

Supplemental Information on the Florida Development Finance Corporation

February 28, 2018

Scope

Subsequent to its November 2017 memorandum on the Florida Development Finance Corporation (FDFC), OPPAGA conducted additional research on FDFC's operations and answered seven questions.

1. Is the FDFC required to follow Florida's Sunshine Law public meetings notice requirement?
2. Has the FDFC complied with the meeting notice provision in corporation bylaws?
3. Has the FDFC operated under a full board of directors and had a quorum at its meetings?
4. What steps has the FDFC taken to implement the conduit issuance policy?
5. Why have FDFC projects been withdrawn?
6. What is FDFC doing to regain profitability?
7. What is the relationship between FDFC and Enterprise Florida, Inc.?

We also developed several options that the Legislature may wish to consider to improve oversight and accountability of the corporation.

Background

The Florida Development Finance Corporation (FDFC) is a statewide development financing authority created by the Legislature in 1993. The corporation's purpose is to assist for-profit and not-for-profit businesses with financing capital projects that promote economic development. FDFC has the power to function within the corporate limits of any public agency including local governments with which it enters into an inter-local agreement.¹

A five-member board appointed by the Governor and confirmed by the Senate for four-year terms governs the FDFC. State law requires that at least three members are bankers and one member is an economic development specialist. An executive director oversees the daily operations of the FDFC.

FDFC offers traditional revenue bonds. FDFC is a conduit bond issuer, meaning it issues bonds on behalf of borrowers. In this capacity, the Legislature granted FDFC authority to issue municipal bonds, either tax-exempt or taxable revenue bonds. These bonds can provide financing for projects that further public purposes and are issued on behalf of a range of organizations, including charter schools, small manufacturers, and health care facilities. The corporation can also issue bonds under the Property Assessed Clean Energy (PACE) program created by the 2010 Legislature; the program supports energy conservation improvements by allowing property owners to place a voluntary non-ad valorem special assessment on their property. Between May 1997 and August 2017, the corporation issued bonds for 80 projects totaling approximately \$1.5 billion; FDFC has yet to issue bonds for the PACE program.²

From Fiscal Year 2014-15 to Fiscal Year 2016-17, FDFC revenues have fluctuated, while expenses have steadily increased. During this period, the corporation's revenues ranged from \$553,231 to \$1.0 million. Expenses have increased over the last three fiscal years, exceeding revenues by \$378,481 in Fiscal Year 2016-17.

¹ Section 288.9604(1), *F.S.*

² The bond issuance process involves the FDFC board meeting twice to approve a project.

Questions and Answers

Is the FDFC required to follow Florida's Sunshine Law public meetings notice requirement?

FDFC is most likely required to follow the Sunshine Law notice requirement.

- Florida's Sunshine Law public meetings notice requirement (s. 286.011, *Florida Statutes*) most likely applies to FDFC because the Legislature created the corporation to perform an essential public function.
- FDFC bylaws (dated December 4, 2015) also require that the FDFC board conduct all meetings in accordance with the Sunshine Law, unless the meetings are otherwise statutorily exempt.

Has the FDFC complied with the meeting notice provision in corporation bylaws?

FDFC has not fully complied with its bylaws for noticing public meetings, as most public meetings have not been noticed timely and are not held proximate to affected citizens.

- FDFC's bylaws require a board meeting notice be published in the *Florida Administrative Register* no less than seven days before the meeting.
- OPPAGA reviewed dates for board meetings, based on meeting minutes and notices published in the *Florida Administrative Register*, for calendar years 2015 through 2017; FDFC held 34 board meetings where minutes and notices were available in that period.³ We found that only 4 of these 34 board meetings had meeting notices published in the *Florida Administrative Register* at least seven days in advance. In addition, none of these meetings were noticed as emergency meetings, which would have allowed fewer days for notice.
 - For example, the FDFC board held three meetings that included discussion and approval of bond resolutions dealing with All Aboard Florida. The meeting held on August 5, 2015 was properly noticed, but the meetings on April 7, 2015 and October 27, 2017 were not.
- Further, over the past two years, meeting minutes were not available to the public online. OPPAGA had to request meeting minutes for calendar years 2015 through 2017.
- Finally, although FDFC issues bonds for projects all over the state, including multi-county projects, the vast majority of board meetings were held in Orlando.
 - For example, two FDFC board meetings dealing with the approval of the All Aboard Florida project were held in Orlando and one meeting was held in Coral Gables (Miami-Dade County). The bonds issued in 2017 for this project involved Broward, Miami-Dade, and Palm Beach counties.
 - This is especially problematic given that in most cases, FDFC does not provide a teleconferencing number for the remote (non-disabled) public to participate. A review of the 34 FDFC board meeting notices in the *Florida Administrative Register* for calendar years 2015 through 2017 and corresponding meeting minutes shows that only 5 of the meeting notices contained teleconferencing numbers for remote (non-disabled) public access.

