

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 527 Scrutinized Companies
SPONSOR(S): Workman, Moskowitz, Rader, and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 86

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N	Moore	Williamson
2) Appropriations Committee	26 Y, 0 N	Delaney	Leznoff
3) State Affairs Committee			

SUMMARY ANALYSIS

The State Board of Administration (SBA) has responsibility for oversight of the Florida Retirement System (FRS) Pension Plan investments and the FRS Investment Plan, which represent approximately \$153.8 billion, or 87.1 percent, of the \$176.5 billion in assets managed by the SBA. The SBA's ability to invest the FRS assets is governed by a "legal list" of the types of investments and the total percentage of funds that may be invested in each type. In 2007, the Legislature unanimously passed the Protecting Florida's Investment Act, which required the SBA to identify and divest of companies with certain business operations in Sudan or Iran.

Chapter 287, F.S., regulates state agency procurement of personal property and services. Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods. Current law prohibits a company with certain business operations in Sudan or Iran or that is engaged in business operations in Cuba or Syria from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of \$1 million or more.

The Boycott, Divestment, and Sanctions (BDS) Movement is a global campaign targeting Israel in an attempt to increase economic and political pressure on the country to comply with the movement's stated goals. The BDS Movement promotes the boycott, divestment, and sanction of Israel and has gained support from many academics, trade unions, political parties, and citizens around the world. However, opposition to the movement is widespread, and critics have claimed the movement is ineffective, immoral, based on false or biased information, and could end up harming the Palestinian cause. In response to the BDS Movement, some states have enacted legislation that condemns BDS activities.

The bill defines "boycott Israel" to mean refusing to deal with, terminating business activities with, or taking other actions intended to penalize, inflict economic harm, or otherwise limit commercial relations with Israel or persons or entities doing business in Israel or in Israeli-controlled territories for reasons other than business, investment, or commercial reasons

The bill requires the SBA to identify and create a list of all companies that boycott Israel in which the SBA, on behalf of the FRS trust fund, has direct or indirect holdings or could possibly have such holdings in the future. The SBA is prohibited from acquiring securities of companies on the list, with certain exceptions.

The bill also prohibits a company on the list from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of \$1 million or more, with certain exceptions.

The bill may have an indeterminate fiscal impact on the private sector, the state, and local governments. See Fiscal Comments section.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

State Board of Administration

The State Board of Administration (SBA or board) is established by Art. IV, s. 4(e) of the State Constitution and is composed of the Governor, the Chief Financial Officer, and the Attorney General. The board members are commonly referred to as "Trustees." The SBA derives its powers to oversee state funds from Art. XII, s. 9 of the Constitution.

The SBA has responsibility for oversight of the Florida Retirement System (FRS) Pension Plan investments and the FRS Investment Plan,¹ which represent approximately \$153.8 billion, or 87.1 percent, of the \$176.5 billion in assets managed by the SBA, as of October 31, 2015.² The SBA also manages more than 30 other investment portfolios with combined assets of \$22.9 billion, including the Florida Hurricane Catastrophe Fund, the Florida Lottery Fund, the Florida Pre-Paid College Plan, and various debt-service accounts for state bond issues.³

Investments

Investment decisions for the pension plan are made by fiduciaries hired by the state. Under Florida law, an SBA fiduciary charged with an investment decision must act as a prudent expert would under similar circumstances, taking into account all relevant substantive factors. A nine-member Investment Advisory Council provides recommendations on investment policy, strategy, and procedures.⁴

The SBA's ability to invest the FRS assets is governed by s. 215.47, F.S., which provides a "legal list" of the types of investments and the total percentage that may be invested in each type. Some "legal list" guidelines specific to the pension plan provide:

- No more than 80 percent of assets should be invested in domestic common stocks.
- No more than 75 percent of assets should be invested in internally managed common stocks.
- No more than 3 percent of equity assets should be invested in the equity securities of any one corporation, except to the extent a higher percentage of the same issue is included in a nationally recognized market index, based on market values, or except upon a specific finding by the board that such higher percentage is in the best interest of the fund.
- No more than 25 percent of assets should be invested in notes issued by FHA-insured or VA-guaranteed first mortgages on real property, or foreign government general obligations.
- No more than 35 percent of assets should be invested in foreign corporate or commercial securities or obligations.
- No more than 20 percent of assets should be invested in alternative investments.

