

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

**BILL:** CS/CS/CS/SB 386

**SPONSOR:** Appropriations Subcommittee on General Government, Governmental Oversight & Productivity Committee and Commerce & Economic Opportunities Committee and Senator Holzendorf

**SUBJECT:** Florida Black Business Investment Board, Inc.

**DATE:** March 4, 2002                      **REVISED:**

|    | ANALYST   | STAFF DIRECTOR | REFERENCE | ACTION       |
|----|-----------|----------------|-----------|--------------|
| 1. | Cibula    | Maclure        | CM        | Favorable/CS |
| 2. | Rhea      | Wilson         | GO        | Favorable/CS |
| 3. | Fabricant | Hayes          | AGG       | Favorable/CS |
| 4. |           |                | AP        |              |
| 5. |           |                |           |              |
| 6. |           |                |           |              |

## I. Summary:

The bill removes the Florida Black Business Investment Board (BBIB or corporation) from the Office of Tourism, Trade, and Economic Development and creates it as a non-profit corporation. Membership on the corporation is expanded from seven to 13 members, two of which are non-voting, ex officio members. The membership appointment process is diversified. The committee substitute directs that the corporation and black business investment corporations (BBICs) include all minority business enterprises within the scope of their duties. Directory instructions are given to Enterprise Florida, Inc., to contract with the corporation for the delivery of economic development services relating to black business enterprises. The committee substitute provides criteria to measure Florida's return on investment from activities of the corporation. The committee substitute requires the corporation to seek private sector support that will equal the state's support by July 1, 2007. After privatization, the corporation is authorized to lease its employees who are employed prior to the effective date of the committee substitute from the Department of Management Services until June 30, 2004.

This bill substantially amends the following sections of the Florida Statutes: 288.707, 288.708, 288.709, 288.7091, 288.711, 288.712, 288.714, and 288.9015.

The committee substitute also creates ss. 288.7075 and 288.7092, F.S.

## II. Present Situation:

Chapter 20, F.S., contains the organizational structure of the executive branch. Section 20.03(12), F.S., defines "board of trustees"

Except with reference to the board created in chapter 253, means a board created by specific statutory enactment and appointed to function adjunctively to a department, the Governor, or the Executive Office of the Governor to administer public property or a public program.

The Florida Black Business Investment Board (“BBIB” or “corporation”) was created by ch. 85-104, L.O.F., to encourage the growth of small and minority businesses by removing unnecessary burdens imposed upon these businesses and by aggressively promoting an atmosphere conducive to their development.<sup>1</sup> The provisions of ch. 85-104, L.O.F., relating to the BBIB were codified in part IV of ch. 288, F.S.

The BBIB is located within the Office of Tourism, Trade, and Economic Development to promote the creation and growth of black business enterprises, defined as businesses that are at least 51 percent owned by black Americans and managed and controlled by such persons.<sup>2</sup> Working in concert with the BBIB are the Black Business Investment Corporations (BBICs) and the Florida Black Business Support Corporation (BBSC).

**The Black Business Investment Corporations** - The BBICs are subsidiaries of financial institutions or a consortium of financial institutions investing in or lending to black business enterprises.<sup>3</sup> Specifically, BBICs provide loan guarantees and direct lending products to black business enterprises.<sup>4</sup> The BBIB has a non-voting investment interest in all of the regional BBICs.<sup>5</sup> There are eight regional BBICs.

**The Florida Black Business Support Corporation** - The BBSC is a non-profit corporation pursuant to s. 501(c)(3), Internal Revenue Code, that administers technical assistance programs and coordinates events to promote the flow of information to BBIB program participants.<sup>6</sup> The BBSC was established as a non-profit organization to allow it to receive tax-deductible contributions.<sup>7</sup> The BBIB is the sole shareholder of the BBSC. The BBSC is also the statewide BBIC, which serves areas not served by the eight regional BBICs.<sup>8</sup>

The board consists of seven members appointed by the Governor and confirmed by the Senate for staggered four-year terms.<sup>9</sup> Six of the board members must be experienced in investment finance and business development.<sup>10</sup> One board member must be a member of a BBIC.<sup>11</sup>

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<sup>1</sup> Preamble to ch. 85-104, L.O.F.

<sup>2</sup> Section 288.707(2)(a) & (3), F.S.

<sup>3</sup> Section 288.707(2)(b), F.S.

