

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 Commerce and Tourism

BILL: CS/SB 226

INTRODUCER: Commerce and Tourism Committee and Senator Ring

SUBJECT: Capital Formation for Infrastructure Projects

DATE: January 20, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Askey	McKay	CM	Fav/CS
2.			FT	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 226 directs the Florida Opportunity Fund to create the Florida Infrastructure Fund partnership. The partnership is a private, for-profit limited partnership or a limited liability partnership, with the fund as a general partner. The purpose of the partnership is to raise and invest capital in infrastructure projects that are in-state and promote economic development.

The bill authorizes the issuance of contingent state revenue bonds by the Florida Development Finance Corporation of up to \$350 million to investing partners who have provided investment capital to the partnership under a commitment agreement. The bonds are payable no sooner than 12 years after commitments by investment partners, out of state sales and use, income, and insurance taxes and are contingent upon the net capital loss of investment by the investment partners.

II. Present Situation:

The Florida Opportunity Fund & the Florida Development Finance Corporation

The Florida Opportunity Fund (fund)¹ 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

¹ See *Florida Opportunity Fund* website available at: <http://floridaopportunityfund.com/HomePage.asp> (Last visited Jan. 14, 2016).

the entity. Initially, the fund 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 the fund’s directive under the Florida Capital Formation Act to create direct investment programs that invest in individual businesses and infrastructure projects. The fund 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, the fund 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 the fund must be included in its annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

The fund is organized as a private, not-for-profit corporation under ch. 617, F.S., and administered by Enterprise Florida, Inc. (EFI). EFI selects a 5-person appointment committee which selects a board of directors for the fund. The board then selects a fund investment manager. Currently, the fund 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 OnPoint Technologies, an early-stage venture capital fund.

The Florida Development Finance Corporation (corporation)² is a statewide financing authority, housed within EFI, tasked to assist for-profit, and not-for-profit business. As a conduit issuer, the corporation provides qualifying projects with access to capital.

The Division of Bond Finance

The Division of Bond Finance (division) was created in the State Bond Act³ (act) in 1969 and is administratively housed within the State Board of Administration.⁴ The Governor serves as chair of the governing board of the division, the Attorney General is the secretary, and the Chief Financial Officer acts as treasurer.⁵

The division is responsible for issuing any state bonds authorized by law or the Florida Constitution, as well as bonds on behalf of any state agency authorized by law.⁶ As it is used in the act, a state agency is defined as “any board, commission, authority, or other state agency heretofore or hereafter created by the constitution or statutes of the state.”⁷ In carrying out its authority, the division is authorized to exercise all of the powers relating to bonds to the same extent as state agencies.⁸

² Section 288.9604, F.S.

³ The State Bond Act encompasses ss. 215.57-215.83, F.S.

⁴ Section 215.62(1), F.S.

⁵ *Id.*

⁶ Section 215.64(2), F.S.

⁷ Section 215.58(6), F.S.

⁸ Section 215.64(3), F.S.

As part of its duties, the division serves as a clearinghouse of information relating to both general obligation bonds and revenue bonds of the state and local governments.⁹ The division is required to collect, maintain, and make available information concerning such bonds.¹⁰

Financing Authority of Local Government Entities for Public Works Projects

Local governments are authorized under current law to issue bonds, revenue certificates, and other forms of indebtedness related to the provision of public works projects.

County Bonding

A county may issue water revenue bonds, sewer revenue bonds, or general obligation bonds to pay all or part of the cost to purchase, construct, improve, extend, enlarge, or reconstruct water supply systems or sewage disposal systems.¹¹ Water revenue bonds are payable solely from water service charges.¹² Sewer revenue bonds are payable solely from sewer service charges.¹³ Neither type of revenue bond pledges the property, credit, or general tax revenue of the county. General obligation bonds are payable from ad valorem taxes alone or from ad valorem taxes with an additional secured pledge of water service charges, sewer service charges, special assessments, or a combination of these sources.¹⁴ Issuance of general obligation bonds requires approval by referendum, and a county is required to levy annually a special tax upon all taxable property within the county to pay the principle and interest as it becomes due.¹⁵ Counties may also create special water and sewer districts to serve unincorporated areas, and the district's board may issue revenue bonds to finance all or part of the cost of a water system, sewer system, or both. Such bonds are payable from the revenues derived from operation of the utility system as provided by law and the authorizing resolution of the district's board.¹⁶

