

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Appropriations Subcommittee

BILL: SB 850

INTRODUCER: Senator Bradley

SUBJECT: Offenses Concerning Racketeering and Illegal Debts

DATE: February 24, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	Favorable
2.	<u>Clodfelter</u>	<u>Sadberry</u>	<u>ACJ</u>	Recommend: Favorable
3.	<u>Clodfelter</u>	<u>Kynoch</u>	<u>AP</u>	Favorable

I. Summary:

SB 850 amends civil enforcement provisions of the Florida RICO (Racketeer Influenced and Corrupt Organization) Act. Major features of the bill include:

- Authorizing an investigative agency, on behalf of the state, to institute a RICO civil proceeding for forfeiture in the circuit court for the judicial circuit in which the real or personal tangible property is located or in a circuit court in the state for intangible property;
- Authorizing an investigative agency to pursue an action to recover fair market value of unavailable property regardless of when the property is conveyed, alienated, disposed of, diminished in value, or otherwise rendered unavailable for forfeiture;
- Authorizing a court to order the forfeiture of any other property of a defendant up to the value of the property subject to forfeiture (as an alternative to the court ordering an amount equal to the fair market value of the unavailable property);
- Authorizing the Department of Legal Affairs to bring an action for a Florida RICO Act violation to obtain injunctive relief, civil penalties, attorney fees, and costs incurred in the investigation and prosecution of any action under the Florida RICO Act;
- Providing that a natural person who violates the Florida RICO Act may be subject to a civil penalty of up to \$100,000 and any other person who violates the act may be subject to a civil penalty of up to \$1 million, and requiring that moneys recovered for such civil penalties be deposited into the General Revenue Fund;
- Requiring that moneys recovered by the Department of Legal Affairs for attorney fees and costs under the Florida Rico Act be deposited into the Legal Affairs Revolving Trust Fund and authorizing use of those funds to investigate Florida RICO Act violations and enforce the act;
- Authorizing any party to a Florida RICO Act civil action to petition the court for entry of a consent decree or for approval of a settlement agreement;

- Providing that an investigative subpoena issued pursuant to the Florida RICO Act is confidential for 120 days after the date of issuance, unless extended by the court upon a showing of good cause by the investigating agency;
- Providing that the list of claims for which a court directs distribution of forfeiture funds includes claims for restitution by RICO victims; and
- Providing that where the forfeiture action was brought by the Department of Legal Affairs, the restitution is distributed through the Legal Affairs Trust Fund (otherwise, the restitution is distributed by the clerk of the circuit court).

The Department of Legal Affairs indicates that the new civil penalties for Florida RICO Act violations may have an indeterminate positive revenue impact on the General Revenue Fund. Changes regarding recovery of the value of property subject to forfeiture that has become unavailable may also increase forfeiture proceeds by an indeterminate amount.

The bill has an effective date of July 1, 2016.

II. Present Situation:

Florida RICO Act

The “Florida RICO Act” is the short title for ss. 895.01-895.06, F.S. “Racketeering activity” means committing, attempting to commit, conspiring to commit, or soliciting, coercing, or intimidating another person to commit any of a number of offenses listed in the definition.¹ Section 895.03, F.S., punishes as a first degree felony:

- With criminal intent receiving any proceeds derived, directly or indirectly, from a pattern of racketeering activity² or through the collection of an unlawful debt³ to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise;⁴
- Through a pattern of racketeering activity or through the collection of an unlawful debt, acquiring or maintaining, directly or indirectly, any interest in or control of any enterprise or real property;

¹ Section 895.02(1), F.S. These offenses include violations of specified Florida laws (e.g., Medicaid fraud, kidnapping, human trafficking, and drug offenses) as well as any conduct defined as “racketeering activity” under 18 U.S.C. § 1961(1).

² “Pattern of racketeering activity” means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within five years after a prior incident of racketeering conduct. Section 895.02(4), F.S.

³ An “unlawful debt” is any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in this state in whole or in part because the debt was incurred or contracted in violation of any law listed in the definition. Section 895.02(2), F.S. These offenses include violations of specified Florida laws (e.g., various gambling offenses) as well as any gambling activity in violation of federal law or in the business of lending money at a rate usurious under state or federal law.

