By the Committee on Commerce and Tourism; and Senator Bogdanoff

577-03869-11 2011976c1

A bill to be entitled

An act relating to capital formation for infrastructure projects; amending ss. 288.9621, 288.9622, and 288.9623, F.S.; conforming a short title, revising legislative findings and intent, and providing definitions for the Florida Capital Formation Act; conforming cross-references; creating s. 288.9627, F.S.; providing for creation of the Florida Infrastructure Fund Partnership; providing the partnership's purpose and duties; providing for management of the partnership by the Florida Opportunity Fund; authorizing the fund to lend moneys to the partnership; requiring the partnership to raise funds from investment partners; providing for commitment agreements with and issuance of certificates to investment partners; authorizing the partnership to invest in certain infrastructure projects; requiring the partnership to submit an annual report to the Governor and Legislature; prohibiting the partnership from pledging the credit or taxing power of the state or its political subdivisions; prohibiting the partnership from investing in projects with or accepting investments from certain companies; creating s. 288.9628, F.S.; creating the Florida Infrastructure Investment Trust; providing for powers and duties, a board of trustees, and an administrative officer of the trust; providing for the trust's issuance of certificates to investment partners; specifying that the certificates guarantee the availability of tax credits under certain conditions; authorizing the trust and the fund to charge fees; limiting the amount of tax credits that may be claimed or applied against state taxes in any year; providing for the redemption of certificates or sale of tax credits; providing for the issuance of the tax credits by the Department of Revenue; specifying the taxes against which the credits may be applied; limiting the period within which tax credits may be used; providing for the state's obligation for use of the tax credits; limiting the liability of the fund; providing for the transferability of certificates and tax credits; requiring the department to provide a certain written assurance to the trust under certain circumstances; specifying that certain provisions regulating securities transactions do not apply to certificates and tax credits transferred or sold under the act; amending s. 213.053, F.S.; authorizing the department to disclose certain information to the partnership and the trust relative to certain tax credits; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 288.9621, Florida Statutes, is amended to read:

288.9621 Short title.—This part ~~Sections 288.9621-288.9625~~ may be cited as the "Florida Capital Formation Act."

Section 2. Subsections (1) and (2) of section 288.9622, Florida Statutes, are amended to read:

288.9622 Findings and intent.—

(1) The Legislature finds and declares that there is a need to increase the availability of seed capital and early stage venture equity capital for emerging companies in the state, including, without limitation, enterprises in life sciences, information technology, advanced manufacturing processes, aviation and aerospace, and homeland security and defense, as well as other strategic technologies and infrastructure funding.

(2) It is the intent of the Legislature that this part ~~ss. 288.9621-288.9625~~ serve to mobilize private investment in a broad variety of venture capital partnerships in diversified industries and geographies; retain private sector investment criteria focused on rate of return; use the services of highly qualified managers in the venture capital industry regardless of location; facilitate the organization of the Florida Opportunity Fund as an investor in seed and early stage businesses, infrastructure projects, venture capital funds, infrastructure funds, and angel funds; and precipitate capital investment and extensions of credit to and in the Florida Opportunity Fund.

Section 3. Section 288.9623, Florida Statutes, is amended to read:

288.9623 Definitions.—As used in this part, the term ~~ss. 288.9621-288.9625~~:

(1) "Board" means the board of directors of the Florida Opportunity Fund.

(2) "Certificate" means a contract between the trust and an investment partner which guarantees the availability of tax credits for use by the partner, or for transfer or sale under s.

288.9628, in order to guarantee the partner’s investment capital in the partnership.

(3) “Commitment agreement” means a contract between the partnership and an investment partner under which the partner commits to providing a specified amount of investment capital in exchange for an ownership interest in the partnership.

(4)~~(2)~~ “Fund” means the Florida Opportunity Fund.

(5) “Infrastructure project” means a capital project in the state for a facility or other infrastructure need in the state with respect to any of the following: water or wastewater system, communication system, power system, transportation system, renewable energy system, ancillary or support system for any of these types of projects, or other strategic infrastructure located within the state.

(6) “Investment capital” means the total capital committed by the investment partner for an equity interest in the partnership pursuant to a commitment agreement.

(7) “Investment partner” or “partner” means a person, other than the partnership, the fund, or the trust, who purchases an ownership interest in the partnership or a transferee of such interest.

(8) “Net capital loss” means an amount equal to the difference between the total investment capital actually advanced by the investment partner to the partnership and the amount of the aggregate actual distributions received by the investment partner.

(9) “Partnership” means the Florida Infrastructure Fund Partnership.

(10) “Tax credits” means credits issued against the taxes

specified in s. 288.9628(7)(c).

(11) “Trust” means the Florida Infrastructure Investment Trust.