<sup>4</sup> Office of Program Policy Analysis and Government Accountability (OPPAGA), “Profile No. 6126,” *Florida Government Accountability Report*, at <http://www.oppaga.state.fl.us/profiles/6126/>, (updated June 27, 2001)

<sup>5</sup> *id.*

<sup>6</sup> *supra*, note 4

<sup>7</sup> *id.*

<sup>8</sup> *id.*

<sup>9</sup> Section 288.707(3)(a), F.S.

<sup>10</sup> *id.*

<sup>11</sup> Section 288.707(2)(b) & (3)(a), F.S.

The board is authorized to appoint an executive director to be the chief administrative and operational officer of the board, who directs and supervises the administrative affairs and general management of the corporation. The executive director and the corporation's employees are state employees subject to the Senior Management System and the Selected Exempt Service System respectively.<sup>12</sup>

The corporation is authorized to adopt administrative rules pursuant to the Administrative Procedures Act to implement the provisions of law conferring duties upon it.<sup>13</sup> The corporation is further broadly empowered with the rights and responsibilities of a corporation, with the power to do all things necessary and convenient to promote black business enterprises.<sup>14</sup> The corporation is also authorized to acquire and dispose of real property without regard to chs. 253 and 270, F.S., governing the acquisition and disposition of state lands generally.<sup>15</sup>

The duties of the corporation include the following: establish certification criteria for BBICs; establish loan criteria that targets high growth jobs; increase the number of black business enterprises participating in government-financed construction projects; and prepare an annual report on the performance of black business investment corporations. The corporation is also required to develop memoranda of understanding with: Enterprise Florida, Inc., to collaborate on various programs; financial institutions that will provide loan guarantees to black business enterprises located in areas not served by a BBIC; and various government agencies to collaborate in areas of common interest.<sup>16</sup>

**The Florida Not For Profit Corporation Act** - Chapter 617, F.S., the Florida Not For Profit Corporation Act, establishes the powers and duties of nonprofit corporations in Florida. Under s. 617.0401(1)(a), F.S., the corporate name must contain the word "corporation" or "incorporated" or the abbreviation "corp." or "inc." or words or abbreviations that will clearly indicate that it is a corporation instead of a natural person, unincorporated association, or partnership. Further, a nonprofit corporation is not authorized under s. 617.0401(1)(d), F.S., to have in its corporate name language that states or implies that it is connected with a state or federal government agency or a corporation chartered under the laws of the United States.

Section 617.0302, F.S., lists the powers of a nonprofit corporation organized under ch. 617, F.S. The list of powers contained in statute include the power to:

1. Sue and be sued;
2. Elect or appoint officers and agents as its affairs require and allow them reasonable compensation;
3. Adopt, change, amend, and repeal bylaws.
4. Increase, by a vote of its members, the numbers of directors;
5. Make contracts and incur liabilities, borrow money, issue notes, bonds, and other obligations, and secure any of its obligations by mortgage and pledge of all or any of its property, franchises, or income;

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<sup>12</sup> Section 288.708(2); part III, ch. 110; part V, ch. 110, F.S.

<sup>13</sup> Section 288.709(1), F.S.

<sup>14</sup> Section 288.709(1) through (19), F.S.

<sup>15</sup> Section 288.709(9), F.S.

<sup>16</sup> Section 288.7091, F.S.

6. Carry on its affairs in any state, territory, district, or possession of the United States or any foreign country;
7. Purchase, lease, acquire real property;
8. Acquire, enjoy, utilize, and dispose of patents, copyrights and trademarks;
9. Sell shares;
10. Lend money for corporate purposes, invest and reinvest its funds;
11. Make donations for the public welfare or for religious, charitable, scientific, educational, or other similar purposes;
12. Have and exercise all powers necessary or convenient to affect any or all of the purposes for which the corporation is organized.
13. Merge with other corporations both for profit and not for profit, domestic and foreign, if the surviving corporation is a corporation not for profit.

### **III. Effect of Proposed Changes:**

The bill removes the Florida Black Business Investment Board (BBIB or corporation) from the Office of Tourism, Trade, and Economic Development and mandates that the corporation become a non-profit corporation. Membership on the board is expanded, and the membership appointment process is diversified. The committee substitute directs that the corporation and black business investment corporations (BBICs) include all minority business enterprises within the scope of their duties, notwithstanding language to the contrary in part IV, ch. 288, F.S., limiting BBIB programs to black business enterprises. Directory instructions are given to Enterprise Florida, Inc., to contract with the corporation for the delivery of economic development services relating to black business enterprises. The committee substitute provides criteria to measure Florida's return on investment from activities of the corporation. The committee substitute requires the corporation to seek private sector support that will equal the state's support by July 1, 2007. After privatization, the corporation is authorized to lease its employees who are employed prior to the effective date of the committee substitute from the Department of Management Services until June 30, 2004.

