

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1111 Government Integrity
SPONSOR(S): State Affairs Committee, Public Integrity & Ethics Committee, Tomkow
TIED BILLS: IDEN./SIM. **BILLS:** SB 1538

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|------------------|-----------|---------------------------------------|
| 1) Public Integrity & Ethics Committee | 16 Y, 0 N, As CS | Kiner | Rubottom |
| 2) Appropriations Committee | 26 Y, 0 N | Keith | Pridgeon |
| 3) State Affairs Committee | 22 Y, 0 N, As CS | Etheridge | Williamson |

SUMMARY ANALYSIS

The bill includes various provisions designed to promote integrity in government and identify and eliminate fraud, waste, abuse, mismanagement, and misconduct in government. Specifically, the bill:

- Creates the Florida Integrity Office (FIO) under the Auditor General for the purpose of ensuring accountability and integrity in state and local government and facilitating the elimination of fraud, waste, abuse, mismanagement, and misconduct in government.
- Requires the Chief Inspector General (CIG) and agency inspectors general to determine whether there is reasonable probability that fraud, waste, abuse, mismanagement, or misconduct in government has occurred within six months of initiating an investigation of such activity.
- Provides a mechanism for the state to recover funds when the CIG or an agency inspector general determines a public official, independent contractor, or agency has committed fraud, waste, abuse, mismanagement, or misconduct in government.
- Requires the Chief Financial Officer to regularly forward to the Florida Integrity Officer (Officer) copies of suggestions and information submitted through the state's "Get Lean" hotline.
- Provides a financial incentive for agency employees to file "Whistle-blower's Act" complaints and participate in investigations that lead to the recovery of funds.
- Establishes fiduciary duty of care standards applicable to appointed public officials and executive officers and requires appointed public officials and executive officers to complete a minimum of five hours of board governance training for each term served.
- Requires specified terms be included in all contracts with public agencies.
- Broadens the competitive solicitation exemption for statewide broadcasting of public service announcements.
- Prohibits state or local tax incentive funds from being used to award or pay a state contractor for services provided or expenditures incurred pursuant to a state contract.
- Prohibits a state employee from lobbying for an appropriation and also participating in awarding any contract funded by the appropriation. The bill provides an exception for a state employee who is an agency head, employed in the Executive Office of the Governor or the Office of Policy and Budget, or an employee who is required to register as a lobbyist but whose primary job responsibilities do not include lobbying.

The bill is projected to have a significant fiscal impact to expenditures of the Auditor General. Provisions of the bill related to the creation of the FIO under the Auditor General are anticipated to cost approximately \$2.5 million annually to implement. However, the bill authorizes the Auditor General to use existing carryforward funds to cover any projected expenditures. The fiscal impact of other provisions of the bill on other state agencies are indeterminate, but likely insignificant, and are expected to be absorbed within existing agency resources. See Fiscal Comments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida Integrity Office (Sections 1 and 15)

Current Situation

The position of Auditor General is established by Art. III, s. 2 of the State Constitution. The Auditor General is appointed to office to serve at the pleasure of the Legislature, by a majority vote of the members of the Legislative Auditing Committee, subject to confirmation by both houses of the Legislature.¹ The appointment of the Auditor General may be terminated at any time by a majority vote of both houses of the Legislature.²

The Auditor General conducts audits, examinations, and reviews of government programs as well as audits the accounts and records of state agencies, state universities, state colleges, district school boards, and others as directed by the Legislative Auditing Committee.³ The Auditor General conducts operational and performance audits on public records and information technology systems and reviews all audit reports of local governmental entities, charter schools, and charter technical career centers.⁴

Current law authorizes the Legislature, through its committees, to inspect and investigate the books, records, papers, documents, data, operation, and physical plant of any public agency in the state, including any confidential information.⁵ Current law also authorizes the Legislature, through its committees, to issue subpoena and other necessary process to compel the attendance of witnesses and issue subpoena duces tecum to compel the production of any books, letters, or other documentary evidence, including any confidential information, in reference to any matter under investigation.⁶

Effect of Proposed Changes

The bill creates the Florida Integrity Office (FIO) under the Auditor General. FIO will be led by the Florida Integrity Officer (Officer), who will be appointed by and serve at the pleasure of the Auditor General. Pursuant to the bill's provisions, the Officer may receive and investigate any complaint alleging fraud, waste, abuse, mismanagement, or misconduct in connection with the expenditure of public funds. The following individuals may submit a complaint: the President of the Senate; the Speaker of the House of Representatives; the chair of an appropriations committee of the Senate or House of Representatives; and the Auditor General.

Upon receipt of a valid complaint, the bill requires the Officer to determine whether the complaint is supported by sufficient information indicating a reasonable probability of fraud, waste, abuse, mismanagement, or misconduct. If the Officer determines that the complaint is not supported by sufficient information indicating a reasonable probability of fraud, waste, abuse, mismanagement, or misconduct, the Officer must notify the complainant in writing, and the complaint must be closed.

If the complaint is supported by sufficient information indicating a reasonable probability of fraud, waste, abuse, mismanagement, or misconduct, the bill requires the Officer to determine whether the matter is under investigation by a law enforcement agency, the Commission on Ethics, the Chief Financial Officer, the Office of the Chief Inspector General, or the applicable agency inspector general. If such an investigation has been initiated, the Officer must notify the complainant in writing, and the complaint may be closed. If such an investigation has not been initiated, the bill requires the Officer to conduct an

¹ S. 11.42(2), F.S.

² S. 11.42(5), F.S.

³ S. 11.45, F.S.

⁴ *Id.*

⁵ S. 11.143(2), F.S.

⁶ S. 11.143(3), F.S.

investigation and issue a report of the investigative findings to the President of the Senate and the Speaker of the House of Representatives. The Officer may also refer the matter to the Auditor General, the appropriate law enforcement agency, the Chief Financial Officer, the Office of the Chief Inspector General, or the applicable agency inspector general.

