending party fails to bring its policies into compliance with the respective treaties. The value thresholds for the procurement of goods at which the terms of these agreements apply are essentially uniform at \$558,000.⁴⁹

³⁷ GPA at Art. XXIII. Exceptions apply where procurement is related to national security or defense interests, or if procurement restrictions are necessary to protect, among others, public morals, order, safety, and human, animal, or plant life or health. Exceptions also apply to products and services of handicapped persons, philanthropic organizations, and prison labor.

³⁸ *Id.* Annex 2.

³⁹ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Arts. 6 and 22, available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm (last visited March 10, 2014).

⁴⁰ *Id.* at Art. 22.

⁴¹ 19 U.S.C. s. 3512(2).

⁴² CAFTA-DR is composed of the United States, El Salvador, the Dominican Republic, Guatemala, Honduras, Nicaragua, and Costa Rica.

⁴³ CAFTA-DR, Annex 9.1.2(b)(i)-25, available at

http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file977_3927.pdf (last visited March 10, 2014).

⁴⁴ CAFTA-DR Art. 9.2, available at http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file766_3926.pdf (last visited March 10, 2014).

⁴⁵ Procurement Thresholds for the Implementation of the Trade Agreements Act of 1979, 78 Fed. Reg. 76700 (December 17, 2013).

⁴⁶ See CAFTA-DR, Art. 20.16. available at

http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file85_3940.pdf (last visited March 10, 2014).

⁴⁷ 19 U.S.C. s. 4012(b).

⁴⁸ These agreements are the U.S.-Australia FTA, U.S.-Chile FTA, U.S.-Colombia FTA, U.S.-Morocco FTA, U.S.-Panama FTA, U.S.-Peru FTA, and the U.S.-Singapore FTA. Revised Appendix, U.S. States, Other Sub-Federal Entities, and Other Entities Subject to U.S. Obligations under International Agreements, available at <http://www.ustr.gov/sites/default/files/REVISED%20Appendix.pdf> (last visited March 10, 2014).

⁴⁹ Procurement Thresholds for the Implementation of the Trade Agreements Act of 1979, 78 Fed. Reg. 76700 (Dec. 17, 2013).

Effect of Bill

The bill provides that the act may be cited as the “All-American Flag Act.”

The bill provides that any United States flag or state flag that is purchased for public use by the state, a county, or a municipality, on or after January 1, 2015, must be made in the United States from articles, materials, or supplies that are grown, produced, or manufactured in the United States. It is unclear how the state, a county, or a municipality would verify whether a United States or state flag acquired for public use is manufactured in the United States entirely from materials produced in the United States.⁵⁰

B. SECTION DIRECTORY:

Section 1 provides that the act may be cited as the “All-American Flag Act.”

Section 2 creates s. 256.041, F.S., requiring a United States flag or a state flag that is purchased by the state, a county, or municipality for public use to be made in the United States.

Section 3 provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

This bill may have an indeterminate negative fiscal impact on state government. See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill may have an indeterminate negative fiscal impact on local governments. See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could have a positive impact on those businesses that sell United States and state flags meeting the “born in America” requirements provided in the bill. In addition, it could have a negative impact if the bill is found to violate government procurement provisions in free trade agreements (FTA) to which the United States is a party, because an aggrieved party to that agreement could take proportional retaliatory trade measures against United States businesses. However, it is unlikely that the value threshold in a given FTA would be met to trigger such violation.

D. FISCAL COMMENTS:

⁵⁰ The Flag Manufacturers Association of America “Certified Made in the U.S.A.” program “certifies that [a] flag has been made in the U.S. of materials that are domestic in origin and that all processes in every step of its manufacture were completed in U.S. facilities with U.S. labor.” The FMAA has so far certified five flag manufacturers. About FMAA Certification, available at <http://www.fmaa-usa.com/about/certification.php> (last visited March 10, 2014).

This bill may have a negative fiscal impact on state and local governments if United States and state flags that must be purchased pursuant to the bill are more expensive than United States and state flags that would otherwise be available for purchase.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, s. 18 of the State Constitution may apply because the bill may require county and municipal governments to spend more funds on the purchase of United States and state flags than they otherwise might spend; however, an exemption may apply as the fiscal impact is likely to be insignificant.

2. Other:

Impairment of Contract

The contract clause of Art. I, s. 10 of the State Constitution prohibits the state from passing laws that impair contract rights. A law impairs contract rights if it changes the substantive rights that parties have under existing contracts.⁵¹ For a law that impairs contracts to be constitutionally valid, the evil that the law seeks to remedy must outweigh the interests of parties not to have their contracts impaired, and the law must not intrude into the ability of people to contract any more than is necessary to achieve the public purpose behind the law.⁵² The state's authority to restrict contractual obligations is especially limited in instances where contractual obligations have already been entered into by the state.⁵³

While the bill applies to purchases of flags made on or after January 1, 2015, it is possible that existing contracts may provide for the purchase and sale of United States and state flags to state and local governments beyond January 1, 2015.

Federal Preemption

While federal and state governments have their respective spheres of sovereignty, the United States Constitution, and laws made pursuant to it, are the supreme law of the United States.⁵⁴ State law may be expressly preempted if federal law explicitly prohibits any state action on a matter. State law also may be preempted by implication if either the federal government has expressed an intent to restrict regulation of a certain field to the federal level, or if a state law conflicts with a federal law.⁵⁵

Treaties and other international agreements entered into by the federal government are a source of federal law. Such agreements are binding on the states through the Supremacy Clause of the United States Constitution.⁵⁶

Pursuant to the federal authority to enter into treaties and executive agreements with foreign powers, the United States has entered into various free trade agreements that address government

⁵¹ *Manning v. Travelers Ins. Co.*, 250 So.2d 872, 874 (Fla. 1971).