Section 4. Section 288.9627, Florida Statutes, is created to read:

288.9627 Florida Infrastructure Fund Partnership; creation; duties.—

(1) The Florida Opportunity Fund shall facilitate the creation of the Florida Infrastructure Fund Partnership, which shall be organized and operated under chapter 620 as a private, for-profit limited partnership or limited liability partnership with the fund as a general partner. The partnership shall manage its business affairs and conduct business consistent with its organizing documents and the purposes described in this section. However, the partnership is not an instrumentality of the state.

(2) The primary purpose of the partnership is to raise investment capital and invest the capital in infrastructure projects in the state which promote economic development.

(3)(a) The fund, as the general partner of the partnership, shall manage the partnership’s business affairs, including, but not limited to:

1. Hiring one or more investment managers to assist with management of the partnership through a solicitation for qualified investment managers for the raising and investing of capital by the partnership. Any such investment manager must have maintained an office in the state for at least 2 years before such solicitation with a full-time investment professional. The evaluation of an investment manager candidate must address the investment manager’s level of experience,

quality of management, investment philosophy and process, demonstrable success in fundraising, and prior investment results.

2. Soliciting and negotiating the terms of, contracting for, and receiving investment capital with the assistance of the investment managers or other service providers.

3. Receiving investment returns.

4. Disbursing returns to investment partners.

5. Approving investments.

6. Engaging in other activities necessary to operate the partnership.

(b) The fund may lend up to $750,000 to the partnership to pay the initial expenses of organizing the partnership and soliciting investment partners.

(4)(a) The partnership shall raise funds from investment partners for investment in infrastructure projects in the state by entering into commitment agreements with such partners on terms approved by the fund’s board.

(b) The Florida Infrastructure Investment Trust shall, pursuant to s. 288.9628, concurrently with the execution of a commitment agreement with an investment partner, issue a certificate.

(c) The partnership shall provide a copy of each commitment agreement to the trust upon execution of the agreement by all parties.

(d) The partnership may enter into commitment agreements with investment partners beginning July 1, 2011. The total principal investment capital payable to the partnership under all commitment agreements may not exceed the total aggregate amount of $700 million. However, if the partnership does not obtain commitment agreements totaling at least $100 million by December 1, 2012, the partnership must cancel any executed agreement and return the investment capital of each investment partner who executed an agreement.

(5)(a) The partnership may only invest in an infrastructure project:

1. That fulfills an important infrastructure need in the state.

2. That raises funding from other sources so that the total amount invested in the project is at least twice the amount invested by the partnership, inclusive of the partnership's investment.

3. For which legal measures exist, appropriate to the individual project, to ensure that the project is not fraudulently closed to the detriment of the residents of the state.

(b) The partnership may not invest more than 20 percent of its total available investment capital in any single infrastructure project.

(c) The partnership may not invest in any infrastructure project that involves any phase of a project authorized under the Florida Rail Enterprise Act, ss. 341.8201-341.842.

(6) The partnership may only invest in an infrastructure project based on an evaluation of the following:

(a) A written business plan for the project, including all expected revenue sources.

(b) The likelihood of the project's attracting operating capital from investment partners, grants, or other lenders.

(c) The management team for the proposed project.

(d) The project’s potential for job creation in the state.

(e) The financial resources of the entity proposing the project.

(f) The partnership’s assessment that the project reasonably provides a continuing benefit for residents of the state.

(g) Other factors not inconsistent with this section which are deemed by the partnership as relevant to the likelihood of the project’s success.

(7) By December 1 of each year beginning in 2011, the partnership shall submit an annual report of its activities to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The annual report must include, at a minimum:

(a) An accounting of the amounts of investment capital raised and disbursed by the partnership and the progress of the partnership, including the progress of each infrastructure project in which the partnership has invested.

(b) A description of the costs and benefits to the state that result from the partnership’s investments, including a list of infrastructure projects; the costs and benefits of those projects to the state and, if applicable, the county or municipality; the number of businesses and associated industries affected; the number, types, and average annual wages of the jobs created or retained; and the impact on the state’s economy.

(c) Independently audited financial statements, including statements that show receipts and expenditures during the preceding fiscal year for the operational costs of the partnership.

(8) The partnership may not pledge the credit or taxing power of the state or any political subdivision thereof and may not make its debts payable from any moneys or resources except those of the partnership. An obligation of the partnership is not an obligation of the state or any political subdivision thereof but is an obligation of the partnership, payable exclusively from the partnership's resources.

(9) The partnership may not invest in an infrastructure project with, or accept investment capital from, a company described in s. 215.472 or a scrutinized company as defined in s. 215.473, and the entity owning an infrastructure project in which the partnership has invested must provide reasonable assurances to the partnership that the entity will not provide such a company or scrutinized company with an ownership interest in the infrastructure project.