Similar to the current authority given to legislative committees,⁷ the bill gives the Officer the authority to inspect and investigate the books, records, papers, documents, data, operation, and physical location of any public agency in the state, including any confidential information. The bill also gives the Officer the authority to investigate the public records of any entity that has received direct appropriations.

The bill authorizes the Officer to request the Legislative Auditing Committee or any legislative committee to exercise existing powers⁸ to issue subpoenas and subpoenas duces tecum to compel testimony or the production of evidence when deemed necessary to an authorized investigation. The bill also provides the means of enforcing any subpoena issued pursuant to the bill's provisions.

Beginning with fiscal year (FY) 2021–2022, the bill requires the Auditor General and the Officer to, within available resources, randomly select and review appropriations projects appropriated in the prior FY and, if appropriate, investigate and recommend an audit of such project. The bill requires that, at a minimum, the investigation or audit must include an evaluation of whether the recipient of the appropriations project administered the project in an efficient and effective manner. Pursuant to the bill, the term “appropriations project” means a specific appropriation or proviso providing funding for a specified entity that is a local government, private entity, or privately-operated program that is named or described. The term does not include an appropriation:

- Specifically authorized by statute;
- That is part of a statewide distribution to local governments;
- Recommended by a commission, council, or other similar entity created in statute to make annual funding recommendations, provided that such appropriation does not exceed the amount of funding recommended by the commission, council, or other similar entity;
- For a specific transportation facility that was part of the Department of Transportation's five-year work program submitted pursuant to s. 339.135, F.S.;
- For an education fixed capital outlay project that was submitted pursuant to s. 1013.60, F.S., or s. 1013.64, F.S.; or
- For a specified program, research initiative, institute, center, or similar entity at a specific state college or university recommended by the Board of Governors or the State Board of Education in its Legislative Budget Request.

The bill's definition of “appropriations project” mirrors the definition of the term in Joint Rule 2.2,⁹ adopted for the 2018–2020 biennium.

Beginning with FY 2021–2022, the bill requires the Auditor General and the Officer, within available resources, to select and review, audit, or investigate the financial activities of:

- Political subdivisions, special districts, public authorities, public hospitals, state and local councils or commissions, units of local government, or public education entities in the state; and
- Any authorities, councils, commissions, direct-support organizations, institutions, foundations, or similar entities created by law or ordinance to pursue a public purpose, entitled by law or ordinance to any distribution of tax or fee revenues, or organized for the sole purpose of supporting one of the public entities listed above.

⁷ See s. 11.143(2), F.S.

⁸ See s. 11.143(3), F.S.

⁹ J.R. 2.2(4), 2018–2020.

Auditor General Responsibilities (Section 2)

Current Situation

The United States Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress.¹⁰ Often called the “congressional watchdog,” the GAO examines how taxpayer dollars are spent and provides Congress and federal agencies with objective, reliable information to help the government save money and work more efficiently.¹¹ GAO’s publication, *Government Auditing Standards* (known as the “Yellow Book”) provides “a framework for performing high-quality audit work with competence, integrity, objectivity, and independence to provide accountability and to help improve government operations and services.”¹² Among other things, the Yellow Book provides a standard definition for “abuse.”¹³

The Florida Department of Management Services (DMS) has promulgated rules that set forth the minimum standards of conduct that apply to all employees in the State Personnel System, the violation of which may result in dismissal.¹⁴

Current law requires the Auditor General to conduct operational audits¹⁵ of state agencies, state universities, state colleges, district school boards, the Florida Clerks of Court Operations Corporation, water management districts, and the Florida School for the Deaf and the Blind at least every three years.¹⁶ Current law also requires the Auditor General to conduct a financial audit¹⁷ of all state universities and state colleges on an annual basis.¹⁸ The Auditor General is required to perform a financial audit of district school boards in counties that have populations of 150,000 or more at least once every three years and annually in counties with populations of fewer than 150,000.¹⁹

If an operational or financial audit report indicates a district school board, state university, or state college has failed to take full corrective action in response to a recommendation that was included in the two preceding operational or financial audit reports, the Auditor General is required to notify the Legislative Auditing Committee.²⁰ In such cases, the Legislative Auditing Committee may initiate actions that require the audited organization to demonstrate the steps it has taken towards corrective

¹⁰ GAO, <https://www.gao.gov/about> (last visited Feb. 14, 2020).

¹¹ *Id.*

¹² GAO, *Government Auditing Standards* 1 (July 2018).

¹³ *Id.* at 114. The GAO defines “abuse” as behavior that is deficient or improper when compared with behavior that a prudent person would consider a reasonable and necessary operational practice given the facts and circumstances. The term includes the misuse of authority or position for personal gain or for the gain of an immediate or close family member or business associate.

¹⁴ R. 60L-36.005, F.A.C., defines “misconduct” as conduct which, though not illegal or inappropriate for a state employee generally, is inappropriate for a person in the employee’s particular position.

¹⁵ S. 11.45(1)(g), F.S., defines an “operational audit” as an audit whose purpose is to evaluate management’s performance in establishing and maintaining internal controls, including controls designed to prevent and detect fraud, waste, and abuse, and in administering assigned responsibilities in accordance with applicable laws, administrative rules, contracts, grant agreements, and other guidelines. Operational audits must be conducted in accordance with government auditing standards. Such audits examine internal controls that are designed and placed in operation to promote and encourage the achievement of management’s control objectives in the categories of compliance, economic and efficient operations, reliability of financial records and reports, and safeguarding of assets, and identify weaknesses in those internal controls.

¹⁶ S. 11.45(2)(f), F.S.

