

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/CS/HB 3 Government and Corporate Activism  
**SPONSOR(S):** State Affairs Committee and Commerce Committee, Rommel and others  
**TIED BILLS:**           **IDEN./SIM. BILLS:** CS/SB 302

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**FINAL HOUSE FLOOR ACTION:** 80 Y's            31 N's            **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/CS/HB 3 passed the House on March 24, 2023, and subsequently passed the Senate on April 19, 2023.

The Governor, Attorney General, and Chief Financial Officer – as trustees of the State Board of Administration (SBA) – directed the SBA in August to invest funds of the Florida Retirement System Defined Benefit Plan in a manner that prioritizes the highest return on investment, without consideration of social, political, or ideological interests that have been the subject of debate among investors in recent years.

This bill expands the directive to cover all funds invested by state and local governments, including general revenue, trusts dedicated to specific purposes, money held by retirement plans, and surplus funds. Investment decisions, including written policies and the exercise of shareholder rights, must be driven solely by pecuniary factors, and may not sacrifice investment return to promote non-pecuniary factors. The Attorney General is authorized to bring civil or administrative actions to enforce provisions of the bill.

The term “pecuniary factor” is defined as a factor that is expected “to have a material effect on the risk or return of an investment based on appropriate investment horizons consistent with applicable investment objectives and funding policy. The term does not include the consideration of the furtherance of any social, political, or ideological interests.”

Additionally, the bill prohibits both the state Division of Bond Finance and specified public bond issuers from issuing an environmental, social, or corporate governance (ESG) bond, paying for the services of another to verify or certify a public bond as an ESG bond, or contracting with rating agencies that use ESG scores in a manner that directly impacts the issuer’s bond ratings.

For government contracting, the bill prohibits all units of state and local government from: 1) considering social, political, or ideological beliefs when evaluating prospective vendors, or 2) giving any preference to a vendor based on social, political, or ideological beliefs.

State and local governments may only deposit funds in banks and savings associations that have been designated as a Qualified Public Depository (QPD). The bill prohibits certification as a QPD if a bank has engaged in an “unsafe and unsound business practice” by denying or canceling services based on political beliefs or affiliations, religious beliefs or affiliations, business sector, or any other factor that is not a quantitative, impartial, risk-based standard, or applying social credit scores. QPDs will be required to certify compliance with this requirement.

Other financial institutions – banks, trust companies, credit unions, consumer finance lenders, and money services businesses – may be subject to administrative sanctions if they engage in an “unsafe and unsound business practice” by denying or canceling services based on political beliefs or affiliations, religious beliefs or affiliations, business sector, any other factor that is not a quantitative, impartial, risk-based standard, or applying social credit scores.

The bill imposes indeterminate costs on state and local governments and on financial institutions operating in Florida.

The bill was approved by the Governor on May 2, 2023, ch. 2023-28, L.O.F., and will become effective on July 1, 2023.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives .**

**STORAGE NAME:** h0003z.DOCX

**DATE:** 5/3/2023

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **Investments**

##### *State Board of Administration*

The State Board of Administration (SBA) was created by the Florida Constitution and serves as the state's independent investment management organization, with authority over 30 funds collectively valued at about \$228 billion as of June 30, 2022, including the state's pension and investment plans for public employees, which accounts for 79 percent of assets under management.<sup>1</sup> Other funds under management include the Florida Hurricane Catastrophe Fund, Department of the Lottery Fund, Florida Prepaid College and Florida College Investment Plan, FSU Research Foundation, Florida PRIME (surplus funds of local governments) and the Police and Firefighters' Premium Tax Trust Fund.<sup>2</sup> The Governor, Chief Financial Officer, and Attorney General serve as the SBA's Board of Trustees (Trustees), and delegate operational authority to an executive director and chief investment officer, who oversee about 200 employees.<sup>3</sup> A nine-member Investment Advisory Council provides guidance on investment policy and strategy.<sup>4</sup>

In August 2022, the Trustees directed the SBA to invest funds in a manner that prioritizes the highest return on investment, without consideration of social, political, or ideological interests.<sup>5</sup> A resolution adopted by the Trustees directed the SBA to amend the Investment Policy Statement (IPS) for the Florida Retirement System Defined Benefit Plan to require that investment decisions be based solely on pecuniary factors.<sup>6</sup> By law, the IPS must clearly state its investment objectives, identify the types of securities the plan may invest in, and the evaluation criteria that will be used to measure fund performance.<sup>7</sup> Investment managers who invest public funds on behalf of the board certify compliance with the IPS annually.<sup>8</sup> The resolution further states that the Trustees, when exercising shareholder rights, including the voting of proxies, may not subordinate the interests of the participants and beneficiaries to other objectives and may not sacrifice investment return or take on additional investment risk to promote non-pecuniary factors.<sup>9</sup>

In December 2021, the Trustees directed the SBA to reclaim proxy voting authority that had been given to large financial firms and provide additional guidance to employees who are responsible for proxy voting and

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<sup>1</sup> Art. IV, s. 4(e) Fla. Const. (1968); State Board of Administration, *Summary Overview of the State Board of Administration of Florida*, [https://www.sbafla.com/fsb/Portals/FSB/Content/Topics/SBAOverview\\_20211025.pdf?ver=2021-10-28-120954-217](https://www.sbafla.com/fsb/Portals/FSB/Content/Topics/SBAOverview_20211025.pdf?ver=2021-10-28-120954-217) (last visited Feb. 13, 2023); State Board of Administration, *Performance Report Month Ending June 30, 2022*, <https://www.sbafla.com/fsb/Portals/FSB/Content/Trustees/2022/June%202022%20Monthly%20Trustee%20Report.pdf?ver=2022-08-24-133206-397> (last visited Feb. 13, 2023).

<sup>2</sup> A full list of SBA-managed investment funds is available at <https://www.sbafla.com/fsb/FundsWeManage.aspx> (last visited Feb. 13, 2023).