⁴ An “enterprise” is any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity. The definition includes: illicit as well as licit enterprises; governmental, as well as other, entities; and a criminal gang, as defined in s. 874.03, F.S. Section 895.02(3), F.S.

- If employed by, or associated with, any enterprise, conducting or participating, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt; and
- Conspiring or endeavoring to violate any of the aforementioned unlawful acts.⁵

In addition to criminal penalties, the Florida RICO Act imposes civil liability for violations of the act, including forfeiture to the state of all property, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of the act.⁶

Recovery of Property Unavailable for Forfeiture

Section 895.05, F.S., provides that if property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a RICO lien notice⁷ or after the filing of a civil or criminal proceeding pursuant to the act, whichever is earlier, an investigative agency may institute an action to recover an amount equal to the fair market value of the property, together with investigative costs and attorney's fees incurred by the investigative agency in the action.⁸ “[I]f a defendant conveys or otherwise disposes of property subject to forfeiture before the filing of a civil RICO action or the filing of a RICO lien notice, or if the property's value has been diminished, no money judgment can be obtained against the defendant for the dissipated or devalued property and the property in question cannot be forfeited.”⁹

Investigative Subpoenas

Section 895.06, F.S., provides that an investigating agency may subpoena witnesses or materials during the course of a civil enforcement investigation. “The purpose of the subpoena power under section 895.06 is to allow an investigative agency to investigate, collect evidence and determine if a RICO violation has occurred.”¹⁰ An investigative agency may apply ex parte to a circuit court for an order directing that a person or entity who has been subpoenaed not disclose the existence of the subpoena for a period of 90 days to anyone except the attorney for the subpoenaed person or entity.¹¹ The 90-day time limit may be extended by the court for good cause shown by the investigative agency.¹²

⁵ Section 895.03(1)-(4), F.S. (prohibited activities).

⁶ Section 895.05(2), F.S.

⁷ An investigative agency may file a RICO lien notice in the county records when it initiates a civil proceeding. The RICO lien notice creates a lien in favor of the state on the real property or beneficial interest situated in the county where the lien is filed. Section 895.07, F.S. An “investigative agency” is the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney. Section 895.02(7), F.S.

⁸ Section 895.05(2), F.S.

⁹ Analysis of SB 850 (January 20, 2016), Department of Legal Affairs (on file with the Senate Committee on Criminal Justice). This analysis is cited hereafter as “Department of Legal Affairs Analysis.”

¹⁰ *Check 'N Go of Florida, Inc. v. State*, 790 So.2d 454, 457 (Fla. 5th DCA 2001).

¹¹ Section 895.06(3), F.S. “Investigative subpoenas issued by the enforcement agency can be disclosed unless the agency obtains a court order preventing disclosure of the subpoena for 90 days.” Department of Legal Affairs Analysis.

¹² *Id.*

Omissions Relevant to Civil Enforcement

Current law does not:

- Specify where an action may be filed if personal property involved in a Florida RICO Act violation is subject to forfeiture;
- Address civil penalties in a Florida RICO Act enforcement action;
- Address consent decrees or settlement agreements in civil actions for Florida RICO Act violations; and
- Authorize restitution to RICO victims.

Public Records Exemption

In 2015, the Legislature created s. 895.06(7), F.S.¹³ Section 895.06(7)(a), F.S., provides that information held by an investigative agency pursuant to an investigation of a violation of s. 895.03, F.S., is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. Information made confidential and exempt under paragraph (a) may be disclosed by the investigative agency to a government entity in the performance of its official duties and to a court or tribunal.¹⁴ This information is no longer confidential and exempt once all investigations to which the information pertains are completed, unless the information is otherwise protected by law.¹⁵ An investigation is considered complete once the investigative agency either files an action or closes its investigation without filing an action.¹⁶

III. Effect of Proposed Changes:

The bill amends civil enforcement provisions of the Florida RICO Act to:

- Authorize an investigative agency, on behalf of the state, to institute a RICO civil proceeding for forfeiture in the circuit court for the judicial circuit in which the real or personal tangible property¹⁷ is located, or in a circuit court in the state for intangible property;¹⁸
- Authorize an investigative agency to pursue an action to recover fair market value of unavailable property regardless of when the property is conveyed, alienated, disposed of, diminished in value, or otherwise rendered unavailable for forfeiture;
- Authorize a court to order the forfeiture of any other property of the defendant up to the value of the unavailable property (as an alternative to the court ordering forfeiture of an amount equal to the fair market value of the unavailable property);
- Authorize the Department of Legal Affairs to bring an action for a Florida RICO Act violation to obtain injunctive relief, civil penalties, attorney fees, and costs incurred in the investigation and prosecution of any action under the Florida RICO Act;

¹³ Ch. 2015-99, L.O.F.