¹⁷ S. 11.45(1)(c), F.S., defines a “financial audit” as an examination of financial statements in order to express an opinion on the fairness with which they are presented in conformity with generally accepted accounting principles and an examination to determine whether operations are properly conducted in accordance with legal and regulatory requirements. Financial audits must be conducted in accordance with auditing standards generally accepted in the United States and government auditing standards as adopted by the Board of Accountancy. When applicable, the scope of financial audits must encompass the additional activities necessary to establish compliance with the Single Audit Act Amendments of 1996, 31 U.S.C. ss. 7501-7507, and other applicable federal law.

¹⁸ S. 11.45(2)(c), F.S.

¹⁹ S. 11.45(2)(d) and (e), F.S.

²⁰ S. 11.45(7)(j), F.S.

action.²¹ This reporting cycle may result in the Legislative Auditing Committee not being notified of one of the above referenced entity's failure to take full corrective action for six or more years.

Effect of Proposed Changes

The bill codifies a definition for "misconduct" and revises the definition for "abuse." The bill defines the term "abuse" as behavior that is deficient or improper when compared with behavior that a prudent person would consider a reasonable and necessary operational practice given the facts and circumstances. The term includes the misuse of authority or position for personal gain or for the gain of an immediate or close family member or business associate. The bill defines the term "misconduct" as conduct that, though not illegal, is inappropriate for a person in his or her specified position. The definition for "abuse" mirrors the definition used by GAO in the Yellow Book. The definition for 'misconduct' mirrors the definition promulgated by DMS rule.

The bill revises the Auditor General's notification responsibilities with respect to a district school board, state university, or state college failing to take full corrective action on an audit finding by shortening the cycle from three to two successive operational audits.

The bill requires the Auditor General to publish a report consolidating common operational audit findings for all state agencies, all state universities, all state colleges, and all district school boards at the conclusion of each three-year cycle.

Inspectors General (Sections 3 and 6)

Current Situation

The Office of Chief Inspector General (CIG) is responsible for promoting accountability, integrity, and efficiency in agencies under the Governor's jurisdiction.²² The CIG monitors the activities of the agency inspectors general under the Governor's jurisdiction and is required to do the following:

- Initiate, supervise, and coordinate investigations, recommend policies, and carry out other activities designed to deter, detect, prevent, and eradicate fraud, waste, abuse, mismanagement, and misconduct in government;
- Investigate, upon receipt of a complaint or for cause, any administrative action of any agency the administration of which is under the direct supervision of the Governor;
- Request such assistance and information as may be necessary for the performance of the CIG's duties;
- Examine the records and reports of any agency the administration of which is under the direct supervision of the Governor;
- Coordinate complaint-handling activities with agencies;
- Coordinate the activities of the Whistle-blower's Act and maintain the whistle-blower's hotline to receive complaints and information concerning the possible violation of law or administrative rules, mismanagement, fraud, waste, abuse of authority, malfeasance, or a substantial or specific danger to the health, welfare, or safety of the public;
- Report expeditiously to and cooperate fully with the Department of Law Enforcement, the Department of Legal Affairs, and other law enforcement agencies when there are recognizable grounds to believe that there has been a violation of criminal law or that a civil action should be initiated;
- Act as liaison with outside agencies and the federal government to promote accountability, integrity, and efficiency in state government;
- Act as liaison and monitor the activities of the inspectors general in the agencies under the Governor's jurisdiction;
- Review, evaluate, and monitor the policies, practices, and operations of the Executive Office of the Governor; and

²¹ *Id.*

²² S. 14.32(1), F.S.

- Conduct special investigations and management reviews at the request of the Governor.²³

Authorized under s. 20.055, F.S., an Office of Inspector General (OIG) is established in each state agency²⁴ to provide a central point for the coordination and responsibility for activities that promote accountability, integrity, and efficiency in government. Each agency OIG is responsible for the following:

- Advising in the development of performance measures, standards, and procedures for the evaluation of state agency programs;
- Assessing the reliability and validity of information provided by the agency on performance measures and standards;
- Reviewing the actions taken by the agency to improve agency performance, and making recommendations, if necessary;
- Supervising and coordinating audits, investigations, and reviews relating to the programs and operations of the state agency;
- Conducting, supervising, or coordinating other activities carried out or financed by the agency for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations;
- Providing central coordination of efforts to identify and remedy waste, abuse, and deficiencies to the agency head,²⁵ or the CIG for agencies under the jurisdiction of the Governor; recommending corrective action concerning fraud, abuses, and deficiencies; and reporting on the progress made in implementing corrective action;
- Coordinating agency-specific audit activities between the Auditor General, federal auditors, and other governmental bodies to avoid duplication;
- Reviewing rules relating to the programs and operations of the agency and making recommendations concerning their impact;
- Ensuring that an appropriate balance is maintained between audit, investigative, and other accountability activities; and
- Complying with the General Principles and Standards for Offices of Inspector General as published and revised by the Association of Inspectors General.²⁶

With respect to investigations, each OIG must initiate, conduct, supervise, and coordinate investigations designed to detect, deter, prevent, and eradicate fraud, waste, mismanagement, misconduct, and other abuses in state government.²⁷ For these purposes, each inspector general must do the following:

- Receive complaints and coordinate all activities of the agency as required by the Whistle-blower's Act;
- Receive and consider the complaints that do not meet the criteria for an investigation under the Whistle-blower's Act and conduct, supervise, or coordinate such inquiries, investigations, or reviews as the inspector general deems appropriate;
- Report expeditiously to the Department of Law Enforcement or other law enforcement agencies, as appropriate, when the inspector general has reasonable grounds to believe there has been a violation of criminal law;

²³ S. 14.32(2), F.S.

²⁴ S. 20.055(1)(d), F.S., defines the term "state agency" as each department created pursuant to ch. 20, F.S., and the Executive Office of the Governor, the Department of Military Affairs, the Fish and Wildlife Conservation Commission, the Office of Insurance Regulation of the Financial Services Commission, the Office of Financial Regulation of the Financial Services Commission, the Public Service Commission, the Board of Governors of the State University System, the Florida Housing Finance Corporation, the Agency for State Technology, the Office of Early Learning, and the state courts system.