<sup>3</sup> S. 215.44, F.S.; *Summary Overview of the State Board of Administration of Florida*, supra footnote 1.

<sup>4</sup> S. 215.444(2), F.S.

<sup>5</sup> The State Board of Administration, *A Resolution Directing an Update to the Investment Policy Statement and Proxy Voting Policies for the Florida Retirement System Defined Benefit Plan, and Directing the Organization and Execution of an Internal Review*, Aug. 23, 2022, last visited (March 10, 2023).

<sup>6</sup> Office of the Governor, *Governor DeSantis Eliminates ESG Considerations from State Pension Investments* (August 23, 2022) <https://www.flgov.com/2022/08/23/governor-ron-desantis-eliminates-esg-considerations-from-state-pension-investments/> (last visited Feb. 13, 2023).

<sup>7</sup> S. 215.475, F.S.

<sup>8</sup> S. 215.4755, F.S.

<sup>9</sup> Officer of the Governor, *Governor DeSantis Eliminates ESG Considerations from State Pension Investments*, supra footnote 5.

investment decisions.<sup>10</sup> During fiscal year 2021, SBA staff cast votes at 10,174 companies in 76 countries, voting on ballot items including director elections, audit firm ratification, executive compensation plans, mergers and acquisitions, and a variety of other management and shareowner proposals.<sup>11</sup> Of all votes cast, 17.5 percent were “against” the recommendation of company management.<sup>12</sup>

### *State General Revenue and Trust Funds*

The Chief Financial Officer (CFO) is responsible for the investment of state general revenue and trust funds.<sup>13</sup> Interest earnings are allocated to the general revenue fund, trust funds, and Special Purpose Investment accounts.<sup>14</sup> A five-member Treasury Investment Council provides guidance on investment policy and strategy.<sup>15</sup>

### *Local Government Retirement Plans*

The Department of Management Services (DMS) monitors and oversees 487 retirement plans of municipalities, special districts, and school boards, to ensure they are actuarially sound.<sup>16</sup> Local governments must adopt a written investment policy that is structured to maximize the financial return on investments and complies with the investment limitations that apply to funds managed by the SBA.<sup>17</sup> State law includes special requirements for police and firefighter retirement plans; investments for these trust funds are managed by the local board of trustees and are subject to similar investment policies applicable to state funds.<sup>18</sup>

### *Local Government Surplus Funds*

There are several investment vehicles for surplus funds of local governments.<sup>19</sup>

The SBA manages Florida PRIME (the Local Government Surplus Funds Trust Fund), which invests surplus funds of 756 units of local government in accordance with the investment restrictions that apply to the investment of state funds.<sup>20</sup>

Two other investment pools were created by interlocal agreements.<sup>21</sup> The Florida Association of Counties and the Florida Court Clerks & Comptrollers created the Florida Local Government Investment Trust, which offers public entities the choice of two professionally managed investment funds.<sup>22</sup> The cities of Bradenton,

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<sup>10</sup> Office of the Governor, *Governor Ron DeSantis Takes Action Against Communist China and Woke Corporations*, Dec. 20, 2021, <https://www.flgov.com/2021/12/20/governor-ron-desantis-takes-action-against-communist-china-and-woke-corporations/> (last visited Feb. 13, 2023).

<sup>11</sup> State Board of Administration, *2022 Corporate Governance Summary Report, 2022 CG Annual Summary v4.pdf* ([sbafla.com](https://www.sbafla.com)) (last visited Feb. 13, 2023).

<sup>12</sup> *Id.*

<sup>13</sup> S. 17.61, F.S. This includes funds of each state agency and of the judicial branch; and funds of all boards, associations, and entities created by the Florida Constitution or by law.

<sup>14</sup> Florida Department of Financial Services, Treasury Investment Pool, <https://www.myfloridacfo.com/division/treasury/treasury-investment-pool> (last visited Feb. 13, 2023).

<sup>15</sup> *Id.*

<sup>16</sup> Florida Department of Management Services, *Florida Local Government Retirement Systems 2022 Annual Report, 2022 Local Report.pdf* ([fl.gov](https://www.fl.gov)) (last visited Feb. 13, 2023).

<sup>17</sup> S. 112.661, F.S.

<sup>18</sup> Ss. 175.071 and 185.06, F.S.

<sup>19</sup> S. 218.403(11), F.S., states: “‘Unit of local government’ means any governmental entity within the state not part of state government and shall include, but not be limited to, the following and the officers thereof: any county, municipality, school district, special district, clerk of the circuit court, sheriff, property appraiser, tax collector, supervisor of elections, authority, board, public corporations, or any other political subdivision of the state.”

<sup>20</sup> S. 218.405(16)(a), F.S. Also see, State Board of Administration, *Florida PRIME Monthly Summary Report, monthly summary report 01 31 23final.pdf* ([sbafla.com](https://www.sbafla.com)) (last visited March 10, 2023).

<sup>21</sup> See ss. 163.01, F.S. and 218.415, F.S.

<sup>22</sup> Florida Local Government Investment Trust, *About*, <https://www.floridatrustononline.com/funds-reports/> (last visited Feb. 13, 2023).

Lauderhill, and Palatka created The Florida Municipal Investment Trust, which offers local governments the choice of six fixed income portfolios, three equity portfolios, and a real estate portfolio.<sup>23</sup>

In general, investments of local government surplus funds are subject to the written investment plan adopted by a governing board or principal officer of the local government entity. If there is no written investment policy, the local government entity may only invest surplus public funds in Florida PRIME, an intergovernmental investment pool, registered money market funds, interest bearing time deposits or savings accounts in qualified public depositories designated by the CFO, or direct obligations of the U.S. Treasury.<sup>24</sup>

### *Citizen Support and Direct-support Organizations*

Citizen support organizations (like Friends of Biscayne Bay or the North Florida Springs Alliance) and direct-support organizations (like the University Athletic Association associated with the University of Florida) raise funds to support causes that are in the public interest and often enter into a contract with a government entity to define the terms of the organizations' support to that government entity. Such organizations must submit annual reports describing their activities to the appropriate government agency. Reports are forwarded to the Governor, the Legislature, and the Office of Program Policy Analysis and Government Accountability by August 15 each year.<sup>25</sup>

### **Effect of the Bill**

The bill codifies and extends the policy adopted by the Trustees – requiring all investment decisions relating to the state retirement system be based solely on pecuniary factors – to all funds managed by the SBA, all funds of the state Treasury, all local government retirement plans, investments of local government surplus funds, and investments of funds raised by citizen support and direct-support organizations.<sup>26</sup> Investment managers who invest public funds on behalf of any of these entities may not sacrifice investment return or take additional investment risk to promote any non-pecuniary factor.