³ Not included in these 34 board meetings was a September 28, 2016 meeting for which a notice was not published in the *Florida Administrative Register*.

Has the FDFC operated under a full board of directors and had a quorum at its meetings?

FDFC has not operated with a full board of directors for four of the last five years, but has had a quorum at recent meetings.

- Based on historical data from FDFC and the Senate’s Committee on Ethics and Elections’ executive appointments database, we conclude that from calendar years 2013 to 2017, the corporation had a full board of five members for only 10 months of 2016. FDFC reports it had four board members in all other years.
- However, we have concerns about the eligibility of two of the four FDFC board participants in calendar years 2013 and 2014. Although the FDFC lists both of the individuals below as official board members from 2009 to 2014, neither of these participants were confirmed by the Senate.
 - One FDFC board participant was nominated in 2009, but the Senate took no action on the appointment because the nomination was not received in time for Senate consideration during the 2010 regular session. The Governor did not reappoint the board participant for Senate confirmation during the next legislative session, but the participant continued to serve on the board through 2014.
 - Another FDFC board participant was timely nominated for a four-year term, but the Senate took no action on the appointment during the 2010 session. The Governor did not reappoint the board participant for Senate confirmation during the next legislative session, but the participant continued to serve on the board through 2014.
- Consequently, these individuals were not confirmed FDFC board members during 2013 and 2014, which means the FDFC board only had two confirmed members at that time.⁴ This appears to conflict with FDFC bylaws, which state that a quorum shall consist of three board members and that three board members must be present to conduct business of the corporation, including approving bond issuances.
- Given that two of the four board members may have been ineligible to serve, decisions made by the FDFC board during calendar years 2013 and 2014 may not have been consistent with the FDFC bylaws. During this period, FDFC reports that they approved 13 bond projects totaling \$479.6 million.
- Our review of FDFC board meetings minutes in calendar years 2015 through 2017 found that all meetings had at least three Senate-confirmed board members present.

What steps has the FDFC taken to implement the conduit issuance policy?

Despite its previous reports to the contrary, FDFC only recently adopted a new conduit issuance policy.

- In November 2017, based on documentation provided by FDFC staff, OPPAGA reported that FDFC had adopted a revised conduit issuance policy on May 3, 2017; the new policy was intended to protect unsophisticated investors from the risks involved in purchasing non-rated bonds. The policy included increasing the limit of minimum denominations of non-rated or non-investment grade rated bonds sold and the use of a traveling investor letter. Further, this policy was intended to address industry best practices areas including the competitive selection of bond professionals.
 - FDFC confirmed this policy adoption in writing to OPPAGA and the revised policy was available on the FDFC website as early as Fall 2017 and as recently as January 29, 2018.
- However, FDFC recently provided evidence that contradicts the earlier report of the policy’s adoption. In January 2018, OPPAGA requested that the FDFC provide evidence of its compliance with the revised policy; FDFC replied in writing that, “Due to some procedural issues, the policy adopted on May 3, 2017 is not in effect.”

⁴ Section 114.05 (1)(f), *F. S.*, states that if the Senate votes to take no action or fails to take action on an appointment for any reason, the person may be reappointed to the same position. If the Senate again takes no action on the reappointment during the next regular session, the person for this office will be deemed to have been rejected and the office shall become vacant upon adjournment of the regular session. When this happens, the person shall not holdover in that office or be eligible for reappointment in that office for one year thereafter.

- Our review of minutes for the May 3, 2017 board meeting at which FDFC previously reported that the conduit issuance policy was adopted shows that the board asked everyone at the meeting , to leave the room prior to a vote on the revised policy with the exception of the board, the Division of Bond Finance representative, and the FDFC director.
 - Florida Statutes specify that such a method of resolving a governance issue may be inconsistent with the Sunshine Law, and so by implication, the FDFC bylaws.⁵ Further, Florida case law suggests that other government entities have been found to be in violation of the Sunshine Law for similar actions, regardless of intent to do so.⁶
- FDFC provided no corroborative evidence of implementing the best practices previously reported as being in place in November 2017. The FDFC reported in January that instead, over the past year, the corporation has been operating under a previous conduit issuance policy adopted in March 2017. The March 2017 policy did not have any of the following: competitive selection of bond professionals, increased limits on minimum denominations, or mandatory use of a traveling letter. FDFC reports it has not issued any bonds using these best practices.
- FDFC’s board met on January 29, 2018 and FDFC reported that the board approved the May 3, 2017 Conduit Issuance Policy. In addition, FDFC is revising the Request for Qualifications to competitively select the issuers counsel and financial advisor.