²⁵ S. 20.055(1)(a), F.S., defines the term "agency head" as the Governor, a Cabinet officer, a secretary as defined in s. 20.03(5), F.S., or an executive director as defined in s. 20.03(6), F.S. It also includes the chair of the Public Service Commission, the Director of the Office of Insurance Regulation of the Financial Services Commission, the Director of the Office of Financial Regulation of the Financial Services Commission, the board of directors of the Florida Housing Finance Corporation, the executive director of the Office of Early Learning, and the Chief Justice of the State Supreme Court.

²⁶ S. 20.055(2), F.S.

²⁷ S. 20.055(7), F.S.

- Conduct investigations and other inquiries free of actual or perceived impairment to the independence of the inspector general or the inspector general's office. This must include freedom from any interference with investigations and timely access to records and other sources of information;
- At the conclusion of an investigation, the subject of which is an entity contracting with the state or an individual substantially affected, submit the findings to the contracting entity or the individual substantially affected, who must be advised that they may submit a written response to the findings. The response and the inspector general's rebuttal to the response, if any, must be included in the final audit report; and
- Submit in a timely fashion final reports on investigations conducted by the inspector general to the agency head.²⁸

Effect of Proposed Changes

The bill requires the CIG and agency inspectors general to make a reasonable probability determination within six months of initiating an investigation of fraud, waste, abuse, mismanagement, or misconduct in government. Pursuant to the bill's provisions, if the investigation continues in the absence of reasonable probability that fraud, waste, abuse, mismanagement, or misconduct has occurred, the CIG or any agency inspector general must make a new determination every three months until the investigation is closed or reasonable probability is found. The bill provides definitions for the terms "fraud,"²⁹ "waste,"³⁰ "abuse,"³¹ and "misconduct."³² The definitions for "fraud," "waste," and "abuse" mirror the definitions used by GAO, as provided in the *Standards for Internal Control in the Federal Government* (known as the "Green Book").³³ The definition for "misconduct" mirrors the definition promulgated by DMS in r. 60L-36.005, F.A.C.

If the CIG or an agency inspector general determines there is reasonable probability to believe a public official, independent contractor, or agency has committed fraud, waste, abuse, mismanagement, or misconduct in government, the bill requires the applicable inspector general to report such determination to the Officer. Pursuant to the bill, such public officer, independent contractor, or agency employee responsible for the fraud, waste, abuse, mismanagement, or misconduct in government is liable for repayment of the funds diverted or lost. If the person liable fails to repay such funds voluntarily and the state does not agree to a settlement, the bill requires the CFO to bring a civil action to recover the funds.

Chief Financial Officer's Office of Fiscal Integrity (Section 4)

Current Situation

The Chief Financial Officer (CFO) is an elected constitutional Cabinet member.³⁴ The CFO serves as the chief fiscal officer of the state and is responsible for settling and approving accounts against the state and keeping all state funds and securities.³⁵ Such responsibilities include, but are not limited to,

²⁸ *Id.*

²⁹ The bill defines the term "fraud" as obtaining something of value through willful misrepresentation, including, but not limited to, the intentional misstatements or intentional omissions of amounts or disclosures in financial statements to deceive users of financial statements, theft of an entity's assets, bribery, or the use of one's position for personal enrichment through the deliberate misuse or misapplication of an entity's resources.

³⁰ The bill defines the term "waste" as the act of using or expending resources unreasonably, carelessly, extravagantly, or for no useful purpose.

³¹ The bill defines the term "abuse" as behavior that is deficient or improper when compared with behavior that a prudent person would consider a reasonable and necessary operational practice given the facts and circumstances. The term includes the misuse of authority or position for personal gain.

³² The bill defines the term "misconduct" as conduct which, though not illegal, is inappropriate for a person in his or her specified position.

³³ GAO, *Standards for Internal Control in the Federal Government* 40 (September 2014).

³⁴ Art. IV, s. 4(a), Fla. Const.

³⁵ Art. IV, s. 4(c), Fla. Const.; s. 17.001, F.S.

auditing and adjusting accounts of officers and those indebted to the state,³⁶ paying state employee salaries,³⁷ and reporting all disbursements of funds administered by the CFO.³⁸

The CFO's Office of Fiscal Integrity (OFI) is a criminal justice agency³⁹ with full statutory subpoena power.⁴⁰ OFI's mission is to detect and investigate the misappropriation or misuse of state assets in a manner that safeguards the interests of the state and its taxpayers.⁴¹

According to OFI, it conducts criminal investigations into misbehavior by state employees that have been under review by their respective agency inspector general. Upon receiving the referral on the state employee, OFI may begin a full criminal investigation. If criminal charges are warranted, OFI will refer the matter to the proper charging authority.

According to OFI, it does not currently have the authority to commence an investigation based on a complaint from an employee of a state agency or state contractor.

Effect of Proposed Changes

The bill authorizes the CFO to commence an investigation based on a complaint or referral from any source, including an employee of a state agency or state contractor. The bill also explicitly authorizes an employee of a state agency or state contractor who has knowledge of suspected misuse of state funds to report such information to the CFO.

Chief Financial Officer's "Get Lean" Program (Section 5)

Current Situation

The CFO is required to operate a 24-hour statewide toll-free hotline to receive information or suggestions from state residents on how to improve the operation of government, increase governmental efficiency, and eliminate waste in government.⁴² The hotline consists of a telephone hotline and website. The CFO is required to advertise the hotline by posting notices in conspicuous places in state agency offices, city halls, county courthouses, and places in which there is exposure to significant numbers of the general public, including, but not limited to, local convenience stores, shopping malls, shopping centers, gas stations, or restaurants.⁴³ Additionally, the law allows the CFO to advertise the availability of the hotline in newspapers of general circulation within the state.⁴⁴ When advertising the hotline, the CFO must use the slogan, "Tell us where we can 'Get Lean.'"⁴⁵

Those that provide tips through the hotline may remain anonymous, but if the tipper provides his or her name, the name is kept confidential.⁴⁶ By law, the tipper is immune from liability for any use of the information and may not be subject to any retaliation by any state employee for providing the tip.⁴⁷

When a tip comes in to the hotline, the CFO's office is required to conduct an evaluation to determine if the tip is appropriate to be processed.⁴⁸ If the tip is appropriate to be processed, the CFO's office is required to keep a record of each suggestion or item of information received in the tip.⁴⁹

³⁶ S. 17.04, F.S.