Municipal Bonding

A municipality may issue revenue bonds, general obligation bonds, ad valorem bonds, or improvement bonds to finance capital expenditures made for a public purpose. Revenue bonds are payable from sources other than ad valorem taxes and are not secured by a pledge of the property, credit, or general tax revenue of the municipality.¹⁷ General obligation bonds are payable from any special taxes levied for the purpose of repayment and any other sources as provided by the authorizing ordinance or resolution.¹⁸ Such bonds are secured by the full faith and credit and taxing power of the municipality and may require approval by referendum. Ad valorem bonds are payable from the proceeds of ad valorem taxes and require approval by

⁹ Section 218.37, F.S.

¹⁰ Section 218.37(1)(a)-(c), F.S.

¹¹ Section 153.03(1) and (2), F.S.

¹² Section 153.02(9), F.S.

¹³ Section 153.02(10), F.S.

¹⁴ Section 153.02(11), F.S.

¹⁵ FLA. CONST. art. VII, s. 12; s. 153.07, F.S.

¹⁶ Section 153.63(1), F.S. Such bonds may also be secured by the pledge of special assessments or the full faith and credit of the district.

¹⁷ Section 166.101(4), F.S.

¹⁸ Section 166.101(2), F.S.

referendum.¹⁹ Improvement bonds are special obligations payable solely from the proceeds of special assessments levied for a project.²⁰

Further, a municipality may issue mortgage revenue certificates or debentures to acquire, construct, or extend public works, including, among other things, water and alternative water supply facilities, sewage collection and disposal facilities, gas plants and distribution systems, and stormwater projects.²¹ These instruments constitute a lien only against the property and revenue of the utility. These instruments may not impose any tax liability upon any real or personal property in the municipality and may not constitute a debt against the issuing municipality.²²

The Division of Bond Finance (DBF) of the State Board of Administration provides information to, and collects information from, units of local government²³ concerning the issuance of bonds by such entities.²⁴ Each unit of local government must provide the DBF a complete description of its new general obligation bonds and revenue bonds and must provide advanced notice of the impending sale of a new issue of bonds.²⁵ According to the DBF, a public utility generally finances projects with revenue bonds, securing the debt with a pledge of net revenues of the utility system. These net revenues consist of the income of the public utility remaining after paying expenses necessary to operate and maintain the utility. The DBF notes that this current practice requires the efficient operation of the utility system to assure that sufficient net revenues are available to pay debt service.

Investment funds in Infrastructure

Investment funds are a mechanism to benefit from investing as a group. Investment funds are also referred to as collective investment vehicles, investment pools, and managed funds (as well as other names). Investment funds benefit from many advantages including:

- The sharing or reducing of risk through asset diversification;
- Lower fixed costs through economies of scale; and
- Professional management of investments.

Investment funds can be sectoral or thematic. Sectoral funds focus on specific economic or industrial sectors such as metals, telecom, or manufacturing. Thematic funds have a broader spectrum and focus on mixed sector themes like infrastructure.

Infrastructure funds are typically global investments and are known for their potential for stable and predictable long-term yields. Infrastructure funds usually represent a portion of the total

¹⁹ FLA. CONST. art. VII, s. 12; s. 166.101(3), F.S.

²⁰ Section 166.101, F.S., et seq.

²¹ Section 180.08, F.S.

²² *Id.*

²³ “Unit of local government” is defined in s. 218.369, F.S., as “a county, municipality, special district, district school board, local agency, authority, or consolidated city-county government or any other local governmental body or public body corporate and politic authorized or created by general or special law and granted the power to issue general obligation or revenue bonds.”

²⁴ Section 218.37, F.S.

²⁵ *Id.* The DBF is authorized only to collect information concerning these bonds; it does not exercise any substantive authority to review or approve these transactions.

assets under management by an investment firm. According to a report by Preqin, an asset industry source for data and intelligence, the highest amount of asset allocation in infrastructure is by the Ontario Municipal Employees Retirement System (OMERS).²⁶ As of June 6, 2016, OMERS had an \$11.6 billion allocation to infrastructure representing 19.4 percent of their assets under management.²⁷ Prudential M&G (UK) has the twentieth highest amount, with \$3.1 billion in asset allocation in infrastructure.²⁸