¹⁴ Section 895.06(7)(b), F.S.

¹⁵ Section 895.06(7)(c), F.S.

¹⁶ Section 895.06(7)(d), F.S.

¹⁷ The bill states that the terms “real or personal tangible property” and “intangible property” are described in s. 895.05(2)(a), F.S. This paragraph states that all property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01-895.05, F.S., is subject to civil forfeiture to the state.

¹⁸ *Id.*

- Provide that a natural person who violates the Florida RICO Act may be subject to a civil penalty of up to \$100,000 and any other person who violates the act may be subject to a civil penalty of up to \$1 million and require that moneys recovered for civil penalties be deposited into the General Revenue Fund;
- Require that moneys recovered by the Department of Legal Affairs for attorney fees and costs under the Florida Rico Act be deposited into the Legal Affairs Revolving Trust Fund and authorize use of those funds to investigate Florida RICO Act violations and enforce the act;
- Authorize any party to a Florida RICO Act civil action to petition the court for entry of a consent decree or for approval of a settlement agreement;
- Require that the proposed decree or settlement specify the alleged violations, the future obligations of the parties, the relief agreed upon, and the reasons for entering into the consent decree or settlement agreement;
- Provide that current law relating to the suspension of the running of the period of limitations with respect to certain causes of action will apply to actions for injunctive relief, civil penalties, attorney fees, and costs incurred in the investigation and prosecution of any Florida RICO Act violation;¹⁹
- Provide that an investigative subpoena issued pursuant to the Florida RICO Act is confidential for 120 days after the date of issuance, unless the period is extended by the court upon a showing of good cause by the investigating agency;
- Prohibit a subpoenaed person or entity from disclosing the existence of the subpoena to any person or entity other than the attorney of the subpoenaed person or entity during the 120-day period;
- Require that the subpoena include a reference to the confidentiality of the subpoena and a notice to the recipient of the subpoena that disclosure of the existence of the subpoena to any person or entity other than the attorney of the subpoenaed person or entity is prohibited;
- Authorize an investigative agency to stipulate to protective orders with respect to documents and information submitted in response to an investigative subpoena;
- Provide that the list of claims for which a court directs distribution of forfeiture funds includes claims for restitution by RICO victims; and
- Provide that if the forfeiture action was brought by the Department of Legal Affairs, the restitution is distributed through the Legal Affairs Trust Fund (otherwise, the restitution is distributed by the clerk of the court).

The bill takes effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹⁹ A criminal or civil action or proceeding under the Florida RICO Act may be commenced at any time within five years after the conduct in violation of the act terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent, or restrain any violation of the act, the running of the period of limitations prescribed with respect to certain causes of action (e.g., an action for damages brought by the state) which is based in whole or in part upon any matter complained of in any such prosecution, action, or proceeding is suspended during the pendency of such prosecution, action, or proceeding and for two years following its termination. Section 895.05(10), F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Department of Legal Affairs, “[t]he civil penalties of up to \$100,000 for a natural person and up to \$1 million for any other person for RICO Act violations created by [SB 850] may have an indeterminate positive revenue impact on the General Revenue Fund.”²⁰ Changes regarding recovery of the value of property subject to forfeiture that has become unavailable may also increase forfeiture proceeds by an indeterminate amount.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 16.53, 16.56, 895.05, 895.06, 895.09, and 905.34, Florida Statutes.

This bill reenacts provisions of the sections 16.53, 27.345, and 92.142, Florida Statutes to incorporate the amendment made to section 895.05, Florida Statutes, in references to that statute.

²⁰ Department of Legal Affairs Analysis, *supra* note 9.

IX. Additional Information:

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

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