The bill also codifies and extends the policy adopted by the Trustees – requiring shareholder rights, including the voting of proxies, to solely be exercised based on pecuniary factors – to all state and local pension plans. Investment managers who exercise shareholder rights on behalf of state and local pension plans may not sacrifice investment return or take additional investment risk to promote any non-pecuniary factor.

The term “pecuniary factor” is defined as a factor that is expected “to have a material effect on the risk or return of an investment based on appropriate investment horizons consistent with applicable investment objectives and funding policy. The term does not include the consideration of the furtherance of any social, political, or ideological interests.” Further, the “weight given to any pecuniary factor must appropriately reflect a prudent assessment of its impact on risk or returns.”

The bill requires the state and local retirement systems' investment policy statements to comply with the bill's provisions.

State and local retirement systems must report compliance with the law on a biennial basis, beginning December 15, 2023. Local government retirement plans must report to DMS; the SBA, on behalf of the Florida Retirement System, must report to the Governor, Attorney General, CFO, and the Legislature. Reports must describe governance policies and standards for the exercise of shareholder rights. After receiving the local reports, DMS must submit a summary report that identifies any relevant trends to the Governor, Attorney

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<sup>23</sup> Florida League of Cities, Florida Municipal Investment Trust, [https://www.floridaleagueofcities.com/services/investments-\(fmivt\)](https://www.floridaleagueofcities.com/services/investments-(fmivt)) (last visited Feb. 13, 2023).

<sup>24</sup> S. 218.415(16), F.S.

<sup>25</sup> S. 20.058, F.S.

<sup>26</sup> The bill requires citizen support organizations and direct-support organizations to submit to the appropriate agency an attestation, under penalty of perjury, stating that the organization has complied with the bill's investment standards.

General, CFO, and the Legislature, on a biennial basis beginning January 15, 2024. In addition, DMS is directed to report incidents of noncompliance to the Attorney General, who may seek an injunction against any agency violating the investment, proxy voting, or reporting provisions and recover attorney fees and costs when an enforcement action is successful.

The bill specifies that the above provisions do not apply to individual member-directed investment accounts established as part of a defined contribution plan under s. 401(a), s. 403(b), or s. 457 of the Internal Revenue Code.

The bill requires any contract between a governmental entity<sup>27</sup> and an investment manager<sup>28</sup> executed, amended, or renewed on or after July 1, 2023, to contain a provision requiring the investment manager to include a disclaimer in an external communication, if the communication is to a company in which the investment manager has invested public funds<sup>29</sup> and discusses social, political, or ideological interests; subordinates the interests of the company's shareholders to the interests of another entity; or advocates for an entity other than the company's shareholders. This applies to the investment of general revenue, surplus funds, trust funds, and retirement plans.

The required disclaimer must state: "The views and opinions expressed in this communication are those of the sender and do not reflect the views and opinions of the people of the state of Florida."

All contracts with investment managers executed, amended, or renewed on or after July 1, 2023, may be unilaterally terminated if certain communications of an investment manager include discussion of social, political, or ideological interests and omit the required disclaimer described above.

Additionally, investment managers, who are required to certify compliance with the fiduciary standards set forth in the state's investment policy annually, are required to certify that all investment decisions made on behalf of the state are based solely on pecuniary factors. In addition, such investment managers are subject to sanctions if they fail to timely file the required certification or submit a certification that is materially false. The Attorney General may bring a civil or administrative action against such persons and recover attorney fees and costs when an enforcement action is successful.

## **Bond Financing**

Entities of state and local government issue bonds to finance public projects. Investors are paid tax-exempt interest during the lifetime of the bond and are repaid the face value of the bond upon maturity.

The Division of Bond Finance (which is administratively housed within the SBA) issues bonds on behalf of local governments and state agencies. General Obligation Bonds are secured by the taxing power of the bond issuer. The investor relies on the full faith and credit of the issuer, and the issuer can impose a tax on the public to repay the bond. Revenue Bonds are backed by revenues that come from a specific source or revenue stream, like a local stadium or highway tolls. Interest rates are higher because these bonds depend on the success of the specific venture that is financed. Appropriation-based bonds are secured by a commitment of

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<sup>27</sup> The bill defines "governmental entity" to mean a state, regional, county, municipal, special district, or other political subdivision whether executive, judicial, or legislative, including, but not limited to, a department, division, board, bureau, commission, authority, district, or agency thereof, or a public school, Florida College System institution, state university, or associated board.

<sup>28</sup> The bill defines "investment manager" to mean a private sector company that offers one or more investment products or services to a governmental entity and that has the discretionary investment authority for direct holdings.