III. Effect of Proposed Changes:

The bill creates s. 288.9628, F.S., directing the Florida Opportunity Fund (fund) to facilitate the creation of the Florida Infrastructure Fund Partnership (partnership) as a private, for-profit limited partnership or a limited liability partnership organized and operated under ch. 620, F.S. The partnership is not an instrumentality of the state. The purpose of the partnership is to raise and invest capital in infrastructure projects that are in-state and promote economic development by leveraging private investment into public infrastructure projects. The bill defines an “infrastructure project” as a capital project in this state which addresses the need for a facility or other strategic infrastructure that serves a public purpose, including a water or a wastewater system, a communication system, a power system, a transportation system, a renewable energy system, other strategic infrastructure located in the state, or an ancillary or support system for any such project.

The fund is a general partner of the partnership. The bill directs the fund to:

- Hire one or more investment managers to assist with managing the partnership and to oversee the raising and investing of capital by the partnership. The evaluation of candidates must consider:
 - The candidate’s level of experience;
 - Their investment philosophy and process;
 - A demonstrable success in fundraising;
 - Prior investment results; and
 - That have maintained an office with a full-time investment professional in this state for at least 2 years before their solicitation to be an investment manager with the partnership.
- Solicit, negotiate the terms of, contract for, and receive investment capital with the assistance of the investment manager(s) or other service providers;
- Receive investment returns;
- Disburse returns to investment partners; and
- Approve investments.

The fund is authorized to lend up to \$750,000 to the partnership for initial expenses associated with the organization of the partnership and solicitation of investment partners. The bill defines an “investment partner” (or more generally “partner”) as a person other than the partnership, the fund, or the trust that purchases or is the transferee of an ownership interest in the partnership.

²⁶ See Preqin Infrastructure Spotlight, June 2015, available at: <https://www.preqin.com/docs/newsletters/inf/Preqin-Infrastructure-Spotlight-June-2015.pdf> (last visited Jan. 14, 2016).

²⁷ See Preqin Infrastructure Spotlight, June 2015, available at: <https://www.preqin.com/docs/newsletters/inf/Preqin-Infrastructure-Spotlight-June-2015.pdf> (last visited Jan. 14, 2016).

²⁸ *Id.*

Beginning July 1, 2016, the partnership is directed to enter into commitment agreements with investment partners to invest in the partnership under terms approved by the board of the fund. The bill defines a “commitment agreement” as a contract between the partnership and an investment partner in which the partner commits to providing a specified amount of investment capital in exchange for an ownership interest in the partnership. “Investment capital,” is defined as the total capital committed by an investment partner, pursuant to a commitment agreement, for an equity interest in the partnership. The bill provides that the total aggregate amount of principal investment capital payable to the partnership under all commitment agreements may not exceed \$350 million. The partnership is required to obtain commitment agreements totaling at least \$100 million by December 1, 2017, or cancel any executed agreements and return the investment capital of each investment partner who executed an agreement.

The partnership may only invest in infrastructure projects that:

- Fulfill an important infrastructure need in the state which would otherwise be funded by public investment;
- Raise funding from other sources that is at least twice the amount invested by the partnership; and
- For which legal measures exist to ensure the project is not closed due to fraud.

The partnership is prohibited from investing more than 20 percent of its total investment capital in any single project, or invest in any project that involves any phase of a project authorized under the Florida Rail Enterprise Act.²⁹

Prior to investing in an infrastructure project, the partnership must assess a project’s continuing benefit to state residents by evaluating:

- A written business plan, including all expected revenue sources for the project;
- The likelihood that it will attract operating capital from investment partners, lenders, or grants;
- The management team for the project;
- The potential for job creation in the state;
- The financial resources provided by the entity proposing the project; and
- Any other factors that are relevant to the project’s success and public benefit derived from the investment.

The partnership is required to submit an annual report of its activities to the Governor, the President of the Senate, and the Speaker of the House of Representatives beginning December 1, 2016, and at a minimum include:

- The amounts of investment capital raised and disbursed by the partnership and the progress of the partnership and each infrastructure project in which it has invested;
- Independently audited financial statements, including for the previous fiscal year; and
- The costs and benefits to the state of the partnership and its investment activity including:
 - A list of projects invested in;
 - Costs and benefits to the county or municipality in which the project is located;
 - The number of businesses and associated industries affected;

²⁹ Sections 341.8201-341.842, F.S.