Section 5. Section 288.9628, Florida Statutes, is created to read:

288.9628 Florida Infrastructure Investment Trust; creation; duties; issuance of certificates; applications for tax credits.—

(1)(a) There is created the Florida Infrastructure Investment Trust, which shall be organized as a state beneficiary public trust to be administered by a board of trustees. The powers and duties of the board of trustees under this section are deemed to be performed for essential public purposes.

(b) The board of trustees shall consist of the Chief Financial Officer, the director of the Office of Tourism, Trade, and Economic Development, and the vice chair of Enterprise

Florida, Inc., or their designees. The board of trustees shall appoint an administrative officer who may act on behalf of the trust under the direction of the board of trustees.

(c) Members of the board of trustees and the board's administrative officer shall serve without compensation but are entitled to reimbursement of their expenses. Each member of the board of trustees has a duty of care to the trust in his or her capacity as a trustee. Neither a member nor the administrative officer may have a financial interest in any investment partner.

(2) The trust may hire consultants, retain professional services, issue certificates, sell tax credits in accordance with paragraph (5)(b), expend funds, invest funds, contract, bond or insure against loss, or perform any other act necessary to administer this section.

(3)(a) The trust shall, pursuant to s. 288.9627 and this section, issue certificates to investment partners in the Florida Infrastructure Fund Partnership, or their assignees, guaranteeing the availability of tax credits of a maximum amount equal to the investment capital committed by such investment partners to the partnership.

(b) The trust and the fund may each seek reimbursement of their respective reasonable costs and expenses from the partnership by charging a fee for the issuance of certificates to investment partners of up to 0.25 percent of the aggregate investment capital committed to the partnership by the investment partners who are issued certificates.

(c) The total aggregate amount of all tax credits made available under the terms of certificates issued by the trust may not exceed $700 million, and each certificate must include the maximum amount of the tax credits that may be issued under such certificate, which shall be the total amount of investment capital committed to the partnership by the investment partner.

(d) A certificate shall be issued concurrently with a commitment agreement between the investment partner and the partnership. A certificate issued by the trust must include a specific calendar year maturity date designated by the trust of at least 12 years after issuance. Contingent tax credits may not be claimed or redeemed except by an investment partner or purchaser in accordance with this section and the terms of a certificate issued by the trust.

(e) Once investment capital is committed to the partnership by an investment partner pursuant to his or her commitment agreement, the certificate is binding, and the partnership, the trust, and the Department of Revenue may not modify, terminate, or rescind the certificate, except for administrative items, including the assignment or sale of tax credits guaranteed to be available under the terms of a certificate.

(4)(a) The partnership shall provide written notice to each investment partner if, on the maturity date of his or her certificate, the partner has a net capital loss. The notice must include, at a minimum:

1. A good faith estimate of the fair market value of the partnership's assets as of the date of the notice.

2. The total investment capital of all investment partners as of the date of the notice.

3. The total amount of distributions received by the investment partners.

4. The amount of the tax credits the investment partner is

entitled to be issued by the Department of Revenue.

(b) The partnership shall concurrently provide a copy of each investment partner's notice to the trust.

(c) Upon receipt of the notice from the partnership, each affected investment partner may make a one-time election to:

1. Have tax credits issued to the investment partner;

2. Have the trust sell, on the partner's behalf, the tax credits guaranteed to be available under the terms of the partner's certificate with the proceeds of the sale to be paid to the partner by the trust; or

3. Maintain the investment partner's investment in the partnership.

(d) Except as provided in paragraph (6)(c), the election made by an investment partner under paragraph (c) is final and may not be revoked or modified.

(e) An investment partner must provide written notice to the partnership and the trust of his or her election within 30 days after his or her receipt of the notice from the partnership. If an investment partner fails to provide notice within 30 days, the investment partner is deemed to have elected to maintain his or her investment in the partnership under subparagraph (c)3.

(5)(a) If an investment partner makes the election under subparagraph (4)(c)1. to have tax credits issued to him or her, the trust shall apply to the Department of Revenue on the partner's behalf for issuance of the tax credits in his or her name in an amount equal to such partner's net capital loss. In order to receive the tax credits, the investment partner must agree in writing to transfer his or her ownership interest in the partnership to the fund.

(b) If an investment partner makes the election under subparagraph (4)(c)2., the trust shall exercise its best efforts to sell the tax credits. In order to receive the proceeds from the trust's sale of the tax credits, the investment partner must agree in writing to transfer his or her ownership interest in the partnership to the fund. A purchaser's payment for tax credits must be made to the trust on behalf of the investment partner or, upon the partner's request, directly to the investment partner. The trust may sell tax credits in an amount not to exceed the lesser of:

1. The maximum amount of the tax credits available under the terms of certificate issued to the investment partner; or

2. The amount of tax credits necessary to yield net proceeds to the investment partner equal to his or her net capital loss as of the date of the partnership's notice.