Exchange-traded Funds

Exchange-traded funds (ETFs) are a type of investment product. ETFs offer investors a way to pool their money in a fund that makes investments in stocks, bonds, or other assets and, in return, to receive an interest in that investment pool. Unlike mutual funds, ETF shares are traded on a national stock exchange and at market prices that may or may not be the same as the net asset value of the shares.⁵

¹ Members in the FRS may elect to participate in the pension plan, which is a defined benefit plan, or the investment plan, which is a defined contribution plan.

² See State Board of Administration, *Performance Report to the Trustees*, October 31, 2015, issued December 15, 2015, p. 5-6, available at https://www.sbafla.com/fsb/Portals/Internet/Reports/20151031_Trustees_Performance_Reportrev.pdf.

³ *Id.*

⁴ Section 215.444, F.S.

⁵ More information about ETFs can be found online at: <http://www.nasdaq.com/investing/etfs/what-are-ETFs.aspx> (last visited Jan. 13, 2016).

State Sponsors of Terrorism

Countries that are determined by the United States Secretary of State to have repeatedly provided support for acts of international terrorism are designated as "State Sponsors of Terrorism" and are subject to sanctions under the Export Administration Act, the Arms Export Control Act, and the Foreign Assistance Act.⁶ The four main categories of sanctions resulting from designations under these acts are: restrictions on U.S. foreign assistance, a ban on defense exports and sales, certain controls over exports of dual use items, and miscellaneous financial and other restrictions.⁷

The three countries currently designated by the U.S. Secretary of State as "State Sponsors of Terrorism" are Iran, Sudan, and Syria.⁸

Divestment of Securities

Divestment of securities is one method of applying economic pressures to companies, groups, or countries whose practices are not condoned by shareholders. Divestment may be used in conjunction with or in lieu of other sanctioning methods, such as economic embargoes and diplomatic and military activities. Alternatively, divestment may be used as a protective device if a particular investment carries a high level of risk to the performance of a fund.

State Divestment Laws

The state has practiced divestment three times in modern history. From 1986 to 1993, the Legislature directed the SBA to divest of companies doing business with South Africa. From 1997 until 2001, the SBA made a decision to divest of 16 tobacco stocks due to pending litigation involving the state and those companies. In 2007, the Legislature unanimously passed the Protecting Florida's Investment Act (PFIA), which required the SBA to divest of companies with certain business operations in the countries of Sudan or Iran. The PFIA requires the SBA to assemble and publish a list of "Scrutinized Companies"⁹ that have prohibited business operations in Sudan or Iran. Once a company is placed on the list, the SBA and its investment managers are prohibited from acquiring that company's securities and are required to divest the company's securities if the company does not cease the prohibited activities or take certain compensating actions involving petroleum or energy, oil or mineral extraction, power production, or military support activities.

⁶ U.S. Department of State, *State Sponsors of Terrorism*, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Jan. 13, 2016).

⁷ *Id.*

⁸ *Id.*

⁹ Section 215.473(1)(t), F.S., defines "scrutinized company" as a company that meets any of the following criteria:

1. The company has business operations that involve contracts with or provision of supplies or services to the government of Sudan, companies in which the government of Sudan has any direct or indirect equity share, consortiums or projects commissioned by the government of Sudan, or companies involved in consortiums or projects commissioned by the government of Sudan, and:

a. More than 10 percent of the company's revenues or assets linked to Sudan involve oil-related activities or mineral-extraction activities; less than 75 percent of the company's revenues or assets linked to Sudan involve contracts with or provision of oil-related or mineral-extracting products or services to the regional government of southern Sudan or a project or consortium created exclusively by that regional government; and the company has failed to take substantial action; or

b. More than 10 percent of the company's revenues or assets linked to Sudan involve power-production activities; less than 75 percent of the company's power-production activities include projects whose intent is to provide power or electricity to the marginalized populations of Sudan; and the company has failed to take substantial action.

2. The company is complicit in the Darfur genocide.

3. The company supplies military equipment within Sudan, unless it clearly shows that the military equipment cannot be used to facilitate offensive military actions in Sudan or the company implements rigorous and verifiable safeguards to prevent use of that equipment by forces actively participating in armed conflict. Examples of safeguards include post-sale tracking of such equipment by the company, certification from a reputable and objective third party that such equipment is not being used by a party participating in armed conflict in Sudan, or sale of such equipment solely to the regional government of southern Sudan or any internationally recognized peacekeeping force or humanitarian organization.