<sup>29</sup> The bill defines "public funds" to mean all moneys under the jurisdiction of a governmental entity and includes all manner of pension and retirement funds and all other funds held, as trust funds or otherwise, for any public purpose, subject to investment.

the state to pay the debt service on the bonds via annual appropriations of the Legislature.<sup>30</sup> The Governor, the Chief Financial Officer, and the Attorney General serve as the governing board of the Division of Bond Finance.<sup>31</sup>

Local governments may also issue bonds through the Florida League of Cities, investment banks, or other financial firms.<sup>32</sup> In such cases, the local government must provide notice of proposed bond sales and detailed information about bonds that have been issued to the Division of Bond Finance, which serves as a clearinghouse for government bonds issued in Florida.<sup>33</sup> The local government also must provide adequate notice to the public about the cost of bond financing and the terms under which bonds are issued.<sup>34</sup>

There is about \$93.6 billion in outstanding state and local long-term debt:

- \$17.1 billion - state<sup>35</sup>
- \$76.5 billion - local<sup>36</sup>

## Effect of the Bill

The bill prohibits bond issuers from issuing an environmental, social, and corporate governance (ESG) bond or paying for a third-party verifier that certifies or verifies that a bond<sup>37</sup> may be designated or labeled as an ESG bond, renders opinions or produces a report on ESG compliance, among other ESG-related services. Issuers are also prohibited from contracting with a rating agency whose ESG scores for the issuer will have a direct, negative impact on the issuer's bond ratings.

The following bond issuers are affected by the bill:

- The Division of Bond Finance, acting on behalf of any entity;
- Any local government, educational entity, or entity of higher education,<sup>38</sup> or other political subdivision granted the power to issue bonds; and
- Any public body corporate and politic authorized or created by general or special law and granted the power to issue bonds, including, but not limited to:
  - Water and sewer districts created under ch. 153, F.S.,
  - Health facilities authorities,<sup>39</sup>
  - Industrial development authorities created under ch. 159, F.S.,
  - Housing financing authorities,<sup>40</sup>
  - Research and development authorities,<sup>41</sup>
  - Legal or administrative entities created by interlocal agreement pursuant to s. 163.01(7), F.S.,

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<sup>30</sup> Division of Bond Finance, *Bond Program Overview*, <https://www.sbafla.com/bondfinance/Bond-Programs> (last visited Feb. 13, 2023).

<sup>31</sup> S. 215.62, F.S.

<sup>32</sup> See, e.g., Florida League of Cities, *Bond Issue Program*, <https://www.floridaleagueofcities.com/services/loans/bond-issue-program> (last visited Feb. 13, 2023).

<sup>33</sup> Ss. 218.37 and 218.38, F.S.

<sup>34</sup> S. 218.385, F.S.

<sup>35</sup> State of Board of Administration, Division of Bond Finance, *State of Florida Debt Report 2022* (Dec. 2022). <https://www.sbafla.com/bond/Portals/0/Content/DebtReport/DAR%202022%20Report%20FINAL.pdf?ver=2022-12-15-121017-743> (last visited Mar. 4, 2023).

<sup>36</sup> Local Government Financial Reporting, *Create Reports*, <https://apps.fldfs.com/localgov/reports/adhoc.aspx> (last visited Mar. 4, 2023).

<sup>37</sup> The bill defines "bond" as any note, general obligation bond, revenue bond, special assessment bond, special obligation bond, private activity bond, certificate of participation, or other evidence of indebtedness or obligation, in either temporary or definitive form.

<sup>38</sup> As defined in s. 215.89(2)(c), (d), and (e), F.S.

<sup>39</sup> As defined in s. 154.205, F.S.

<sup>40</sup> As defined in s. 159.603(3), F.S.

<sup>41</sup> As defined in s. 159.702(1)(c), F.S.

- Community redevelopment agencies,<sup>42</sup>
- Regional transportation authorities created under ch. 163, F.S.,
- Community development districts,<sup>43</sup>
- Educational facilities authorities,<sup>44</sup>
- The Higher Educational Facilities Financing Authority created pursuant to s. 243.53, F.S.,
- The Florida Development Finance Corporation created pursuant to s. 288.9604, F.S.,
- Port district or port authorities,<sup>45</sup>
- The South Florida Regional Transportation Authority created pursuant to s. 343.53, F.S.,
- The Central Florida Regional Transportation Authority created pursuant to s. 343.63, F.S.,
- The Tampa Bay Area Regional Transit Authority created pursuant to s. 343.92, F.S.,
- The Greater Miami Expressway Agency created pursuant to s. 348.0304, F.S.,
- The Tampa-Hillsborough County Expressway Authority created pursuant to s. 348.52, F.S.,
- The Central Florida Expressway Authority created pursuant to s. 348.753, F.S.,
- The Jacksonville Transportation Authority created pursuant to s. 349.03, F.S., and
- The Florida Housing Finance Corporation created pursuant to s. 420.504, F.S.

An ESG bond is any bond that has been designated or labeled as a bond that will be used to finance a project with an ESG purpose, including, but not limited to, green bonds, Certified Climate Bonds, GreenStar designated bonds, and other environmental bonds marketed as promoting a generalized or global environmental objective; social bonds marketed as promoting a social objective; and sustainability bonds and sustainable development goal bonds marketed as promoting both environmental and social objectives. It includes bonds self-designated by the issuer as ESG-labeled bonds and those designated as ESG-labeled bonds by a third-party verifier.

The bill expressly applies to bonds issued and agreements made and contracts executed on or after July 1, 2023.

## **Government Contracts**

Chapter 287, F.S., sets forth the procurement and contracting procedures for most state agencies.<sup>46</sup>

In general, the law requires a competitive solicitation process when state agencies wish to procure commodities or contractual services that cost more than \$35,000.<sup>47</sup> An agency may use an invitation to bid, issue a request for proposals from vendors who are able to provide the desired service(s), or issue an invitation to negotiate when one or more responsive vendors may be able to provide the desired service(s).<sup>48</sup> A competitive solicitation is the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors.<sup>49</sup>

For contracts that cost more than \$195,000, at least three people who have experience and knowledge in the program area and service requirements must independently evaluate proposals and replies.<sup>50</sup> If the value of the contract exceeds \$1 million in any fiscal year, at least one of the persons conducting negotiations must be a certified contract negotiator.<sup>51</sup>

<sup>42</sup> As defined in s. 163.340(1), F.S.

<sup>43</sup> As defined in s. 190.003, F.S.

<sup>44</sup> As defined in s. 243.52(1), F.S.