⁵² *Pomponio v. Claridge of Pomapano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979).

⁵³ *Chiles v. United Faculty of Fla.*, 615 So.2d 671 (Fla. 1993).

⁵⁴ Art. VI, cl. 2, U.S. Const., provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

⁵⁵ *State v. Harden*, 938 So.2d 480, 485 (Fla. 2006) (stating that “[u]nder the Supremacy Clause, a federal law may expressly or impliedly preempt state law. A state cannot assert jurisdiction where Congress clearly intended to preempt a field of law.”) *citing Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

⁵⁶ *U.S. v. Pink*, 315 U.S. 203, 230-231 (1941) (noting that “state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement.”); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

procurement policies and, in some cases, require the national and sub-national governments of the contracting parties to treat goods from other contracting parties identically to nationally produced goods for the purpose of government procurement.

A reviewing court may find that the bill is preempted under the United States Constitution if it requires procurement practices that violate these trade agreements.

Dormant Foreign Affairs Doctrine

The United States Constitution grants the federal government various powers related to foreign affairs, such as the power to declare war,⁵⁷ maintain a military,⁵⁸ enter into treaties and other international agreements,⁵⁹ regulate foreign commerce,⁶⁰ and to hear cases involving foreign states and citizens.⁶¹ These grants of power have been interpreted to grant the federal government the exclusive power to act in the area of foreign affairs.⁶² The federal government's exclusive authority to act in the area of foreign affairs is known as the dormant foreign affairs doctrine.

When a state law operates in the field of foreign affairs without federal authorization, a reviewing court might find the state law to be invalid as a violation of the dormant foreign affairs doctrine.⁶³ If the purpose of the bill is to impact foreign affairs,⁶⁴ or if the effects of the bill have a sufficiently serious impact on foreign policy,⁶⁵ the bill may be found in violation of the dormant foreign affairs doctrine.⁶⁶

Dormant Foreign Commerce Clause

The United States Constitution grants the United States Congress the power to regulate "Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁶⁷ This provision has long been interpreted as granting Congress the exclusive power to regulate commerce between the states.⁶⁸ This clause is therefore not only a grant of power to Congress, but simultaneously acts to limit the power of states to enact laws that impose burdens on commerce subject to the clause.⁶⁹ For example, a state law that facially discriminates against out of state commerce is invalid under the dormant interstate commerce clause unless the state can demonstrate that the law furthers a legitimate government interest and that there is no way to serve the purpose as well by non-discriminatory means.⁷⁰

This dormant interstate commerce clause, which generally prohibits states from enacting laws or policies that burden interstate commerce or favor in-state economic interests over others, has a recognized market participant exception. This exception provides that when a state acts as a market participant, as opposed to a market regulator, the state is not subject to the requirements of the

⁵⁷ Art. I, sec. 8, U.S. Constitution.

⁵⁸ *Id.*

⁵⁹ Art. II, sec. 2, U.S. Constitution.

⁶⁰ Art. I., sec. 8, U.S. Constitution.

⁶¹ Art. III, sec. 2, U.S. Constitution.

⁶² *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (stating that the "Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

⁶³ *Zschernig v. Miller*, 389 U.S. 429 (1968); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

⁶⁴ *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (pointing out that a congressional invocation of exclusively national powers with respect to addressing human rights violations in Burma precluded Massachusetts from restricting its agencies from purchasing goods or services from companies that did business with Burma; the case, however, was decided on the basis that a federal law preempted the state law.).

⁶⁵ *Clark v. Allen*, 331 U.S. 503, 517-518 (1947) (finding a state law that addressed the disposition of personal property of alien decedents valid, in spite of noting that the law would "have some incidental or indirect effect in foreign countries."); *Zschernig v. Miller*, 389 U.S. 429 (1968).

⁶⁶ Matthew Shaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining, and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 237-239 (2011).

⁶⁷ Art. I., sec. 8, cl. 3, U.S. Const.

⁶⁸ *Gibbons v. Ogden*, 22 U.S. 1 (1822).

⁶⁹ *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984).

⁷⁰ *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

dormant interstate commerce clause.⁷¹ The market participant exception likely applies to state practices that affect foreign commerce;⁷² however, the exception has not been applied by the United States Supreme Court to a case implicating foreign commerce. Therefore it is not certain that states as market participants are allowed to discriminate against foreign commerce.⁷³

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rule-making authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2014, the Government Operations Subcommittee adopted an amendment to the bill and reported the bill favorably as a committee substitute. The amendment removed criminal penalties for a willful violation of the bill, and clarified that the bill applies to purchases of United States and state flags for public use on or after January 1, 2015.

This analysis is drafted to the committee substitute as approved by the Government Operations Subcommittee.

⁷¹ *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (stating that there was “no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.”)

⁷² *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990).

⁷³ *Antilles Cement Corp. v. Futuno*, 670 F.3d 310, 237-328 (2012) (recognizing that “[t]here is some reason to believe that the market participant exception might be inapplicable to state laws that discriminate against foreign commerce” because “the dormant Foreign Commerce Clause places stricter constraints on states than its interstate counterpart.” Nevertheless, the Circuit Court did find the market participant exception applicable.)