Why have FDFC projects been withdrawn?

Projects can be withdrawn before the bonds close for a variety of reasons.

- We received four fiscal years of data from FDFC for 11 bond projects that either did not sell to investors (4 bonds) or were withdrawn by the applicant/borrower (7 bonds).
 - These 11 projects included five industries: retirement communities (4), charter or private schools (3), manufacturing (2), affordable housing (1), and communications (1).
- The most common reason provided by FDFC to explain project withdrawals was delays in getting Tax Equity and Fiscal Responsibility Act approval from the State Board of Administration’s (SBA) Division of Bond Finance (3 bonds).⁷ In these cases, the borrower changed conduit issuers. Other reasons for withdrawal included a borrower being unable to obtain a 35-year term and unfavorable market conditions.
- The All Aboard Florida Project was not included in the 11 withdrawn projects, despite a period in which bonds were not sold to investors and issuance operations appear to have been temporarily suspended. The FDFC board approved a bond issuance of up to \$1.75 billion for the project on August 5, 2015, but the bonds did not close at that time. The FDFC board re-authorized a lesser amount, \$600 million in bonds, in October 2017, and issued these bonds in December 2017.

⁵ Section 286.011(1), *F.S.* states, “All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.”

⁶ *Town of Palm Beach v. Gradison* noted that a subordinate group or committee selected by governmental authorities should not feel free to meet in private and is subject to the Sunshine Law.

⁷ The federal Tax Equity and Fiscal Responsibility Act (P.L 97-248) requires tax-exempt Private Activity Bonds be approved by the public by either approval by an applicable elected representative following a public hearing or by a referendum of voters.

What is FDFC doing to regain profitability?

FDFC anticipates revenues from traditional and Property Assessed Clean Energy Program bonds will restore profitability.

- FDFC's current budget estimates that the corporation will likely have a loss of \$232,000 resulting from funds spent establishing the PACE program and transitioning from services previously provided by Enterprise Florida, Inc. (see discussion below).
- It took FDFC four years of preparation and collaboration to launch the PACE program in June 2017 using revenues from traditional bond issuances. FDFC anticipates issuing bonds under the program in the first quarter of 2018.
- FDFC anticipates future revenue from the issuance of traditional and PACE program bonds will allow it to regain profitability.
 - For example, FDFC anticipated receiving \$600,000 in issuance fees from the All Aboard Florida Project Phase 1. We do not have information on future revenues for PACE bonds.

What is the relationship between FDFC and Enterprise Florida, Inc.?

FDFC and Enterprise Florida, Inc. are separate corporations governed by different laws and boards; the two entities are phasing out a shared services agreement.

- The FDFC and Enterprise Florida, Inc. (EFI) are separate nonprofit corporations created under different sections in state law. The Legislature established the FDFC under s. 288.9604, *Florida Statutes*, and EFI was created in s. 288.901, *Florida Statutes*.
- Each corporation has distinct governing boards; thus, FDFC can make its own decisions and has established bylaws to govern its operations. However, EFI nominates a list of bankers to the Governor for selection of three bankers to be on the FDFC board (s. 288.9604(2), *Florida Statutes*).
- The statutes establishing FDFC have two references to the relationship between the corporation and other entities, including EFI. In each case, the language does not establish one entity having control over another, including its daily operations.
 - Section 288.9605(2)(v), *Florida Statutes*, allows FDFC to enter into investment agreements with EFI on the issuance of bonds and other forms of indebtedness and capital.
 - Section 288.9614, *Florida Statutes*, authorizes EFI to take any action that it deems necessary to achieve the purposes of this [FDFC] act in partnership with private enterprises, public agencies, and other organizations, including, but not limited to, efforts to address the long-term debt needs of small-sized and medium-sized firms, to address the needs of microenterprises, to expand availability of venture capital, and to increase international trade and export finance opportunities.
- While FDFC and EFI are separate entities, early in FDFC's establishment, the FDFC board decided to utilize EFI staff and resources to provide administrative services to process bond applications to minimize costs. FDFC entered into two services agreements with EFI.
 - FDFC had paid EFI to lease a portion of one staff person, who served as both vice president for EFI Capital Programs and the executive director for FDFC.
 - One agreement had EFI providing administrative services including accounting and bond assistance to FDFC. EFI charged FDFC \$50,000 annually for these services.
 - FDFC and EFI also entered into a separate agreement for office space, furniture, equipment, and fixtures as well as for processing services related to payroll and benefits and IT support. EFI charged FDFC \$6,310 per month for these services.
 - EFI reported that the services agreement was set to expire March 31, 2018, but FDFC was relocating its facilities, had hired accounting staff, and was administratively independent as of December 31, 2017. (See Exhibit 1.)
- FDFC has incurred expenses because of this transition including the salary of the executive director, who was an EFI employee. In addition, FDFC reports a one-time expense of about \$200,000 for office relocation.