³⁷ S. 17.09, F.S.

³⁸ S. 17.11, F.S.

³⁹ S. 20.121(2)(e), F.S.

⁴⁰ S. 17.05(2), F.S.

⁴¹ Office of Fiscal Integrity, <https://myfloridacfo.com/Division/DIFS/OFI/default.htm> (last visited Feb. 19, 2020).

⁴² S. 17.325(1), F.S.

⁴³ S. 17.325(2), F.S.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ S. 17.325(3), F.S.

⁴⁷ S. 17.325(4), F.S.

⁴⁸ S. 17.325(3), F.S.

⁴⁹ *Id.*

If the tipper discloses that he or she is a state employee, the CFO's office may refer any information or suggestion from the tipper to an existing state awards program administered by the impacted agency.⁵⁰ If forwarded, the impacted agency must conduct a preliminary evaluation of the efficacy of the suggestion or information and provide the CFO's office with a preliminary determination of the amount of revenue the state might save by implementing the suggestion or making use of the information.⁵¹

Effect of Proposed Changes

The bill requires the CFO's office to provide a copy of each suggestion or item of information processed through the "Get Lean" hotline to the Officer by the 15th of the month following receipt of the suggestion or item of information.

Florida Whistle-blower's Act (Sections 8, 16 - 18)

Current Situation

The "Whistle-blower's Act"⁵² protects government employees from adverse actions from their employers or an independent contractor for reporting any act (or suspected act) of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty; or any violation (or suspected violation) of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor that creates and presents a substantial and specific danger to the public's health, safety, or welfare.⁵³ The Whistle-blower's Act, codified in ss. 112.3187 – 112.31895, F.S., governs the complaint filing and resolution process, provides investigatory procedures upon receipt of a complaint and in response to prohibited personnel actions, and provides for confidentiality of the complainant's name or identity.

Effect of Proposed Changes

The bill broadens the category of complaints that may be covered by the Whistle-blower's Act. Specifically, the bill covers complaints alleging "mismanagement," "waste of public funds," and "neglect of duty" as opposed to "gross mismanagement," "gross waste of public funds," and "gross neglect of duty" as under current law. The bill makes conforming changes to other portions of the Whistle-blower's Act consistent with the revised definitions and broader category of complaints.

Savings Sharing Program (Section 7)

Current Situation

Florida law provides a state "Savings Sharing Program" for the purpose of providing a process by which state agencies can retain a portion of their budget for implementing internally generated program efficiencies and cost reductions and then redirect the savings to employees.⁵⁴ By law, DMS must adopt rules that prescribe procedures for the program.⁵⁵

Each state agency is eligible to participate in the Savings Sharing Program, and each agency head is responsible for recommending employees individually or by group to be awarded an amount of money, which must be directly related to the cost savings realized.⁵⁶ Each proposed award must be approved by the Legislative Budget Commission before distribution.⁵⁷ All employees within the Career Service

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Ss. 112.3187–112.31895, F.S.

⁵³ S. 112.3187(4) and (5), F.S.

⁵⁴ S. 110.1245, F.S.

⁵⁵ S. 110.1245(1)(a), F.S.

⁵⁶ S. 110.1245(1)(b) and (c), F.S.

⁵⁷ S. 110.1245(1)(b), F.S.

and Selected Exempt Service are eligible to receive awards, provided they meet the statutory eligibility criteria.⁵⁸

Additionally, the law allows the Chief Justice to establish a savings sharing program for employees in the judicial branch.⁵⁹

Effect of Proposed Changes

The bill creates a reward system for state employees whose reports under the Whistle-blower's Act result in savings or recovery of public funds in excess of \$1,000. The amount of the award will be determined by the amount saved or recovered, the employee's employment classification, and when more than one employee makes a relevant report, in proportion to each employee's contribution to the investigation that led to the recovery of such funds. The bill sets the following award amounts:

- Career Service Employee – 10 percent of savings or recovery certified, but not less than \$500 and not more than a total of \$50,000 in any year.
- Selected Exempt Service Employees and Senior Management Service – 5 percent of savings or recovery certified, but not more than \$1,000 in any year.

The agency head must recommend the employee or employees for awards and requires the funds be paid from the specific appropriation or trust fund from which the savings or recovery resulted. The bill provides that these awards are not bonuses and do not require approval by the Legislative Budget Commission.

To protect the identity of the whistle-blower, the bill allows employees to authorize an agent, trustee, or custodian to collect any award for which the employee is eligible on the employee's behalf.

Fiduciary Duty of Care of for Appointed Public Officers and Executive Officers (Sections 9 and 10)

Current Situation

The Florida Business Corporation Act (Act) imposes certain duties on members and officers of corporate boards, such as a duty to act in good faith and in a manner reasonably believed to be in the best interest of the corporation.⁶⁰ In discharging their duties, the Act generally requires corporate board members to exercise the care that an ordinary prudent person in a like position would reasonably believe appropriate under similar circumstances.⁶¹ In taking such actions, the Act allows corporate board members to rely on reliable and competent corporate employees and/or legal counsel or financial or accounting-type employees, to supply information, opinions, reports, statements, or other financial data to assist their decisionmaking.⁶² Among other duties, the Act imposes on corporate officers certain duties to the board, such as, the duty to inform of actual or material violations of law involving the board, material breaches of duty to the corporation by an officer, employee, or agent, or other material information about corporate affairs.⁶³ In carrying out these duties, the Act also allows corporate officers to rely on reliable and competent employees and/or legal counsel.⁶⁴

In some cases, a corporate board member may be legally liable for a breach of board duty. Generally, the Act provides a board member is not personally liable for monetary damages to the corporation or any other person for action or non-action as a board member, unless, among other things, the board member's breach or failure to perform his or her duties violates criminal laws, he or she derives an improper personal benefit, or the member's behavior displays conscious disregard for the best interest

⁵⁸ S. 110.1245(1)(c) and (2)(b), F.S.