<sup>45</sup> As defined in s. 315.02(1) and (2), F.S.

<sup>46</sup> Chapters 255, 283, and 337 provide requirements for building construction, printing services, and road/bridge construction, respectively.

<sup>47</sup> Ss. 287.057 and 287.017, F.S.

<sup>48</sup> S. 287.057(1), F.S. Certain commodities (including but not limited to artistic services, lectures by individuals, legal services, healthcare) are exempt from the competitive solicitation process. S. 287.057(3)(e), F.S.

<sup>49</sup> S. 287.012(6), F.S.

<sup>50</sup> S. 287.057(17)(a)1., F.S.

<sup>51</sup> S. 287.057(17)(b)1., F.S.

Contracts for commodities or services may be renewed for the term of the original contract or for up to three years, whichever is longer. Renewals must be in writing, are contingent upon satisfactory performance evaluations by the agency and the availability of funds, and may not include compensation for costs associated with the renewal.<sup>52</sup>

DMS oversees state purchasing activity and registers vendors that wish to provide goods or services to the state.<sup>53</sup> DMS also maintains lists of vendors who may not submit bids, proposals, or reply to agency requests for proposals. These include companies identified on the:

- Suspended vendor list – Vendors who are in default on a contract or have repeatedly failed to fulfill the terms of state contracts. Contracts cannot be awarded to such vendors until the vendor reimburses the agency for the costs of re-procurement and the agency is satisfied that further default will not occur.<sup>54</sup>
- Convicted vendor list – Vendors who have been disqualified due to conviction of a public entity crime, which includes fraud, theft, bribery, collusion, racketeering, conspiracy, or material misrepresentation related to a contract for services to be provided to a public entity.<sup>55</sup>
- Discriminatory vendor list – Vendors who have been disqualified for violating any state or federal law prohibiting discrimination based on race, gender, national origin, disability, or religion.<sup>56</sup>

## **Effect of the Bill**

The bill prohibits consideration of social, political, or ideological beliefs in state and local government contracting, and explicitly notes that this includes all political subdivisions of the state. Specifically, the bill prohibits an awarding body from: 1) requesting documentation or considering a vendor's social, political, or ideological beliefs when determining if the vendor is a responsible vendor;<sup>57</sup> or 2) giving a preference to a vendor based on the vendor's social, political, or ideological beliefs.

Beginning July 1, 2023, all solicitations for commodities or contractual services must include notice of these requirements.

## **Financial Institutions**

### *Dual Oversight of Depository Institutions*

To accept deposits, an institution must have a federal or state charter. Banks are chartered and regulated as national banks under the authority of the Office of the Comptroller of the Currency within the U.S. Department of the Treasury or as state banks under the authority of a state regulator.<sup>58</sup>

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<sup>52</sup> S. 287.057(14), F.S.

<sup>53</sup> Ss. 287.032 and 287.042, F.S. Also see, Department of Management Services, *Vendor Registration and Vendor Lists*, [Vendor Registration and Vendor Lists / State Agency Resources / State Purchasing / Business Operations / Florida Department of Management Services - DMS \(myflorida.com\)](#) (last visited Feb. 13, 2023).

<sup>54</sup> S. 287.1351, F.S.

<sup>55</sup> S. 287.133, F.S.

<sup>56</sup> S. 287.134, F.S.

<sup>57</sup> "Responsible vendor" means a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance. S. 287.012(25), F.S.

<sup>58</sup> Congressional Research Service, *Introduction to Financial Services: Banking*, January 5, 2023, <https://crsreports.congress.gov/product/pdf/IF/IF10035> (last visited Feb. 13, 2023).



The Florida Financial Institutions Codes<sup>59</sup> apply to all state-authorized or state-chartered financial banks, trust companies, credit unions, and related entities.<sup>60</sup> The Office of Financial Regulation (OFR) licenses and regulates 197 financial entities, including 69 state-chartered banks and 66 state-chartered credit unions.<sup>61</sup> There are also 33 federally-chartered banks and 63 federally chartered credit unions operating in Florida.<sup>62</sup>

Due to federal preemptions, a state's regulatory powers in relation to federally chartered institutions are limited. However, the state may exercise powers within their exceptions to exclusive federal visitorial authority. Such exceptions are those recognized by federal law and courts of law or created by the U.S. Congress.<sup>63</sup>

Once a financial institution obtains a charter, the regulator's primary task is to ensure solvency; the regulator does this by conducting financial exams of its licensed entities. Financial institutions also need approval from their regulator to make changes in their upper management, merge with another company, pay dividends to shareholders, engage in material transactions with subsidiaries and affiliates, or make significant changes to their business operations.<sup>64</sup>

Banks chartered by OFR must become a member of the Federal Reserve or obtain insurance from the Federal Deposit Insurance Corporation.<sup>65</sup> Credit Unions chartered by OFR must insure their accounts by becoming a member of the National Credit Union Administration.<sup>66</sup> Thus, state-chartered banks and credit unions are subject to a dual-regulatory system.

OFR must examine the condition of each state-chartered financial institution at least every 18 months, and may conduct more frequent examinations as needed, based on risks associated with a licensee, like prior examination results or significant operational changes.<sup>67</sup> When a state-chartered financial institution also has a federal regulator, OFR may accept an examination performed by the federal regulator or the regulators may conduct a joint examination.<sup>68</sup>

Financial institutions that become insolvent are liquidated by their primary regulator.<sup>69</sup>

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<sup>59</sup> Under s. 655.005(1)(k), F.S., the Financial Institutions Codes are:

1. Chapter 655, relating to financial institutions generally;
2. Chapter 657, relating to credit unions;
3. Chapter 658, relating to banks and trust companies;
4. Chapter 660, relating to trust business;
5. Chapter 662, relating to family trust companies;
6. Chapter 663, relating to international banking;
7. Chapter 665, relating to associations; and
8. Chapter 667, relating to savings banks.

