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/SB 2614

SPONSOR: Education Committee and Senator Diaz de la Portilla

SUBJECT: Commerce with Terrorist States Act

DATE: April 13, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dodson	Skelton	HP	Favorable
2.	Dormady	O'Farrell	ED	Favorable/CS
3.			RI	
4.			CJ	
5.			AGG	
6.			AP	

I. Summary:

The bill creates the "Commerce with Terrorist States Act," which requires that a security assessment fee be charged to every person or entity that transports persons via charter from Florida to an identified terrorist state. For chartered boats, the assessment is at the rate of 10 percent of the total consideration received or to be received for the chartered travel, in addition to any other taxes or assessments that may be due. For chartered aircraft, the assessment consists of a $100 charge on every airplane take-off, plus an additional charge related to the weight of the aircraft. Only persons operating under federal or state authority and persons acting in the performance of active military duty are exempt from the security assessment.

The term "terrorist state" is defined in the bill as any state, country, or nation presently deemed a state sponsor of terrorism by the U.S. Department of State. Currently, those states are Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. For purposes of the bill, the Florida Department of Revenue is responsible for documenting and specifying in rule those states or nations identified as state sponsors of terrorism by the U.S. Department of State and annually updating this list to the U.S. Department of State's most current list of state sponsors of terrorism.

Persons responsible for charging the required security assessment are directed to remit the proceeds from the assessment to Florida Department of Revenue, which must transfer the proceeds to the State Homeland Security Trust Fund created under SB 2620. The bill does not specify the uses of these funds.

The bill also requires that mandatory travel information be reported to the Department of Education by any state university or community college that utilizes chartered travel for transportation to an identified terrorist state. The bill provides rulemaking authority for the Department of Education and the Department of Revenue and allows for severable treatment of its provisions.

This bill creates section 288.857 of the Florida Statutes.

The bill takes effect January 1, 2005.

II. Present Situation:

Law Enforcement/Security Costs: The events of September 11, 2001, fundamentally changed the way transportation security is performed in the United States. Airlines must screen all checked passenger bags, as mandated by Congress. A multi-layered system has been implemented to screen passengers and baggage using explosive detection equipment, an enhanced computer-assisted passenger prescreening system, explosive-trace detection, sniffing by trained dogs, and manual searches, or some combination of these methods. Although most of these costs are being paid by the airlines, airports are impacted by having to provide the physical space to house security personnel and equipment. Federal funds are being made available to airports to implement their share of the requirements.

Federal legislation requiring screening of cargo continues to be discussed, as are security requirements for general aviation airports.

As for seaport and maritime security, Florida seaports have taken the lead among their peers in other states by implementing state-required security plans and procedures. These plans include facility improvements and the purchase of security equipment, such as container scanners, as well as background checks and badging of certain port employees and port users. In addition, shippers and other maritime-related businesses are beginning to feel the impact of new Coast Guard security regulations.

Florida has 19 commercial service airports, 112 general aviation airports, and an estimated 700 privately owned airports and airparks. The state also has 14 deepwater ports located along the Atlantic and Gulf coasts, and is home to four of the 20 busiest container seaports in the nation and the top three cruise ports in the world. In addition, there are a number privately owned ports along both coastlines that serve specific businesses. All of these facilities have been impacted to some degree by the new security requirements since September 11, 2001.

Airport and seaport security project costs could run into hundreds of millions of dollars. Airports and seaports have received a combination of federal, state, and local-government funds to help defray some of these costs, and have used some of their revenues generated by business using the facilities.[1]

In Florida seaports, law enforcement/security operational costs have increased 276 percent since September 11, 2001 and the total number of law enforcement/security personnel have increased 153 percent. The state's share of law enforcement/security costs has increased from nothing in FY 01-02 to 8.2 million in FY 02-03 and 7.1 million in FY 03-04. The seaport share of costs has gone from $23.1 million to $34.9 million over the same period of time.[2]

[1] Information in the above paragraphs is from the House Committee on Transportation Fact Sheet on Airport and Seaport Security, December 2003.
[2] "Florida Seaports Law Enforcement/Security Operational Costs Since 9/11", Florida Ports Council, March 2004.