#### **Section 1. Structure and Membership of the BBIB**

The bill removes the BBIB from the Office of Tourism, Trade, and Economic Development and directs the BBIB to become a non-profit corporation. The membership of the board is expanded, and the authority to appoint members is diversified. The committee substitute provides for appointments to the board as follows: six members appointed by the Governor; one member appointed by the President of the Senate; one member appointed by the Speaker of the House; three chairmen of black business investment corporations selected by the chairmen of the black business investment corporations; the vice chairman of Enterprise Florida, Inc., serving as an ex officio non-voting member; the chair of the Florida Development Finance Corporation serving as an ex officio non-voting member; and two at-large members, who may be appointed by a board resolution.

#### **Section 2. Board Duties to Minority Business Enterprises**

Despite contrary language in ss. 288-707-288.714, F.S., limiting assistance from the corporation and BBICs to black business enterprises, the committee substitute requires the corporation and

the BBICs to include businesses 51 percent or more owned by Hispanic Americans, Asian Americans, Native Americans, and American women within the scope of their duties. The committee substitute also redefines the term “black business enterprise” as a business owned 51 percent or more by an African-American, rather than a business owned 51 percent or more by a black American. The corporation and BBICs are required to submit an annual report to the Governor and the Legislature detailing their progress in assisting black business enterprises and the aforementioned minority business enterprises.

### **Sections 3. & 10. Management and Employees of the Corporation; Financial Responsibility of the Corporation**

The bill provides that the position of the executive director of the corporation is re-titled as the president. The president is appointed by and serves at the pleasure of the board. No salaries for board employees may exceed the Governor’s salary unless the employee achieves certain performance measures specified in the employee’s employment contract providing the basis for incentive payments that will increase the employee’s compensation above the Governor’s. The president and the employees of the corporation will no longer be state employees subject to the Senior Management System and Selected Exempt Service Systems respectively. The corporation is authorized to lease its employees who are employed prior to the effective date of the committee substitute from the Department of Management Services until June 30, 2004. Under the employee leasing program, corporation employees maintain their status as state employees including the right to participate in the Florida Retirement System.

Section 3 of the bill provides that the corporation and its officers shall ensure that the corporation’s funds are used in compliance with applicable laws and that funds appropriated by the Legislature for the black business investment corporations are distributed as directed.

The bill provides for a financial audit by an independent certified public accountant to be filed within 12 months after the end of the fiscal year with the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Auditor General.

### **Sections 5, 6, & 11. Direction to Work with Similar Organizations; Return on Investment**

Sections 5 and 6 of the bill additional directory instructions to the corporation to work with organizations having similar goals of promoting the expansion and formation of black business enterprises. Section 5 of the committee substitute also directs the corporation to expand its focus to include the formation of BBICs in areas not currently served by such corporations and to intensify its efforts to increase the number of franchises owned by black Americans. Because section 2 of the committee substitute requires the corporation to include all minority business enterprises within the scope of its duties, the corporation is directed by sections 5 and 6 of the committee substitute to work with similar organizations to promote minority business enterprises and work to increase the number of franchises owned by all minorities. Sections 5 and 11 of the committee substitute provide specific instructions for Enterprise Florida, Inc., to contract with the corporation for the delivery of economic development services to small and minority-owned business.

Section 6 of the bill also provides that funds appropriated by the Legislature shall form the basis for determining the state's return on investment. The committee substitute further provides that the corporation seek private-sector support for the corporation that will match the state's annual investment by July 1, 2007. Private-sector support includes cash given to the corporation; cash jointly raised by the corporation with other organizations; and cash generated from the corporation's products or services and in-kind contributions. The corporation is required to hire an accounting firm in consultation with the Office of Program Policy Analysis and Government Accountability to develop a methodology for determining the state's return on investment and the value of in-kind contributions. The corporation is required to quantify the state's return on investment in its annual report to the Legislature.

### **Technical and Conforming Changes**

Throughout the bill references to ss. 9-21, ch. 85-104, L.O.F., are replaced with a reference to ss. 288.707-288.714, F.S. This change is not a substantive change because ss. 9-21, ch. 85-104, L.O.F., was codified as ss. 288.707-288.714, F.S.