<sup>60</sup> S. 655.005(1)(k), F.S., states that the Financial Institutions Codes includes: Ch. 655, financial institutions generally; Ch. 657, credit unions; Ch. 658, banks and trust companies; Ch. 660, trust business; Ch. 662, family trust companies; Ch. 663, international banking; Ch. 665, relating to associations; and Ch. 667, savings banks.

<sup>61</sup> Office of Financial Regulation, *Fast Facts* (2021 ed.), [FastFacts.pdf \(flofr.gov\)](#) (last visited Feb. 13, 2023).

<sup>62</sup> *Id.*

<sup>63</sup> 12 C.F.R. § 7.4000 (2011).

<sup>64</sup> For a detailed discussion of the regulatory framework, see, Congressional Research Service, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework*, March 10, 2020, <https://crsreports.congress.gov/product/pdf/R/R44918/7> (last visited Feb. 13, 2023). Also see ss. 655.037, 655.0385, 655.0386, 655.03855, and 655.412, F.S.

<sup>65</sup> Ss. 658.22 and 658.38, F.S.

<sup>66</sup> Ss. 657.005, 657.008, F.S.

<sup>67</sup> S. 655.045(1), F.S.

<sup>68</sup> S. 655.045(1)(a), F.S.

<sup>69</sup> Ss. 657.063, 657.064, 658.83, 660.48, F.S.

## Authority of OFR

OFR may impose administrative sanctions on financial institutions subject to the Florida Financial Institutions Codes that engage in an “unsafe or unsound practice.” This term is defined at s. 655.005(1)(y), F.S., which states:

“Unsafe or unsound practice” means any practice or conduct found by the office to be contrary to generally accepted standards applicable to a financial institution, or a violation of any prior agreement in writing or order of a state or federal regulatory agency, which practice, conduct, or violation creates the likelihood of loss, insolvency, or dissipation of assets or otherwise prejudices the interest of the financial institution or its depositors or members. In making this determination, the office must consider the size and condition of the financial institution, the gravity of the violation, and the prior conduct of the person or institution involved.

Possible penalties include: issuance of a Cease and Desist Order,<sup>70</sup> removal of an Institution-Affiliated Party,<sup>71</sup> administrative fines,<sup>72</sup> and a court-ordered injunction to restrain conduct that violates a formal enforcement action.<sup>73</sup> When imposing a sanction or requiring a remedy, OFR must consider “the appropriateness of the penalty with respect to the size of the financial resources and good faith of the person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.”<sup>74</sup>

OFR may impose monetary fines if a licensee violates a provision of the financial institutions codes or associated rules, an order of the office, or a written agreement with the office.<sup>75</sup> In general, administrative fines may not exceed \$2,500 per day for each violation.<sup>76</sup> Larger fines are allowed in the following circumstances:

- Up to \$10,000 per day for each violation for reckless violations that result in more than a minimal loss to a financial institution or pecuniary benefit to the person liable for the violation;<sup>77</sup>
- Up to the lesser of \$500,000 per day or 1 percent of the total assets in the case of a financial institution, or \$50,000 per day in any other case, for knowing violations that result in more than a minimal loss to a financial institution or pecuniary benefit to the person liable for the violation;<sup>78</sup> and
- Up to \$10,000 per day for any financial institution that refuses to permit an examination.<sup>79</sup>

Criminal violations – like embezzlement and fraud – may be prosecuted under the penal code.<sup>80</sup>

OFR has authority to monitor state-chartered banks, to ensure compliance with state and federal laws, and may enforce state consumer protection laws on federally chartered banks operating within their boundaries so long as the state law is not pre-empted by federal law.<sup>81</sup> Federal pre-emption permits federally chartered banks and savings associations to operate under a uniform set of rules when they operate across state lines.<sup>82</sup>

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<sup>70</sup> S. 655.033, F.S.

<sup>71</sup> S. 655.037, F.S.

<sup>72</sup> S. 655.041, F.S.

<sup>73</sup> S. 655.034, F.S.

<sup>74</sup> S. 655.031(1), F.S.

<sup>75</sup> S. 655.041, F.S.

<sup>76</sup> S. 655.041(2), F.S.

<sup>77</sup> S. 655.041(2)(a), F.S.

<sup>78</sup> S. 655.041(2)(b), F.S.

<sup>79</sup> S. 655.041(2)(c), F.S. Rule 69U-100.0451, F.A.C, discusses fees that may be assessed to cover the costs of examinations.

<sup>80</sup> S. 655.0322, F.S.

<sup>81</sup> 12 U.S.C. 25b.

<sup>82</sup> U.S. Department of the Treasury, Office of the Comptroller of the Currency, *OCC Chief Counsel's Interpretation: 12 U.S.S. §25b*, Dec. 18, 2020, <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-176a.pdf> (last visited Feb. 13, 2023).

When a state chartered financial institution encounters a competitive disadvantage caused by state law in relation to the capacities and powers allowed to federally chartered institutions, OFR may issue an order or a rule waiving the state law causing the competitive imbalance.<sup>83</sup>

### *Non-Depository Financial Institutions*

OFR also has regulatory authority over consumer finance lenders that help consumers finance products or services, and money services businesses that assist consumers in transacting instruments or transmitting money. Non-depository lenders profit from fees charged on such loans or transactions.