Florida's airport security needs have been estimated at $1 billion by the airports themselves. The airports are hoping to get special appropriations from Congress through the Transportation Security Agency (TSA).[3]

Federal Designation as a Terrorist State: Currently, seven countries are designated as terrorist states: Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. Designating countries that repeatedly support international terrorism, that is, placing a country on the "terrorism list" imposes four main sets of U.S. government sanctions:

1. A ban on arms-related exports and sales.
2. Controls over exports of dual use items, requiring 30-day Congressional notification for goods or services that could significantly enhance the terrorist list country's military capability or ability to support terrorism.
3. Prohibitions on economic assistance.
4. Imposition of miscellaneous financial and other restrictions, including:

    - Requiring the U.S. to oppose loans by the World Bank and other international financial institutions.
    - Lifting the diplomatic immunity to allow families of terrorist victims to file civil lawsuits in U.S. courts.
    - Denying companies and individuals tax credits for income earned in terrorist list counties.
    - Denial of duty-free treatment for goods exported to the US.
    - Authority to prohibit any U.S. person from engaging in a financial transaction with a terrorist list government without a Treasury Department license.
    - Prohibition of Defense Department contracts above $100,000 with companies controlled by terrorist list states.[4]

The state sponsors of terrorism list has been relatively static since its initiation in 1979, with only two states ever having been removed: South Yemen, which was removed in 1990 when it merged with North Yemen to form the current state of Yemen; and Iraq, which was removed from the list in 1982 and was returned to the list in 1990 after its invasion of Kuwait.[5]

Federal Restrictions on Travel to Terrorist States: Chapter 5, Title 31 of the Code of Federal Regulations delineates the ability to travel and do business with countries such as Cuba, Iraq, Iran, Libya, and Sudan. The ability to travel to these and other countries varies, as do the requirements for and the ability to be authorized or licensed by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury for such travel. Specific licenses may be issued to authorize travel transactions related to certain educational activities by students or employees affiliated with a licensed academic institution meeting certain requirements. Once

[3] Information provided by Mr. Bill Ashbaker with the Florida Department of Transportation's Aviation Office, March 23, 2004. The Florida Department of Transportation does not keep a database of federal funding to individual airports.

[4] "Patterns of Global Terrorism" report, U.S. Department of State, pp. 76-81. This report is required to be submitted to Congress pursuant to Title 22 of the United States Code, Section 2656f(a).

[5] "The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organizations", Audrey Kurth Cronin, Specialist in Terrorism, Foreign Affairs, Defense, and Trade Division, October 21, 2003, pp. CRS-3 and CRS-4.

licensed, categories of travelers associated with the institution are authorized to travel. Specific licenses are also provided to such groups as religious organizations, humanitarian projects, journalistic activities, and private foundations. According to the Florida Department of Education, licenses for educational institutions for cultural education trips are not being renewed by OFAC; therefore, when those licenses expire, no universities or community colleges will be able to embark on such trips. Other educational licenses will still be available through the OFAC.

Family Educational Rights and Privacy Act: The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education. Generally, schools must have written permission from the student (or, for students under age 18, the student's parent) in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to certain parties under various conditions stipulated by rule.[6]

III. Effect of Proposed Changes:

The bill creates s. 288.857, F.S., the "Commerce with Terrorist States Act," which provides for a security assessment charge for every person or entity chartering travel that will originate in this state and arrive in an identified terrorist state. For chartered boats, the assessment is at the rate of 10 percent of the total consideration received or to be received for the chartered travel, in addition to any other taxes or assessments that may be due. For chartered aircraft, the assessment consists of a $100 charge on every airplane take-off, plus an additional charge of $0.04 per thousand pounds of landed aircraft weight. Only persons operating by contract with a federal authority or a Florida state authority and persons acting in the performance of active military duty are exempt from the security assessment. The bill does not exempt humanitarian or religious groups that travel by chartered transportation.

The term "terrorist state" is defined in the bill as any state, country, or nation presently deemed a state sponsor of terrorism by the U.S. Department of State. Currently, those states are Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. For the purposes of the bill, the Florida Department of Revenue is responsible for documenting and specifying in rule those states or nations identified as state sponsors of terrorism by the U.S. Department of State and annually updating this list to the U.S. Department of State's most current list of state sponsors of terrorism.