(6)(a) Within 30 days after receipt of an investment partner's election to be issued tax credits under paragraph (5)(a), or within 30 days after the sale of tax credits under paragraph (5)(b), the trust shall apply to the Department of Revenue for issuance of the tax credits on behalf of the partner or on behalf of the purchaser of the tax credits, as applicable. However, the trust's failure to timely submit an application to the Department of Revenue does not affect the investment partner's or purchaser's eligibility for the tax credits.

(b) The trust's application for tax credits must include the partnership's certification of the amount of tax credits to be issued, the identity of the taxpayer to whom the tax credits are to be issued, and the tax against which the credits shall be applied. The Department of Revenue shall issue the tax credits within 30 days after receipt of a timely and complete application.

(c) The trust shall provide the investment partner with written notice if, within 90 days after the partner’s election, the trust is unable to sell enough tax credits to yield net proceeds to the investment partner equal to his or her net capital loss as of the date of the partnership’s notice and tax credits available under the terms of the partner’s certificate remain unsold. Within 30 days after receipt of such notice, the investment partner may:

1. Revoke his or her prior election and make a new election under paragraph (4)(c); or

2. Modify the election and:

a. Have unsold tax credits issued to him or her, to the extent that unsold tax credits are available, in an amount equal to the partner’s net capital loss, less the proceeds of any sold credits; or

b. Have the trust continue to sell tax credits until the partner’s net capital loss is satisfied or the maximum amount of tax credits available under the partner’s certificate is reached, whichever occurs first.

Within 30 days after such modified election, the trust shall apply to the Department of Revenue in accordance with paragraph (a) for issuance of tax credits on behalf of the investment partner and on behalf of the purchasers in the amount of their purchased credits.

(7)(a) The Department of Revenue may not issue more than

$700 million in tax credits. The trust may not approve tax credits in excess of the total capital committed through commitment agreements.

(b) The amount of tax credits that may be claimed by the owner of the credits, or applied against state taxes, in any one state fiscal year may not exceed an amount equal to $150 million multiplied by a fraction the numerator of which is the amount of credits that the Department of Revenue issued to such owner and the denominator of which is the amount of all credits that the Department of Revenue issued to all tax credit owners.

(c) Tax credits issued by the Department of Revenue under this section may be used by the owner of the credits as an offset against any state taxes owed to the state under chapter 212, chapter 220, or ss. 624.509 and 624.5091. The offset may be applied by the owner on any return for an eligible tax due on or after the date that the credits are issued by the Department of Revenue but within 7 years after the credits are issued. The owner of the tax credits may elect to have the amount authorized in the credits, or any portion thereof, claimed as a refund of taxes paid rather than applied as an offset against eligible taxes if such election is made within 7 years after the credits are issued.

(d) To the extent that tax credits issued under this section are used by their owner either as credits against taxes due or to obtain payment from the state, the amount of such credits becomes an obligation to the state by the partnership, secured exclusively by the ownership interest transferred to the fund by the investment partner whose investment generated the tax credits. In such case, the state’s recovery is limited to such forfeited ownership interest. The Department of Revenue shall account for tax credits used under this section and make such information available to the partnership. The fund, as general partner, is not liable to the state for repayment of the used tax credits.

(e) Any certificate and related tax credits issued under this section are transferable in whole or in part by their owner. An owner of a certificate or tax credits must notify the trust and the Department of Revenue of any such transfer.

(8) The Department of Revenue, upon the request of the trust, shall provide the trust with a written assurance that the certificates issued by the trust will be honored by the Department of Revenue as provided in this section.

(9) Chapter 517 does not apply to the certificates and tax credits transferred or sold under this section.

Section 6. Paragraph (dd) is added to subsection (8) of section 213.053, Florida Statutes, as amended by chapter 2010-280, Laws of Florida, to read:

213.053 Confidentiality and information sharing.—

(8) Notwithstanding any other provision of this section, the department may provide:

(dd) Information relative to tax credits under ss. 288.9627 and 288.9628 to the Florida Infrastructure Fund Partnership and the Florida Infrastructure Investment Trust.

Disclosure of information under this subsection shall be pursuant to a written agreement between the executive director and the agency. Such agencies, governmental or nongovernmental, shall be bound by the same requirements of confidentiality as the Department of Revenue. Breach of confidentiality is a misdemeanor of the first degree, punishable as provided by s. 775.082 or s. 775.083.

Section 7. This act shall take effect July 1, 2011.