⁵⁹ *Id.*

⁶⁰ Ss. 607.0830(1) and 607.08411(1), F.S.

⁶¹ S. 607.0830(2), F.S.

⁶² S. 607.0830(3) – (5), F.S.

⁶³ S. 607.08411(3), F.S.

⁶⁴ S. 607.08411(6), F.S.

of the corporation, willful or intentional misconduct, recklessness, bad faith, malicious purpose, or wanton and willful disregard of human rights, safety, or property.⁶⁵ This standard is similar to a Florida law that shields officers, employees, or agents of the state or any political subdivision from personal liability unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.⁶⁶

Generally, a relationship in which one person is under a duty to act in accordance with the above is referred to as a fiduciary relationship, and the duty is referred to as a fiduciary duty.

A number of provisions of Florida law impose a fiduciary duty on certain appointees to public boards. Most of the provisions apply to individuals responsible for the administration of public employee retirement or pension plans and those who sit on specific boards that have the authority to spend large sums of public money.⁶⁷ However, there does not appear to be a provision imposing a fiduciary duty of care on appointed board members or executive officers as a class.

Florida's Code of Ethics for Public Officers and Employees (Code) is set forth in ch. 112, part III, F.S. Foremost among the goals of the Code is to promote the public interest and maintain the respect of the people for their government. The Code is also intended to ensure that public officials conduct themselves independently and impartially, not using their offices for private gain other than compensation provided by law.⁶⁸ The Code contains provisions that establish standards for the conduct of elected and appointed officials and government employees.

With respect to ethics training, the Code requires "constitutional officers,"⁶⁹ elected municipal officers, and community redevelopment agency commissioners to complete four hours of ethics training on an annual basis.⁷⁰ As a class of officers, the Code does not require appointed public officers or executive officers to receive annual ethics training; however, Florida law does not preclude such individuals from receiving ethics training from the legal counsel for the board or governmental entity.

Florida law authorizes the state and local governments to provide legal representation for officers and employees.

Effect of Proposed Changes

The bill establishes fiduciary duty of care standards applicable to executive officers⁷¹ and appointed public officials⁷² of governmental entities.⁷³ The term "appointed public official" includes certain "local officers" and "state officers" that must file a Statement of Financial Interest, otherwise known as a FORM 1. Specifically, an appointed public official would include any of the following individuals:

- Local Officers:⁷⁴
 - Any appointed member of any of the following boards, councils, commissions, authorities, or other bodies of any county, municipality, school district, independent special district, or other political subdivision of the state:
 - The governing body of the political subdivision, if appointed;

⁶⁵ S. 607.0831(1), F.S.

⁶⁶ S. 768.28(9)(a), F.S.

⁶⁷ S. 112.656, F.S.

⁶⁸ S. 112.311(1), F.S.

⁶⁹ Per s. 112.3142(1), F.S., the term "constitutional officer" is defined as the Governor, the Lieutenant Governor, the Attorney General, the Chief Financial Officer, the Commissioner of Agriculture, state attorneys, public defenders, sheriffs, tax collectors, property appraisers, supervisors of elections, clerks of the circuit court, county commissioners, district school board members, and superintendents of schools.

⁷⁰ S. 112.3142, F.S.

⁷¹ The term "executive officer" means the chief executive officer of a governmental entity.

⁷²

⁷³ The term "governmental entity" means the entity, or a board, a council, a commission, an authority, or other body thereof, to which an appointed public official or an executive officer is appointed or hired.

⁷⁴ Approximately 15,195 individuals are included in this category.

- A community college or junior college district board of trustees;
 - A board having the power to enforce local code provisions;
 - A planning or zoning board, board of adjustment, board of appeals, community redevelopment agency board, or other board having the power to recommend, create, or modify land planning or zoning within the political subdivision, except for citizen advisory committees, technical coordinating committees, and such other groups who only have the power to make recommendations to planning or zoning boards;
 - A pension board or retirement board having the power to invest pension or retirement funds or the power to make a binding determination of one's entitlement to or amount of a pension or other retirement benefit; or
 - Any other appointed member of a local government board who is required to file a statement of financial interests by the appointing authority or the enabling legislation, ordinance, or resolution creating the board.
- State Officer:⁷⁵
 - An appointed member of each board, commission, authority, or council having statewide jurisdiction, excluding a member of an advisory body.
 - A member of the Board of Governors of the State University System or a state university board of trustees, the Chancellor and Vice Chancellors of the State University System, and the president of a state university.

The bill provides that each appointed public official and executive officer have a duty to:

- Act in accordance with the laws, ordinances, rules, policies, and terms governing his or her office or employment.
- Act with the care, competence, and diligence normally exercised by private business professionals in similar corporate and proprietary circumstances.
- Act only within the scope of his or her authority.
- Refrain from conduct that is likely to damage the financial or economic interests of the governmental entity.
- Use reasonable efforts to maintain documentation in accordance with applicable laws.
- Maintain reasonable oversight of any delegated authority and discharge his or her duties with the care that a reasonably prudent person in a like private business position would believe appropriate under the circumstances, and must:
 - Become reasonably informed in connection with any decision making function;
 - Become reasonably informed when devoting attention to any oversight function;
 - Keep reasonably informed concerning the affairs of the governmental entity; and
 - Keep reasonably informed concerning the performance of a governmental entity's executive officers or other officers, agents, or employees.