Throughout the bill technical and conforming changes are made to the BBIB program to account for its change in status from a government entity to a private corporation. These changes include: an authorization to the corporation to adopt policies instead of administrative rules; repeal of s. 288.709(9), F.S., as lands acquired by the BBIB as a private corporation will not be public lands; an authorization to reimburse board members and employees for actual expenses instead of reimbursement in accordance with s. 112.061, F.S.; and a requirement for board members to make a disclosure of their financial interests pursuant to s. 112.3145, F.S., unless otherwise required to do so pursuant to s. 8, Art. II of the State Constitution.

### **Effective Date**

The bill takes effect on July 1, 2002.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

While the Florida Black Business Investment Board is specifically found by the Legislature not to be a unit or entity of state government, it is created in statute, has the majority of its members appointed by the Governor and confirmed by the Senate, has two members appointed by legislative leaders, and performs a public service of creating and growing black business enterprise in Florida. Given these aspects of the corporation, it appears that the Florida Black Business Investment Board is subject to the requirements of Art. I, s. s. 4 of the State Constitution, which provides:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee

of the state, *or persons acting on their behalf*, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, *or entity created pursuant to law* or this Constitution (*emphasis added*).

As a result, the records of the Florida Black Business Investment Board, Inc., are open to public inspection and copying and its meetings must be noticed and open to all. The committee substitute explicitly requires that the corporation state in its bylaws that that open records and open meeting requirements are applicable to the corporation. Such a statement is typical of state-created entities and helps to clarify for the entity and the public the applicable standards regarding records and meetings.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill transforms the Black Business Investment Board (BBIB or corporation) into a public-private partnership, with the BBIB becoming a non-profit corporation. A number of changes to the board will have indeterminate effects on the private businesses that make use of the services and funding that are developed and provided by the corporation to the Black Business Support Corporation and the eight regional black business investment corporations. The committee substitute requires the corporation to seek private-sector support that will equal the state's support by July 1, 2007.

C. Government Sector Impact:

The bill transforms the BBIB into a public-private partnership similar to other partnerships under the Office of Tourism, Trade, and Economic Development (OTTED). As a public-private partnership, the six BBIB staff positions would be transferred out of the Executive Office of the Governor's budget, and the corporation would enter into a performance-based contract with OTTED.

The bill requires the Department of Management Services to establish an employee leasing program under which employees of the BBIB who are employed prior to the effective date of the committee substitute may retain their status as state employees until June 30, 2004. The employee retains the right to participate in the Florida Retirement System under the bill.

The bill requires Enterprise Florida, Inc. (EFI), where practicable and consistent with the expertise of the BBIB, to contract with the corporation for the delivery of services in fulfillment of the responsibilities of EFI relating to small and minority businesses.

Senate bill 2500, the General Appropriations Act for FY 2002-2003, as introduced provides \$1,651,210 for the Black Business Investment Board.

#### **VI. Technical Deficiencies:**

None.

#### **VII. Related Issues:**

**Corporate Powers** – The bill specifies the corporate powers of the Black Business Investment Board. The bill does not, however, state whether the powers that are stated in the bill are the only powers that board has or whether those powers are in addition to those powers listed in s. 617.0302, F.S., which lists the powers of a nonprofit corporation organized under ch. 617, F.S. Some of the powers listed in the bill are also contained in the list of powers found in ch. 617, F.S. Given that there are duplicative powers listed in the bill, it could be argued that the only powers of the corporation are those established in the bill. That may be more limiting than desirable. On the other hand, ch. 617, F.S., provides a nonprofit corporation generally with the power to perform certain functions, such as make donations for religious purposes. Given the amount of state funding provided to the corporation, this practice may be unacceptable to the Legislature at best or in violation of constitutional requirements relating to the separation of church and state. As a result, it would be appropriate to specify exactly what powers the Legislature does or does not wish the corporation to have.

Further, a nonprofit corporation is not authorized under s. 617.0401(1)(d), F.S., to have in its corporate name language that states or implies that it is connected with a state or federal government agency or a corporation chartered under the laws of the United States. Section 20.03(12), F.S., defines “board of trustees”

Except with reference to the board created in chapter 253, means a board created by specific statutory enactment and appointed to function adjunctively to a department, the Governor, or the Executive Office of the Governor to administer public property or a public program.

Given that the board was traditionally associated as a state governmental entity, the corporate name may be confusing to some.

#### **VIII. Amendments:**

None.