4. The company has business operations that involve contracts with or provision of supplies or services to the government of Iran, companies in which the government of Iran has any direct or indirect equity share, consortiums, or projects commissioned by the government of Iran, or companies involved in consortiums or projects commissioned by the government of Iran and:

a. More than 10 percent of the company's total revenues or assets are linked to Iran and involve oil-related activities or mineral-extraction activities; and the company has failed to take substantial action; or

b. The company has, with actual knowledge, on or after August 5, 1996, made an investment of \$20 million or more, or any combination of investments of at least \$10 million each, which in the aggregate equals or exceeds \$20 million in any 12-month period, and which directly or significantly contributes to the enhancement of Iran's ability to develop the petroleum resources of Iran.

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency¹⁰ procurement of personal property and services. Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods that include:

- Single source contracts, which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposals, which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- Invitations to negotiate, which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services.¹¹

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.¹² However, specified contractual services and commodities are not subject to competitive solicitation requirements.¹³

The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include overseeing agency implementation of the procurement process,¹⁴ creating uniform agency procurement rules,¹⁵ implementing the online procurement program,¹⁶ and establishing state term contracts.¹⁷ The agency procurement process is partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through DMS.

Prohibition against Contracting with Scrutinized Companies and Companies Engaged in Business Operations in Cuba or Syria

Current law prohibits a company that is on the Scrutinized Companies with Activities in Sudan List (Sudan List) or on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List (Iran List) or that is engaged in business operations in Cuba¹⁸ or Syria from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity¹⁹ for goods or services of \$1 million or more.²⁰ A company that submits a bid or proposal for or enters into or renews such a contract must certify that the company is not on the Sudan List or the Iran List or that it

¹⁰ Section 287.012(1), F.S., defines the term "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.

¹¹ See ss. 287.012(6) and 287.057(1), F.S.

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

¹³ See s. 287.057(3)(e), F.S.

¹⁴ See ss. 287.032 and 287.042, F.S.

¹⁵ See ss. 287.032(2) and 287.042(3), (4), and (12), F.S.

¹⁶ See s. 287.057(23), F.S.

¹⁷ See ss. 287.042(2), 287.056, and 287.1345, F.S.

¹⁸ The law prohibiting a company that is engaged in business operations in Cuba from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of \$1 million or more is known as the "Cuba Amendment" and was passed in 2012. In *Odebrecht Const., Inc. v. Secretary, Fla. Dep't of Transp.*, 715 F.3d 1268 (11th Cir. 2013), the Eleventh Circuit Court of Appeals affirmed an injunction prohibiting enforcement of the Cuba Amendment. The court found that the Cuba Amendment was preempted by extensive federal statutory and administrative sanctions and would undermine the President's discretionary authority concerning federal policy toward Cuba.

¹⁹ Section 287.135(1)(c), F.S., defines "local governmental entity" as a county, municipality, special district, or other political subdivision of the state.

²⁰ Section 287.135(2), F.S.

does not have business operations in Cuba or Syria.²¹ The certification must be submitted at the time a bid or proposal is submitted or before a contract is executed or renewed.²² In addition, a contract for goods or services of \$1 million or more entered into or renewed on or after July 1, 2012, must contain a provision that allows for the termination of the contract, at the option of the awarding body, if the company is found to have submitted a false certification, been placed on the Sudan List or the Iran List, or been engaged in business operations in Cuba or Syria.²³

If an agency or local governmental entity determines that a company has submitted a false certification, it must provide the company with written notice, and the company has 90 days to respond in writing to such determination.²⁴ If the company fails to demonstrate that the determination of false certification was made in error, the awarding body must bring a civil action against the company.²⁵ If a civil action is brought and the court determines that the company submitted a false certification, the company must pay all reasonable attorney fees and costs (including costs for investigations that led to the finding of false certification).²⁶ In addition, a civil penalty equal to the greater of \$2 million or twice the amount of the contract for which the false certification was submitted must be imposed.²⁷ The company is ineligible to bid on any contract with an agency or local governmental entity for three years after the date the agency or local governmental entity determined that the company submitted a false certification.²⁸ A civil action to collect the penalties must commence within three years after the date the false certification is submitted.²⁹

An agency or local governmental entity is authorized to make a case-by-case exception to the contracting prohibition for a company on the Sudan List or the Iran List if all of the following occur:

- The scrutinized business operations³⁰ were made before July 1, 2011;
- The scrutinized business operations have not been expanded or renewed after July 1, 2011;
- The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company; and
- The company has adopted, has publicized, and is implementing a formal plan to cease scrutinized business operations and to refrain from engaging in any new scrutinized business operations.³¹

An agency or local governmental entity is also authorized to make a case-by-case exception to the contracting prohibition for a company engaged in business operations in Cuba or Syria if:

- The business operations were made before July 1, 2012;
- The business operations have not been expanded or renewed after July 1, 2012;
- The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company; and
- The company has adopted, has publicized, and is implementing a formal plan to cease business operations and to refrain from engaging in any new business operations.³²

In addition, an agency or local governmental entity may make an exception to the contracting prohibition for a company on the Sudan List, on the Iran List, or that is engaged in business operations in Cuba or Syria if one of the following occurs:

²¹ Section 287.135(5), F.S.

²² *Id.*

²³ Section 287.135(3)(b), F.S.

²⁴ Section 287.135(5)(a), F.S.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Section 287.135(5)(a)1., F.S.

²⁸ Section 287.135(5)(a)2., F.S.

²⁹ Section 287.135(5)(b), F.S.

³⁰ Section 215.473(1)(t), F.S., defines “scrutinized business operations” to mean business operations that result in a company becoming a scrutinized company.

³¹ Section 287.135(4)(a)1., F.S.

³² Section 287.135(4)(a)2., F.S.

- The local governmental entity makes a public finding that, absent such an exemption, the local governmental entity would be unable to obtain the goods or services for which the contract is offered.
- For a contract with an executive agency, the Governor makes a public finding that, absent such an exemption, the agency would be unable to obtain the goods or services for which the contract is offered.
- For a contract with an office of a state constitutional officer other than the Governor, the state constitutional officer makes a public finding that, absent such an exemption, the office would be unable to obtain the goods or services for which the contract is offered.³³

Section 287.135(8), F.S., specifies that the contracting prohibitions discussed above become inoperative on the date that federal law ceases to authorize the state to adopt and enforce such prohibitions.

Boycott, Divestment, and Sanctions against Israel

The Boycott, Divestment, and Sanctions (BDS) Movement is a global campaign targeting Israel in an attempt to increase economic and political pressure on the country to comply with the movement's stated goals, which are:

- Ending its occupation and colonization of all Arab lands occupied in June 1967 and dismantling the wall;
- Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and
- Respecting, protecting, and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194.³⁴

The BDS Movement promotes the boycott, divestment, and sanction of Israel and has gained support from many academics, trade unions, political parties, and citizens around the world.³⁵ However, opposition to the movement is widespread, and critics have claimed the movement is ineffective,³⁶ immoral,³⁷ based on false or biased information,³⁸ and could end up harming the Palestinian cause.³⁹

In response to the BDS Movement, some states have enacted legislation that condemns BDS activities. In 2015, Illinois passed a law that requires state-funded retirement systems to divest of holdings in companies that boycott Israel under certain circumstances.⁴⁰ South Carolina also enacted anti-BDS legislation that prohibits the state or a political subdivision of the state from accepting a proposal from or procuring goods or services from a business that engages in the boycott of a person or an entity based on race, color, religion, gender, or national origin.⁴¹ Other states, including Tennessee, Indiana, Pennsylvania, and New York, have passed resolutions condemning the BDS Movement. States considering anti-BDS legislation include Ohio, New York, and New Jersey.

In June of 2015, President Obama signed into law the first federal anti-BDS legislation. With respect to an agreement that is proposed to be entered into with the Transatlantic Trade and Investment

³³ Section 287.135(4)(a)1., F.S.

³⁴ BDS Movement, *Introducing the BDS Movement*, <http://bdsmovement.net/bdsintro> (last visited Jan. 14, 2016).

³⁵ BDS Movement, *BDS in 2015: Seven ways our movement broke new ground against Israeli settler-colonialism and apartheid*, <http://bdsmovement.net/2015/7-ways-our-movement-broke-new-ground-13634> (last visited Jan. 14, 2016).

³⁶ *Boycotting Israel: New pariah on the block*, THE ECONOMIST (Sept. 13, 2007), available at <http://www.economist.com/node/9804231>.

³⁷ Naftalia Balanson, *The Moral Argument Against BDS*, ZEEK (Nov. 29, 2010), available at <http://zeek.forward.com/articles/117084/>.