Beginning January 1, 2021, the bill requires each appointed public official and executive officer to complete a minimum of five hours of board governance training for each term served. Individuals serving in these positions as of January 1, 2021, must complete the training before their term expires. Those who begin their terms after January 1, 2021, must complete the training within 180 days after beginning service.

By January 1, 2021, the bill requires the Department of Business and Professional Regulation (DBPR) to contract for or approve a board governance training program that includes an affordable web-based electronic media option, or publish a list of approved board governance training providers on its website. The bill provides a list of training providers DBPR may approve and provides the minimum course content that must be included. The bill does not appear to mandate DBPR contract with multiple providers to develop a training program if DBPR chooses to go the contract route. Therefore, it does not appear that DBPR would be prohibited from contracting with a single provider and declining to approve other providers.

⁷⁵ Approximately 1,590 individuals are included in this category.

A governmental entity complies with the training requirement by providing a department-approved program or contracting with a provider listed by DBPR. However, the bill allows governmental entities with annual revenue less than \$300,000 to have the training provided through in-house legal counsel or by the unit of government that created the entity.

The bill requires each appointed public official and executive officer to certify under oath, in writing or electronic form, to DBPR that he or she has:

- Completed the required training;
- Read the laws and policies applicable to his or her position;
- Will work to uphold such laws and policies to the best of his or her ability; and
- Will faithfully discharge his or her fiduciary responsibility.

The certification must be made within 30 days after completion of the board training.

The bill contains the following three exceptions to the training requirement:

- Appointed public officials and executive officers of governmental entities whose annual revenues are less than \$100,000.
- Appointed public officials and executive officers who hold elected office in another capacity.
- Appointed public officials and executive officers who complete board governance training involving fiduciary duties or responsibilities which are required under any other state law.

The bill provides the appointment of an executive officer or general counsel is subject to approval by a majority vote of the governing body of the governmental entity and requires all legal counsel employed by a governmental entity to represent the legal interest of the governmental entity's governing board and not the interest of any individual or employee, unless such representation is directed by the governmental entity.

Contracts and the Procurement of Commodities and Services (Sections 11 and 12)

Current Situation

Chapter 287, F.S., regulates state agency⁷⁶ procurement of personal property and services. DMS 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.⁷⁷ DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.⁷⁸

Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods, which include:⁷⁹

- Invitations to bid – used when the agency is capable of specifically defining the scope of work for which a contractual service is required or when the agency is capable of establishing precise specifications defining the actual commodity or group of commodities required. In such cases, the contract is awarded to the responsible and responsive vendor who submits the lowest responsive bid;
- Requests for proposal – used when the purposes and uses for which the commodity, group of commodities, or contractual service being sought can be specifically defined and the agency is capable of identifying necessary deliverables. Various combinations or versions of commodities

⁷⁶ S. 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. The term does not include the university and college boards of trustees or the state universities and colleges.

⁷⁷ See ss. 287.032 and 287.042, F.S.

⁷⁸ *Id.*

⁷⁹ See ss. 287.012(6) and 287.057, F.S.

or contractual services may be proposed by a responsive vendor to meet the specifications of the solicitation document. In such cases, the contract is awarded to the responsible and responsive vendor whose proposal is determined in writing to be the most advantageous to the state, taking into consideration the price and other criteria set forth in the request for proposals; and

- Invitations to negotiate – used when the agency intends to determine the best method for achieving a specific goal or solving a particular problem and identifies one or more responsive vendors with which the agency may negotiate in order to receive the best value; and

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.⁸⁰ However, certain contractual services and commodities are exempt from this requirement.⁸¹ A contract for commodities or contractual services may be awarded without competition if state or federal law prescribes with whom the agency must contract,⁸² or the rate of payment or the recipient of the fund may be established during the appropriations process.⁸³

Current law contains an exemption from the competitive solicitation requirement for statewide public service announcement programs provided by a Florida statewide nonprofit corporation under s. 501(c)(6) of the Internal Revenue Code that have a guaranteed documented match of at least \$3 to \$1.⁸⁴

Effect of Proposed Changes

The bill requires all contracts between a contractor and a public agency entered into or amended on or after July 1, 2020, to provide that the public agency may inspect:

- Financial records, papers, and documents of the contractor directly related to the execution of the contract or the expenditure of state funds; and
- Programmatic records, papers, and documents of the contractor that are necessary to monitor the performance of the contract or ensure that the terms of the contract are being met, as determined by the public agency.

The bill specifies that the contract provision must require the contractor to provide any such documents within 10 business days of the request from the public agency.

The bill expands the competitive solicitation exemption for statewide public service announcements. Specifically, the bill removes the provision that required the public service announcement to be statewide and provided by a 501(c)(6) corporation.

The bill also prohibits a state employee from lobbying for funding for a contract and participating in the awarding of such contract. This provision of the bill does not apply to a state employee who is an agency head, employed in the Executive Office of the Governor or the Office of Policy and Budget, or an employee who is required to register as a lobbyist but whose primary job responsibilities do not include lobbying.

Tax Incentives (Section 13)

Current Situation

Chapter 288, F.S., governs the operation of numerous economic development programs, some of which provide tax credits, tax refunds, sales tax exemptions, cash grants, and other similar programs.

⁸⁰ S. 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold in s. 287.017, F.S., be competitively bid.

⁸¹ See s. 287.057(3), F.S.

⁸² S. 287.057(10), F.S.

⁸³ *Id.*

⁸⁴ S. 287.057(3)(e)(13), F.S.

Effect of Proposed Changes

The bill prohibits a tax incentive, notwithstanding any other law, from being awarded or paid to a state contractor or any subcontractor for services provided or expenditures incurred pursuant to a state contract.