Persons responsible for charging the required security assessment are directed to remit the proceeds from the assessment to the Department of Revenue at the time the assessment funds are received from the customer. Payment of the assessment should be accompanied by a form prescribed by the Department of Revenue. The Department of Revenue must transfer these proceeds to the State Homeland Security Trust Fund, which is created under SB 2620. The bill

[6] Schools generally may disclose student information to: School officials with legitimate educational interest; other schools to which a student is transferring; specified officials for audit or evaluation purposes; appropriate parties in connection with financial aid to a student; organizations conducting certain studies for or on behalf of the school; accrediting organizations; persons in order to comply with a judicial order or lawfully issued subpoena; appropriate officials in cases of health and safety emergencies; and state and local authorities, within a juvenile justice system, pursuant to specific state law. *See* 34 CFR § 99.31.

defines "proceeds" for these purposes as all funds collected, including delinquency and penalty fees. The bill does not specify the uses of the proceeds once in the trust, except as may be extrapolated from general intent language. The bill permits the Department of Revenue to retain administrative costs from these funds, to assist with implementing the section, that are capped at 3 percent of total revenues.

The Department of Revenue is required to administer, collect and enforce the security assessment generally according to the procedures set forth in Ch. 212, F.S., which deals with taxes on transactions. The bill specifies that the provisions of Ch. 212 relating to the authority to audit and make assessments, the keeping of books and records, and interest and penalties on delinquent fees will apply with regard to the assessment fee. The assessment fee will not, however, be included in the computation of estimated taxes under s. 212.11, F.S., and a dealer's credit for collecting taxes or fees in s. 212.12 will not apply to this fee.

The bill also requires that mandatory travel information be reported to the Department of Education by any state university or community college that utilizes chartered travel for transportation to an identified terrorist state. The information is required to be reported 30 days prior to the commencement of the trip. The information required to be reported includes:

- passenger lists for the trip, including the name and address of each participant and the enrollment (or employment) status of each person in the state university or community college;
- a detailed trip itinerary;
- a complete accounting of all costs associated with the trip as well as the use of all money received in payment for the trip; and
- certificates of organization and other identifying information for any entity contracted to organize or facilitate the trip.

Rulemaking authority is provided for the Department of Education and the Department of Revenue to implement the section. Additionally, the Department of Revenue is specifically authorized to adopt emergency rules under ss. 120.536(1) and 120.54(4), F.S., in connection with the bill. The emergency rules will remain effective for 6 months after adoption and may be renewed.

The bill provides for severable treatment of its provisions.

The bill takes effect January 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require municipalities or countries to expend funds, does not reduce their authority to raise revenue, and does not reduce the percentage of a state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

The bill provides that proceeds collected for security assessments must be remitted to the Department of Revenue for deposit into the State Homeland Security Trust Fund.

D. Other Constitutional Issues:

Congressional Foreign Commerce Power: Article I, Section 8 of the United States Constitution grants Congress the power to "regulate Commerce with foreign Nations[.]" This power is Congress's exclusive domain, in which states have even less freedom to act than with respect to the regulation of interstate commerce.[7] Courts hold state or local laws to be unconstitutionally in conflict with the Congressional foreign commerce power if they impair the federal government's ability to speak with "one voice" internationally.[8] In those cases where state or local laws with international effect have been found valid, this has usually been because Congress had an opportunity to examine the specific issue and either acquiesced in, or affirmatively granted, the states' authority to do so.[9]

In order to be constitutional under Article I, Section 8, the tax set forth in CS/SB 2614 cannot prevent the federal government from "speaking with one voice" when regulating commercial relations with foreign governments (i.e., it cannot "impair federal uniformity in an area where federal uniformity is essential"). In determining compliance with this factor, international agreements regulating trade are relevant. The U.S. does not maintain international agreements with any of the terrorist states. Although both Cuba and the U.S. are members of the World Trade Organization and have both agreed to abide by the General Agreement on Tariffs and Trade (GATT), GATT does not include trade between the U.S. and Cuba in its provisions. In addition, in light of the Helms-Burton Act, it may be argued that this bill does not have an effect contrary to the "one voice" of the U.S, at least with respect to the state of Cuba.

Federal Law Preemption: Prohibitions on Collecting Certain Fees and Head Charge for Commercial or General Aviation: Under the Federal Anti-Head Tax Act, a state, a political subdivision of a state, and any person who has purchased or leased an airport under 49 U.S.C. s. 47134, may not levy or collect a tax, fee, head charge, or other charge on the following:

- An individual traveling in air commerce;
- The transportation of an individual traveling in air commerce;
- The sale of air transportation; or

[7] *See Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976).
[8] *Barclays Bank PLC v. Franchise Tax Board,* 512 U.S. 298, 328 (1994).
[9] *See id; Wardair Canada v. Florida Dept. of Revenue,* 477 U.S. 1 (1986); *Gerling Global Reinsurance, supra.*

- The gross receipts from that air commerce or transportation**.**[10]

The bill, as written, levies a take-off fee, together with a charge per pound for aircraft engaged in travel to terrorist states. Neither of these fees are likely to be found an impermissible head tax as prohibited by 49 U.S.C. 40116;[11] however, usually such fees are constructed as "landing fees," which are explicitly permitted under federal law, rather than the "take-off" fees provided by this bill, which are not.[12]

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There could be a potential negative impact on charter companies providing transportation services as described in the legislation. There could also be a negative impact on private sector groups licensed by the federal government to travel to such countries for humanitarian or other purposes.