³⁸ *Hundreds in academic world sign anti-BDS petition*, JEWISH TELEGRAPHIC AGENCY (Sept. 22, 2014), available at <http://www.jta.org/2014/09/22/news-opinion/united-states/hundreds-of-academics-sign-anti-bds-petition>.

³⁹ *Chomsky says BDS tactics won't work, may be harmful to Palestinians*, THE JERUSALEM POST (July 3, 2014), available at <http://www.jpost.com/Diplomacy-and-Politics/Chomsky-says-BDS-tactics-wont-work-may-be-harmful-to-Palestinians-361417>.

⁴⁰ *Illinois Gov. Signs First Anti-BDS Bill Into Law*, THE WASHINGTON FREE BEACON (July 23, 2015), <http://freebeacon.com/issues/ill-gov-signs-first-anti-bds-bill-into-law/>.

⁴¹ Miles Terry, *South Carolina: The First State in the Country to Stand with Israel Against the BDS Movement*, ACLJ, <http://aclj.org/israel/south-carolina-the-first-state-in-the-country-to-stand-with-israel-against-the-bds-movement> (last visited Jan 14, 2016).

Partnership countries, the law specifies that the principal negotiating objectives of the United States regarding commercial partnerships are the following:

- To discourage actions by potential trading partners that directly or indirectly prejudice or otherwise discourage commercial activity solely between the United States and Israel.
- To discourage politically motivated actions to boycott, divest from, or sanction Israel and to seek the elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on the State of Israel.
- To seek the elimination of state-sponsored unsanctioned foreign boycotts against Israel or compliance with the Arab League Boycott of Israel by prospective trading partners.

Effect of Proposed Changes

Prohibited Investments in Companies that Boycott Israel

The bill creates s. 215.4725, F.S., relating to prohibited investments by the SBA in companies that boycott Israel. It provides the following definitions:

- “Boycott Israel” or “boycott of Israel” means refusing to deal with, terminating business activities with, or taking other actions intended to penalize, inflict economic harm, or otherwise limit commercial relations with Israel or persons or entities doing business in Israel or in Israeli-controlled territories for reasons other than business, investment, or commercial reasons.
- “Company” means a sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company, or other entity or business association, including all wholly owned subsidiaries, majority-owned subsidiaries, and parent companies, that exists for the purpose of making profit.
- “Direct holdings” in a company means all securities of that company that are held directly by the state board on behalf of the public fund or in an account or fund in which the state board, on behalf of the public fund, owns all shares or interests.
- “Indirect holdings” in a company means all securities of that company that are held in a commingled fund or other collective investment, such as a mutual fund, in which the state board, on behalf of the public fund, owns shares or interests together with other investors not subject to the newly created section or that are held in an index fund.
- “Public fund” means the System Trust Fund as defined in s. 121.021(36), F.S.⁴²
- “Scrutinized companies” means companies that boycott Israel or engage in a boycott of Israel.
- “State board” means the SBA.
- “Trustees” means the Board of Trustees of the SBA.

By August 1, 2016, the SBA is required to make its best efforts to identify all scrutinized companies in which the SBA, on behalf of the public fund, has direct or indirect holdings or could possibly have such holdings in the future. The bill directs the SBA to use the following efforts to identify these companies:

- Reviewing and relying, as appropriate in the SBA’s judgment, on publicly available information regarding companies that boycott Israel, including information provided by nonprofit organizations, research firms, international organizations, and government entities;
- Contacting asset managers contracted by the SBA, on behalf of the public fund, for information regarding companies that boycott Israel; and
- Contacting other institutional investors that prohibit such investments or that have engaged with companies that boycott Israel.

In addition, a statement by a company that it is participating in a boycott of Israel, or that it has initiated a boycott in response to a request for a boycott of Israel or in compliance with, or in furtherance of, calls for a boycott of Israel, may be considered by the SBA as evidence that a company is participating in a boycott of Israel.

Before its first meeting following the identification of scrutinized companies, the SBA must compile and make available the Scrutinized Companies that Boycott Israel List (Israel List). The SBA is required to

⁴² Section 121.021(36), F.S., defines “System Trust Fund” as the trust fund established in the State Treasury by ch. 121, F.S., for the purpose of holding and investing the contributions paid by FRS members and employers and paying the benefits to which members or their beneficiaries may become entitled.

update and make publicly available quarterly the Israel List based on evolving information from the sources used to compile the initial list as well as other sources.