- The number and types of jobs created or retained, and their average annual wages; and
- The impact on the state economy.

The bill prohibits the partnership from paying any debts from money or resources other than that belonging to the partnership. The bill clarifies that any obligation of the partnership are not an obligation of the state, and are exclusively payable from the partnership's resources.

The partnership is prohibited from investing in a project with, or accepting capital from, a prohibited company identified in s. 215.472, F.S., or a scrutinized company as defined in s. 215.473, F.S. Additionally, the entity owning the infrastructure project in which the partnership has invested, must provide reasonable assurances that such companies do not have an ownership interest in the project.

Contingent State Revenue Bonds

The bill creates s. 288.9629, F.S., which provides for the issuance of contingent state revenue bonds for the partnership. The Florida Development Finance Corporation (corporation) is directed to issue contingent state revenue bonds to investment partners in the partnership equal to the investment capital committed by each partner. "Contingent state revenue bonds" are defined as state revenue bonds that are contingent upon a net capital loss incurred by an investment partner under s. 288.9629, F.S., and that are payable by the Department of Revenue from certain revenues received by the state under ch. 212 (sales and use tax), ch. 220 (income tax), or ss. 624.509 and 624.5091, F.S., (insurance taxes). The corporation and the fund are permitted to seek reimbursement for reasonable costs and expenses related to the partnership by charging a fee for the issuance of contingent state bonds. The fee may be up to 0.25 percent of the aggregate investment capital committed to the partnership.

The total amount of all contingent state revenue bonds issued by the corporation may not exceed \$350 million.

Contingent state revenue bonds are issued concurrently with a commitment agreement between the investment partner and the partnership. A commitment agreement must include a calendar-year maturity date, designated by the corporation, of at least 12 years after the date of the agreement. Contingent state revenue bonds may only be redeemed in accordance with s. 288.9629, F.S., and the terms of the contingent state revenue bond.

The bill provides that after a contingent state revenue bond is issued, the bond is binding. After issuance, the partnership, the trust, the state, the Department of Revenue, and the corporation may not substantively modify, terminate, or rescind the related contingent state revenue bond.

On the maturity date in a commitment agreement, if a partner has a net capital loss, the partnership will provide written notice to that partner and to the corporation. The bill defines "net capital loss" as an amount equal to the difference between actual total investment capital advanced by the investment partner to the partnership and the actual amount of the aggregate distributions received by the investment partner. The notice must include:

- A good faith estimate of the fair market value of the partnership assets;
- The total capital investment of all investment partners;

- The total amount of distributions received by the investment partners; and
- The amount payable by the Department of Revenue to which the investment partner is entitled.

Upon receipt of the notice, the investment partner may elect to transfer ownership interest in the partnership and seek payment on the contingent state revenue bond in accordance with the bond's terms, or maintain the investment partner's investment in the partnership. The investment partner has 30 days to provide written notice to the partnership and the corporation as to their election. If no election is made, it is presumed that the partner will maintain investment in the partnership. The one-time election is final, but a new election may be made for each subsequent notice. If the partner elects to transfer ownership interest in the partnership, it must transfer it to the fund.

At any time on or after 90 days from such an election, the contingent state revenue bonds may be claimed for payment by the owner from the Department of Revenue from revenues received under ch. 212, ch. 220, or ss. 624.509 and 624.5091, F.S. The bill provides that the maximum amount of bonds which may be claimed by a bond owner in any fiscal year is limited to a calculation of \$75 million multiplied by the number of bonds held by that owner divided by the total number of bonds held by all owners.

The bill requires that the Department of Revenue, upon request of the partnership, shall provide written assurance that the contingent state revenue bonds will be honored by the corporation and the Department of Revenue.

The bill exempts the bonds transferred or sold under this section from ch. 517, F.S.³⁰

The bill amends s. 213.053, F.S., authorizing the Department of Revenue to disclose certain information to the partnership and the corporation relative to contingent state bonds.

Miscellaneous Changes

The bill names ch. 288, Part XI (Capital Formation), F.S., as the "Florida Capital Formation Act."

The bill amends subsection (1) (legislative findings) of s. 288.9622, F.S., to include a need for leveraging public investment infrastructure funding.