Consumer finance lenders may make secured or unsecured loans of up to \$25,000 at interest rates between 18 and 30 percent per year.<sup>84</sup> Each location of a consumer finance company must be licensed by OFR, even if the separate locations are part of the same business entity.<sup>85</sup> OFR investigates consumer complaints to ensure that consumer finance lenders are licensed to purchase or hold retail installment contracts and comply with fair lending laws.<sup>86</sup> Administrative sanctions for consumer finance lenders may include suspension or revocation of a license, a written reprimand, or a fine of up to \$1,000 for each violation.<sup>87</sup> Certain violations, such as violating fair lending laws or operating without a license, may be prosecuted as a first-degree misdemeanor.<sup>88</sup>

Money services businesses provide services such as cashing checks, transmitting money, and exchanging foreign currency. Examples include check cashers like Amscot, money transmitters like PayPal, and exchangers like Currency Exchange International. Money services businesses also include “payday lenders” who offer short-term, high-interest loans that are due on the consumer’s next pay day. Two types of payday loans are allowed in Florida:

- The lender provides cash in exchange for the borrower’s check (up to \$500) and agrees to hold the check for seven to 31 days before cashing the check. Fees may not exceed 10 percent of the payment to the borrower plus a \$5 verification fee.
- The lender provides cash in exchange for the borrower’s check (up to \$1,000) and the borrower repays the loan in installments. The term of the loan is 60-90 days. The lender may charge a \$5 verification fee and 8 percent of the balance on a biweekly basis.<sup>89</sup>

In addition to licensing and ongoing solvency monitoring, OFR requires that money service businesses maintain accounts – in permissible investments that can be liquidated to satisfy business obligations – that are at least equal to the amount of all outstanding money transmissions and payment instruments sold by the licensee or an authorized vendor.<sup>90</sup> OFR also monitors the check cashing practices of money services businesses to verify corporate records and determine compliance with workers’ compensation laws,<sup>91</sup> and to ensure compliance with fair debt collection laws.<sup>92</sup> Administrative sanctions for money services businesses may include issuance of a Cease and Desist Order, removal of an Institution-Affiliated Party, suspension or revocation of a license, or a fine of at least \$1,000 but not more than \$10,000 for each violation.<sup>93</sup> Money laundering may be prosecuted under state or federal law.<sup>94</sup>

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<sup>83</sup> S. 655.061, F.S.

<sup>84</sup> S. 516.02, F.S.

<sup>85</sup> S. 516.05, F.S.

<sup>86</sup> Ss. 516.11, 516.15, 516.26, 516.31 and 516.35, F.S.

<sup>87</sup> S. 516.07(2), F.S.

<sup>88</sup> S. 516.19, F.S.

<sup>89</sup> S. 560.404, F.S.

<sup>90</sup> S. 560.210, F.S.

<sup>91</sup> S. 560.310, F.S.

<sup>92</sup> S. 560.309, F.S.

<sup>93</sup> S. 560.114, F.S.

<sup>94</sup> Ss. 560.111 and 560.123, F.S.

## Effect of the Bill

The bill adds the term “unsafe and unsound practice” to the section of the Florida Financial Institutions Codes that defines “unsafe or unsound practice (excerpted above) for banks, trust companies, and credit unions. The term “unsafe and unsound practice” is also added to laws governing consumer finance loans and money services businesses. The definition echoes references found to “unsafe or unsound practice” in sections of the bill relating to bond finance and qualified public depositories, and states it is an unsafe and unsound practice for a licensee to deny or cancel its services to a person, or to otherwise discriminate against a person, on the basis of:

- The person's political opinions, speech, or affiliations;
- The person's religious beliefs, exercise, or affiliations;
- Any other factor that is not a quantitative, impartial, and risk-based standard; or
- A social credit score.<sup>95</sup>

The bill states that financial institutions operating in Florida – banks, trust companies, credit unions, consumer finance lenders and money service businesses – must make determinations about the provision or denial of services “based on an analysis of risk factors unique to each individual customer or member.”

Upon application for a license or license renewal, financial institutions regulated by Florida must provide an attestation stating that the financial institution’s practices comply with the applicable requirements and limitations created by the bill.

If a financial institution licensed by OFR engages in an “unsafe or unsound practice,” OFR may impose administrative penalties, including an order requiring corrective action, a financial penalty, and suspension or revocation of a license.

Additionally, the bill states that a financial institution licensed by OFR that engages in an “unsafe or unsound practice,” has also violated the Florida Deceptive and Unfair Trade Practices Act. This makes banks, trust companies, credit unions, consumer finance lenders, and money service businesses subject to the enforcement actions identified in part II of chapter 501, F.S., which include civil actions brought by the Attorney General and criminal prosecution by a State Attorney in the appropriate judicial circuit. Civil actions may include an injunction, an action seeking damages, or a civil penalty up to \$10,000 per violation.

The bill prohibits the waiver of state laws by OFR and the Financial Services Commission in relation to unsafe and unsound business practices by financial institutions.<sup>96</sup>

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<sup>95</sup> The bill provides that a social credit score includes, but is not limited to, using any rating, scoring, analysis, tabulation, or action that considers a social credit score based on factors including, but not limited to: the person's political opinions, speech, or affiliations; the person's religious beliefs, religious exercise, or religious affiliations; the person's lawful ownership of a firearm; the person's engagement in the lawful manufacture, distribution, sale, purchase, or use of firearms or ammunition; the person's engagement in the exploration, production, utilization, transportation, sale, or manufacture of fossil fuel-based energy, timber, mining, or agriculture; the person's support of the state or federal government in combatting illegal immigration, drug trafficking, or human trafficking; the person's engagement with, facilitation of, employment by, support of, business relationship with, representation of, or advocacy for any person described in this paragraph; the person's failure to meet or commit to meet, or expected failure to meet, any of the following as long as such person is in compliance with applicable state or federal law:

- Environmental standards, including emissions standards, benchmarks, requirements, or disclosures;
- Social governance standards, benchmarks, or requirements, including, but not limited to, environmental or social justice;
- Corporate board or company employment composition standards, benchmarks, requirements, or disclosures based on characteristics protected under the Florida Civil Rights Act of 1992; or
- Policies or procedures requiring or encouraging employee participation in social justice programming, including, but not limited to, diversity, equity, or inclusion training.

<sup>96</sup> The Financial Services Commission is the Governor, Attorney General, Commissioner of Agriculture, and Chief Financial Officer. The Commission is the agency head over OFR. S. 20.121(3), F.S.