The bill prohibits the SBA, on behalf of the public fund, from acquiring securities of companies on the Israel List. However, the following securities are excluded from the prohibition:

- Indirect holdings;
- Securities that are not publicly traded, which the bill deems indirect holdings;
- Alternative investments, as defined in s. 215.4401, F.S.,⁴³ which the bill deems indirect holdings; and
- ETFs.

For indirect holdings containing companies that boycott Israel, the SBA is required to submit letters to managers of the investment funds requesting that the managers consider removing such companies from the fund or create a similar fund having indirect holdings devoid of such companies. If the investment manager creates a similar fund, the SBA, on behalf of the public fund, is required to replace all applicable investments with investments in the similar fund in an expedited timeframe consistent with prudent investing standards.

The bill requires the SBA to immediately determine companies on the Israel List in which the SBA, on behalf of the public fund, owns direct or indirect holdings. For each company the SBA newly identifies after August 1, 2016, the SBA must send a written notice informing the company of its scrutinized company status and advising the company that it may become subject to investment prohibition. The notice must inform the company of the opportunity to clarify its activities regarding the boycott of Israel and encourage the company to cease the boycott within 90 days to avoid qualifying for investment prohibition. If, within 90 days after notification by the SBA, the company ceases a boycott of Israel, the company must be removed from the Israel List, and the investment prohibition may no longer apply to that company unless the company resumes a boycott of Israel.

Within 30 days after the Israel List is created, the SBA is required to file a report with each member of the trustees, the President of the Senate, and the Speaker of the House of Representatives that includes the Israel List. The report must be made available to the public.

At each quarterly meeting of the trustees thereafter, the SBA must file a report, which must be made available to the public and to each member of the trustees, the President of the Senate, and the Speaker of the House of Representatives. This report must include the following:

- A summary of correspondence with companies identified as scrutinized companies;
- All prohibited investments;
- Any progress related to communicating with managers of indirect holdings that contain companies that boycott Israel; and
- A list of all publicly traded securities held directly by the public fund.

The SBA is required to adopt and incorporate the actions it takes to comply with the bill's investment prohibition into the SBA's investment policy statement as set forth in s. 215.475, F.S.⁴⁴

⁴³ Section 215.4401(3)(a)1., F.S., defines "alternative investment" as an investment by the SBA in a private equity fund, venture fund, hedge fund, or distress fund or a direct investment in a portfolio company through an investment manager.

⁴⁴ Section 215.475, F.S., entitled "Investment policy statement" provides:

(1) In making investments for the System Trust Fund pursuant to ss. 215.44-215.53, F.S., the board shall make no investment which is not in conformance with the Florida Retirement System Defined Benefit Plan Investment Policy Statement, hereinafter referred to as "the IPS," as developed by the executive director and approved by the board. The IPS must include, among other items, the investment objectives of the System Trust Fund; permitted types of securities in which the board may invest; and evaluation criteria necessary to measure the investment performance of the fund. As required from time to time, the executive director of the board may present recommended changes in the IPS to the board for approval.

(2) Prior to any recommended changes in the IPS being presented to the board, the executive director of the board shall present such changes to the Investment Advisory Council for review. The council shall present the results of its review to the board prior to the board's final approval of the IPS or changes in the IPS.

Notwithstanding any other provision of the bill to the contrary, the SBA, on behalf of the public fund, may invest in certain scrutinized companies if clear and convincing evidence shows that the value of all the assets under management by the SBA, on behalf of the public fund, becomes equal to or less than 99.5 percent, or 50 basis points, of the hypothetical value of all assets under management by the SBA, on behalf of the public fund, assuming no investment prohibition for any scrutinized company had occurred. Cessation of the investment prohibition and any new investment in a scrutinized company is limited to the minimum steps necessary to avoid this contingency. For any cessation of the investment prohibition and new investment in a scrutinized company, the SBA must submit a written report to the trustees, the President of the Senate, and the Speaker of the House of Representatives in advance of the new investment. The report must be updated semiannually thereafter as applicable, setting forth the reasons and justification, supported by clear and convincing evidence, for its decisions to cease the investment prohibition in scrutinized companies.

Prohibition against Contracting with Companies that Boycott Israel

The bill amends current law to prohibit a company on the Israel List from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of \$1 million or more. At the time a company submits a bid or proposal for such a contract or before the company enters into or renews such a contract, the company must certify that it is not on the Israel List.