The bill creates subsection (5) of s. 288.9622, F.S., declaring it is the intent of the Legislature that the Florida Opportunity Fund creates, manages, operates, and invests in infrastructure funds, including the creation and operation of the Florida Infrastructure Fund Partnership; and that the partnership's investments are focused on infrastructure development that could assist in mitigating the financial burden of the state for projects that could be funded directly by public funds.

³⁰ Regulation of Securities Transactions.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill authorizes the issuance and sale of contingent state bonds payable from specified sales and use, income, and insurance taxes to repay lost investment capital contributed by investment partners. This seems to implicate the prohibitions in Article VII, Sections 10 (pledging state credit to aid a partnership), 11(a) (issuance of bonds for state fixed capital outlay projects), and (11e) (issuance of bonds pledging dedicated state tax revenue) of the Florida Constitution. The bill currently lacks specific constitutional authority specifying the purpose and revenues permitted to be pledged required for bonds issued by the state.

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

Indeterminate.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill provides that the corporation and the fund may charge a fee for reimbursement of costs and expenses related to issuing the contingent state revenue bonds. It is unclear if the fee is assessed to the individual investment partner who is being issued the bonds, or the partnership.

The bill references contingent state revenue bonds that are “payable by the Department of Revenue” (DOR). The DOR does not administer, issue, or is otherwise involved in redeeming bonds.³¹

The bill provides that bonds are transferable only to the partnership. It is unclear how this relates to additional provisions in the bill that exempt transfers and sales of bonds from the provisions in ch. 517, F.S.

The bill provides the DOR with the authority to share information regarding contingent state revenue bonds to the partnership and the corporation. The DOR does not issue or administer bonds.³²

The bill references “the trust” in the definition for “investment partner” and as an entity that cannot modify, terminate, or rescind contingent state revenue bonds. There is no reference to a trust anywhere else in the bill and seems to be a holdover from a previous bill.

VII. Related Issues:

The bill provides that the fund must hire investment managers, and specifies minimal qualifications, but does not require that the hiring process must be competitive, as it would be if done by a state agency. Since the investment manager will presumably earn fees for providing services to the fund, which may be backed by revenue from the state, the Legislature may wish to consider whether there should be some type of competitive process for hiring the investment managers.

The bill provides for owners to claim contingent state revenue bonds by the DOR for payment. The bill does not provide a mechanism by which to redeem the bonds, but does provide a limitation on the amount “claimed” in a given fiscal year.

The bill provides that the contingent state revenue bonds are payable from state sales and use, income, and insurance taxes which are distributed into many different funds and used for different programs. It is unclear how the DOR can distribute funds attributable only to those taxes, since there is not an “account” from which they can be distributed. Additionally, the DOR does not administer or issue bonds, and is not otherwise involved in the redeeming of bonds.

The bill does not provide for any limitations on the interest rate to be paid on the bonds or the length of the bond terms. Statutes authorizing bonds typically provide greater detail relating to the structure of the transaction; see e.g., ch. 159, F.S.

The bill provides that the bonds may be transferred or sold without limitation by their owners and that the transfer and sale of these bonds are exempt from the provisions of ch. 517, F.S., (Regulation of Securities Transactions). It is not clear why a blanket exemption from such provisions should apply to the resale of the bonds authorized by the bill.

³¹ Florida Dept. of Revenue, *Legislative Bill Analysis: SB226*, Oct. 27, 2015, (on file with the Commerce and Tourism Committee).

³² *Id.*

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 288.9621, 288.9622, 288.9623, and 213.053.

This bill creates the following sections of the Florida Statutes: 288.9628 and 288.9629.

IX. Additional Information:

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

CS by Commerce and Tourism on January 19, 2016:

The CS provides that:

- Upon bond maturity, an owner may elect to transfer ownership interest in the partnership to the fund and after 90 days claim contingent state bond payment from the Department of Revenue or maintain ownership interest in the partnership. Previously, the bill provided that if the partnership could not find a new investment partner to take ownership interest the original investment partner could change their election at 90 days;
- The contingent state revenue bonds are binding and cannot be modified, terminated, or rescinded;
- The Department of Revenue will make payable revenues from ch. 212, ch. 220, and ss. 624.509 and 624.5091, F.S., when an investment partner claims a contingent state revenue bond;
- The issuance of contingent state revenue bonds is to be concurrent with a commitment agreement between the partnership and the investment partner; and
- All occurrences of “contingent state bond” are changed to “contingent state revenue bond.”

- B. **Amendments:**

None.