## Qualified Public Depositories

Unless a specific exemption applies, state and local governments must deposit public funds in a bank or savings association that has been designated as a qualified public depository (QPD) under the Florida Security for Public Deposits Act.<sup>97</sup>

To be designated as a QPD by the CFO, a bank, savings bank, or savings association must:

- Have authority to accept deposits because it has been chartered and regulated by the state or federal government;
- Have its principal place of business in Florida, or a branch office in Florida;
- Have deposit insurance pursuant to the Federal Deposit Insurance Act;
- Have procedures and practices for accurate identification, classification, reporting, and collateralization of public deposits; and
- Meet all the requirements of ch. 280, F.S., relating to security for public deposits.<sup>98</sup>

QPDs must secure public deposits with a pledge of eligible collateral, to protect the deposit against losses that could occur in the event of insolvency or default.<sup>99</sup> The amount of collateral required is based on statutory guidelines and the QPD's overall financial condition.<sup>100</sup>

Public deposits include, but are not limited to, time deposit accounts, demand deposit accounts, and nonnegotiable certificates of deposits; they do not include moneys in deposit notes, securities, mutual funds, and similar investments.<sup>101</sup>

To be qualified as a QPD, a bank or savings association must guaranty public depositors against losses caused by the default or insolvency of other QPDs.<sup>102</sup> Any shortfall that is not covered by the maximum federal deposit insurance of \$250,000, the CFO's demand for payment under letters of credit or the sale of pledged collateral becomes the responsibility of solvent QPDs, who would be required to pay assessments imposed by the CFO.<sup>103</sup>

As of May 20, 2022, Florida had 118 authorized QPDs.<sup>104</sup> These QPDs include 23 of the 28 federally chartered banks and trusts that operate in Florida.<sup>105</sup>

### Effect of the Bill

The bill amends the definition of a QPD to prohibit the CFO from qualifying a bank or savings association that engages in an "unsafe and unsound practice" of denying or canceling its services based on political beliefs or affiliations, religious beliefs or affiliations, business sector, or any other factor that is not a quantitative, impartial, risk-based standard.

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<sup>97</sup> S. 280.01, F.S. Certain public deposits, including those that are fully collateralized under other laws and moneys contributions to the state retirement system that are held in the System Trust Fund, are exempt pursuant to s. 280.03(3), F.S.

<sup>98</sup> S. 280.02(26), F.S.

<sup>99</sup> S. 280.041(6), F.S.

<sup>100</sup> S. 280.04, F.S., and Rule 69C-2.024, F.A.C.

<sup>101</sup> S. 280.02(23), F.S.

<sup>102</sup> S. 280.07, F.S.

<sup>103</sup> S. 280.08, F.S.

<sup>104</sup> Florida Department of Financial Services, Division of the Treasury, *List of Active QPDs*, May 20, 2022, [List of Active QPDs.xlsx \(myfloridacfo.com\)](#) (last visited Feb. 13, 2023).

<sup>105</sup> U.S. Department of the Treasury, Office of the Comptroller of the Currency, *Financial Institution Lists*, <https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/index-financial-institution-lists.html> (last visited Feb. 13, 2023).

It is an unsafe and unsound practice for a licensee to deny or cancel its services to a person, or to otherwise discriminate against a person, on the basis of:

- The person's political opinions, speech, or affiliations;
- The person's religious beliefs, exercise, or affiliations;
- Any other factor that is not a quantitative, impartial, and risk-based standard; or
- A social credit score.<sup>106</sup>

Beginning July 1, 2023, banks and savings associations must certify compliance with this requirement when filing an application to be designated or re-designated as a QPD. Failure to file the required attestation is grounds for suspension or disqualification of a QPD, and failure to timely file the attestation is deemed a knowing and willful violation of the law.

The bill gives the CFO authority to verify the attestation and impose penalties if a QPD fails to timely file the attestation. The CFO can impose an administrative penalty, issue a Cease and Desist Order to require compliance with the law, and suspend or revoke a QPD's qualification.

Additionally, if the CFO determines that an affidavit is materially false, the CFO must report the finding to the Attorney General, who may bring a civil or administrative action against the QPD, and recover attorney fees and costs if the enforcement action is successful.

The bill does not give the CFO "visitorial powers" to inspect, examine, supervise, or regulate the affairs of federally-chartered banks or savings associations. Only the federal regulator has visitorial powers.<sup>107</sup> DFS reports that there are 37 federally chartered institutions active as a QPD, as of March 1, 2023.<sup>108</sup>

The bill's QPD-related provisions are not preempted by federal law because the QPD program is a creature of Florida law, in which the federally chartered institutions voluntarily participate. To participate in the program, they must accept the conditions of QPD eligibility.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

The bill may increase administrative costs of state agencies that may need to revise policies or practices relating to investments, bond financing, contracts, QPDs, and banking; and train staff accordingly. Enforcement costs of state agencies are recoverable through the imposition of administrative fines. Enforcement costs of the Attorney General may be recovered through awards of attorney fees and costs, so long as an enforcement action is successful.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

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<sup>106</sup> Supra, note 95.

<sup>107</sup> 12 U.S.C. 484 and 12 CFR § 7.400.

<sup>108</sup> Florida Department of Financial Services, Agency Analysis of HB 3, p. 2, (Mar. 2, 2023).

2. Expenditures:

The bill may increase administrative costs of local governments that may need to revise policies relating to investments, bond financing, and contracts; and train staff accordingly. Such costs could be absorbed within ongoing operating budgets.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may:

- Limit the ability of some financial firms to provide services to units of state and local government;
- Limit the ability of some banks to be certified as QPDs and accept deposits from units of state and local government;
- Ensure that financial entities focus on pecuniary factors and safe and sound practices that will protect their businesses;
- Expand who can receive government procurement awards;
- Impose administrative costs on banks, trusts, and credit unions operating in Florida if they must revise investment policies and train staff to comply with the fiduciary standards set forth in the bill; and
- Increase access to financial products and services that would otherwise be limited by ESG-related discrimination.

D. FISCAL COMMENTS:

None.