Any contract with an agency or local governmental entity for goods or services of \$1 million or more entered into or renewed on or after October 1, 2016, must contain a provision that allows for the termination of the contract by the awarding body if the company:

- Is found to have submitted a false certification; or
- Has been placed on the Israel List.

An agency or local governmental entity is authorized to make a case-by-case exception to the contracting prohibition for a company on the Israel List if all of the following occur:

- The scrutinized business operations were made before October 1, 2016;
- The scrutinized business operations have not been expanded or renewed after October 1, 2016;
- The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company; and
- The company has adopted, has publicized, and is implementing a formal plan to cease scrutinized business operations and to refrain from engaging in any new scrutinized business operations.

An agency or local governmental entity is also authorized to make an exception to the contracting prohibition for a company on the Israel List if one of the following occurs:

- The local governmental entity makes a public finding that, absent such an exemption, the local governmental entity would be unable to obtain the goods or services for which the contract is offered.
- For a contract with an executive agency, the Governor makes a public finding that, absent such an exemption, the agency would be unable to obtain the goods or services for which the contract is offered.
- For a contract with an office of a state constitutional officer other than the Governor, the state constitutional officer makes a public finding that, absent such an exemption, the office would be unable to obtain the goods or services for which the contract is offered.

B. SECTION DIRECTORY:

Section 1. creates s. 215.4725, F.S., relating to prohibited investments by the SBA in companies that boycott Israel.

Section 2. amends s. 287.135, F.S., relating to the prohibition against contracting with scrutinized companies.

Section 3. provides an effective date of upon becoming a law except as expressly provided in the act.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill has an indeterminate fiscal impact on the private sector. Companies that engage in a boycott of Israel may not be eligible to contract with the state and local governmental entities, which may have a negative fiscal impact on the company. In addition, the SBA may be prohibited from acquiring securities in those companies as an asset of the FRS, which to a lesser degree may have a negative fiscal impact on those companies .⁴⁵

D. FISCAL COMMENTS:

Prohibition on Contracting with Companies that Boycott Israel

The bill has an indeterminate fiscal impact on the state and local governments. State agencies and local governments will not be authorized to contract with certain companies that boycott Israel in certain instances. This prohibition may eliminate companies that otherwise would have been the least expensive source for certain goods or services.

Prohibition on Investing in Companies that Boycott Israel

There will be a recurring cost to the SBA to subscribe to appropriate services and for additional staff time necessary to comply with requirements of the bill related to companies that boycott Israel. However, such costs are expected to be less than \$25,000 per year and can be absorbed within existing agency funds.⁴⁶

The fiscal impact of prohibiting the SBA from acquiring securities of companies that boycott Israel as an asset of the FRS is indeterminate. According to the SBA, there is a potential for an impact on the employer contribution rates to the FRS, but such impact, if any, would be indiscernable, similar to other similar prohibitions currently in affect..⁴⁷

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

⁴⁵ State Board of Administration, Agency Analysis of 2016 House Bill 527, p. 4 (Dec. 16, 2015).

⁴⁶ *Id.*

⁴⁷ *Id.*

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

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,⁴⁸ maintain a military,⁴⁹ enter into treaties and other international agreements,⁵⁰ regulate foreign commerce,⁵¹ and to hear cases involving foreign states and citizens.⁵² These grants of power have been interpreted to grant the federal government the exclusive power to act in the area of foreign affairs.⁵³ 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.⁵⁴ If the purpose of the bill is to impact foreign affairs,⁵⁵ or if the effects of the bill have a sufficiently serious impact on foreign policy,⁵⁶ the bill may be found in violation of the dormant foreign affairs doctrine.⁵⁷

South Carolina and Illinois have both enacted anti-BDS laws that have not been challenged.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

⁴⁸ Section 8, Art. I, U.S. Constitution.

⁴⁹ *Id.*

⁵⁰ Section 2, Art. II, U.S. Constitution.

⁵¹ Section 8, Art. I, U.S. Constitution.

⁵² Section 2, Art. III, U.S. Constitution.

⁵³ *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.").

⁵⁴ *Zschernig v. Miller*, 389 U.S. 429 (1968); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

⁵⁵ *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.).

⁵⁶ *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).

⁵⁷ Matthew Shafer, *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).