Department of Education Inspector General Investigations (Section 14)

Current Situation

The Office of Inspector General within the Department of Education (DOE-IG) is responsible for promoting accountability, efficiency, and effectiveness and detecting fraud and abuse within school districts, the Florida School for the Deaf and the Blind, and Florida College System institutions.⁸⁵

If the Commissioner of Education determines that a district school board, the Board of Trustees for the Florida School for the Deaf and the Blind, or a Florida College System institution board of trustees is unwilling or unable to address substantiated allegations made by any person relating to waste, fraud, or financial mismanagement within the school district, the Florida School for the Deaf and the Blind, or the Florida College System institution, the DOE-IG must conduct, coordinate, or request investigations into such substantiated allegations.⁸⁶

Additionally, the DOE-IG must investigate allegations or reports of possible fraud or abuse against a district school board made by any member of the Cabinet; the presiding officer of either house of the Legislature; a chair of a substantive or appropriations committee with jurisdiction; or a member of the board for which an investigation is sought.⁸⁷

Effect of Proposed Changes

To increase accountability, the bill requires the DOE-IG to also investigate allegations or reports of possible waste, fraud, abuse, or mismanagement against a Florida College System institution made by any member of the Cabinet; the presiding officer of either house of the Legislature; a chair of a substantive or appropriations committee with jurisdiction; or a member of the board for which an investigation is sought. Additionally, the bill requires the DOE-IG to investigate allegations or reports of possible waste or mismanagement against a district school board made by any of the previously referenced members or officers.

B. SECTION DIRECTORY:

Section 1. Creates s. 11.421, F.S., establishing FIO within the Office of Auditor General.

Section 2. Amends s. 11.45, F.S., relating to Auditor General reporting requirements.

Section 3. Amends s. 14.32, F.S., relating to the OIG.

Section 4. Amends s. 17.04, F.S., relating to the CFO's authority to audit and adjust accounts of officers and those indebted to the state.

Section 5. Amends s. 17.325, F.S., relating to Florida's 'Get Lean' hotline.

Section 6. Amends s. 20.055, F.S., relating to agency inspectors general.

Section 7. Amends s. 110.1245, F.S., relating to the state 'Savings Sharing Program.'

Section 8. Amends s. 112.3187, F.S., relating to the 'Whistle-blower's Act.'

⁸⁵ S. 1001.20(4)(e), F.S.

⁸⁶ *Id.*

⁸⁷ *Id.*

Section 9. Directs the Division of Law Revisions to create ch. 112, part IX, F.S., consisting of s. 112.89, F.S.

Section 10. Creates s. 112.89, F.S., relating to fiduciary duty of care for appointed public officials and executive officers.

Section 11. Creates s. 216.1366, F.S., relating to contract terms.

Section 12. Amends s. 287.057, F.S., relating to the procurement of commodities or contractual services.

Section 13. Creates s. 288.00001, F.S., relating to use of state or local incentive funds.

Section 14. Amends s. 1001.20 F.S., relating to duties of the DOE-IG.

Section 15. Provides authority to the Auditor General to use carryforward funds to fund the establishment and operation of FIO.

Section 16. Amends s. 112.3188, F.S., conforming provisions to changes made by the act.

Section 17. Amends s. 112.3189, F.S., conforming provisions to changes made by the act.

Section 18. Amends s. 112.31895, F.S., conforming provisions to changes made by the act.

Section 19. Provides an effective date of July 1, 2020.

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:

None.

2. Expenditures:

The bill may have an indeterminate negative fiscal impact on local governments related to costs associated with training requirements for public officials and officers.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

According to the Office of Auditor General, the projected annual fiscal impact is approximately \$2.5 million to staff and to fund the newly created FIO. However, only a portion of that amount will be needed in the first year as the office ramps up staffing and associated expenses. Additionally, some of the functions of the FIO will not be fully implemented until FY 2021–2022. The bill authorizes the

Auditor General to use existing carryforward funds to fund the office, which are sufficient to cover such costs for more than three years, therefore no appropriation is necessary.

The revisions to the state Savings Sharing Program will have an indeterminate positive fiscal impact on agencies as they provide an incentive for agency employees to file Whistle-blower's Act complaints and participate in investigations that lead to the recovery of state or federal funds. Any award given pursuant to this provision will be paid from the specific appropriation or trust fund from which the savings or recovery resulted.

Additional reporting and tracking requirements assigned to agencies, as well as investigations of complaint referrals and processing whistle-blower complaints, can be absorbed within existing agency resources.

The board governance training program may have an indeterminate fiscal impact on state government. Potential expenditures would be related to DBPR choosing the option to contract for a board governance training program meeting the bill's requirements and whether a state governmental entity with officials and officers subject to the training requirements elect to contract with a listed, approved training provider.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, s. 18 of the Florida Constitution may apply because the bill requires local governments to spend funds related to board governance training; however, an exemption may apply because the fiscal impact of the bill is expected to be insignificant.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not confer rulemaking authority nor does it appear to require the promulgation of rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 23, 2020, the Public Integrity & Ethics Committee adopted two amendments and reported the bill favorably as a committee substitute. The amendments revised the bill in the following ways:

- Removed the requirement that the Chief Inspector General and agency inspectors general make referrals to the Commission on Ethics.
- Removed the requirement that the Florida Integrity Officer make referrals to the Commission on Ethics.

With the removal of the referral requirement, the current law process that allows the Governor, Florida Department of Law Enforcement, a state attorney, or a United States Attorney, to make a referral to the Commission on Ethics is maintained. Additionally, a person with knowledge of any alleged ethics violation may still file a complaint with the Commission on Ethics.

On March 2, 2020, the State Affairs Committee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS revised the bill in the following ways:

- Established fiduciary duty of care standards for appointed public officials and executive officers and a board governance training program for each term served.
- Required specified terms be included in all contracts with public agencies.

This bill analysis is drafted to the committee substitute as approved by the State Affairs Committee.