C. Government Sector Impact:

The bill places additional responsibilities on the Department of Revenue and the Department of Education for carrying out the provisions of the bill. Additional funds in the form of taxes imposed by the bill would accrue to the state, however. Because the volume of travel to terrorist states is not currently known and cannot be reliably predicted for the future, both the administrative costs associated with the bill as well as revenues that may accrue to the state under the bill are not currently determinable.

VI. Technical Deficiencies:

Section (3)(a) of the bill defines terrorist states as those that are "presently" deemed state sponsors of terrorism by the U.S. Department of State. The use of the word "presently" in this section could imply that the list should include those states that are deemed terrorist states by the U.S. Department of State at the time the bill is enacted; however, other language in the section – especially regarding the Department of Revenue's obligation to update the list of terrorist states -- suggests another interpretation. It may be helpful to amend this language to provide that the Act's provisions will apply for travel to a state that is deemed a state sponsor of terrorism at the time an individual or entity regulated by the bill travels to such state. This language change would accommodate the potentially fluctuating nature of the list of terrorist states.

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[10] 49 U.S.C. 40116(b). There are two exceptions provided: 49 U.S.C. 40116(c) and 49 U.S.C. 40117.

[11] *See, e.g., New England Legal Fndn v. Mass Port Authority et al.*, 883 F. 2d 157 (1989) (stating that landing fees and charges per pound of aircraft weight did not violate the Federal Anti-Head Tax Act.)

[12] Landing fees are specifically permitted under 49 U.S.C. 40116(e)(2), whereas "take-off fees" are not. This subsection does, however, also permit the imposition of "other service charges" for use of airport facilities, provided that they are reasonable. It is likely that a "take-off fee," which is conceptually similar to a "landing fee," could be included under this "other service charge" exemption contained in the law.

VII. Related Issues:

As currently drafted, the bill requires state colleges and universities organizing trips regulated by the bill to provide detailed information on the trip's passengers and other features, including the itinerary, lodging, restaurants, planned excursions, and costs incurred, to the Department of Education. This information must be provided no later than 30 days prior trip commencement. Neither the purpose of the information nor the intended use of the information is provided in the legislation. Without clarification about how this information is to be used, it is anticipated that privacy questions and concerns will arise.

As noted above, FERPA permits schools to disclose student record information to certain parties under conditions stipulated by rule; none of these exemptions appears applicable with respect to the information required to be disclosed by schools under the bill, however. Schools are also permitted, under certain conditions, to disclose mere "directory" information about students; however, the information required pursuant to CS/SB 2614 would likely not qualify as such under federal law. Accordingly, the bill's requirement that certain post-secondary institutions disclose the identities of the individuals approved for travel to designated terrorist states likely violates the requirements of FERPA and of state law governing student privacy, which is generally coextensive with FERPA's requirements.

Provisions of the bill could have a potential negative impact on charter companies providing transportation services described in the legislation. There could also be a negative impact on private sector groups licensed by the federal government to travel to such countries for humanitarian or other purposes.

The Department of Revenue raised the following concerns regarding implementation of the legislation as written:

- The bill does not address the application of penalties to businesses and entities subject to the assessment that fail to collect and remit funds to the Department of Revenue.
- Refunds and audits for compliance are not addressed by the bill.
- The bill should provide specific reference to the U.S. Department of State publication that should be used by the Department of Revenue as a source for compiling and maintaining a list of identified terrorist states.
- The Department of Revenue also recommended that the bill language be amended to allow the Department of Revenue to publish the listing of identified terrorist states via Florida Administrative Weekly as opposed to providing the listing within an administrative rule. This would allow for immediate updates of the listing by avoiding the required administrative procedures for amending a rule.

The bill requires detailed information only on cultural or educational trips involving the state university or community college systems. Other travelers are not required to provide information.

VIII. Amendments:

None.