- EFI reported that this separation was a natural outgrowth of its recent restructuring process and the end of the services agreement with FDFC.
- However, EFI is still statutorily required to recommend the banker representatives to the FDFC board. Documentation provided by EFI shows it has also recommended persons that were not bankers.
- With its transition from EFI, FDFC will have a limited relationship with state government, other than being created by the Legislature and interfacing with SBA’s Division of Bond Finance. Thus, the state’s current capacity to manage any reputational risk posed by FDFC bond issuance activities is limited.

Exhibit 1
FDFC has Taken Several Actions to Transition Services From EFI

Date	FDFC Action
December 3, 2015	FDFC board held a workshop and discussed with staff FDFC related versus EFI related workload. It was determined that staff needed to focus 100% of its time on FDFC and the board requested a transition plan.
December 16, 2015	FDFC board met, discussed, and approved a plan for FDFC to transition staffing and administrative services from EFI.
March 16, 2016	FDFC board discussed the employment agreement for the FDFC executive director and modifications to the service agreement with EFI.
April 1, 2016	FDFC executed an amended services agreement with EFI to begin the transition process.
December 2017	FDFC transitioned its staff and some back-office services including accounting services internally. FDFC was relocating its operations to a new location.

Source: Florida Development Finance Corporation.

Options for Consideration

The FDFC, along with other conduit bond issuers in Florida, offers businesses access to tax exempt bonding to support business expansion and job creation. However, the FDFC has had a number of public access and governance issues that inhibit its capacity to operate in an effective and accountable manner. Given these concerns, the Legislature could consider several options, including modifying the FDFC’s administrative procedures to improve public access, enhancing data and reporting activities, and establishing executive branch oversight mechanisms such as adding state agency staff to the FDFC board or making FDFC a unit within a state agency. (See Exhibit 2.)

These options may have financial and governance implications. Under any of the options, the FDFC could continue to operate without state appropriation and issue bonds without the full faith and backing of the state. Governance considerations for any option involving an executive agency will be a function of how the Legislature specifies the executive agency’s oversight role. This could include the following.

- The Legislature could provide statutory direction that FDFC submit its preliminary budget to the Legislature, as Florida’s water management districts do.
- The Legislature could add executive agency staff to the FDFC board, which provides an additional element of accountability to board decision-making. Such a model is similar to that of the Department of Economic Opportunity’s relationship to the Florida Housing Finance Corporation, where the department’s executive director or his or her designee serves as an ex officio and voting member of the corporation’s board.
- The Legislature could make FDFC a separate entity within an agency, not subject to the control, review, or supervision by the agency, similar to the Department of Economic Opportunity’s relationship to the Florida Housing Finance Corporation and CareerSource Florida. Such a model could allow independence but also financial or operational review by the Florida Auditor General.

Under these models, a general governance consideration is how the state would affect or be affected by FDFC’s operations. For example, one consideration could be the state’s reputational risk in the event of a borrower’s default. Projects for which the FDFC has provided funding have historically had few defaults, and as an issuer, the FDFC is distantly associated with the default. However, if an executive agency is involved in any way with the FDFC, the state’s reputation could be affected. Further, the Legislature may also wish to consider how increased executive agency involvement would affect the private sector’s impressions of the FDFC, specifically, whether the executive agency’s presence would appear to or actually slow down the bonding process and discourage businesses from using FDFC’s services.

Exhibit 2

The Legislature Could Consider Options for Addressing Public Access, Accountability, and Governance Concerns at FDFC

MODIFY ADMINISTRATIVE PROCEDURES TO ENHANCE PUBLIC ACCESS

OPTION 1 – Amend Ch. 288, Part X, *F.S.*, FDFC’s authorizing statute, to include the following provisions.

- FDFC must post its meeting minutes online within 30 days after a board meeting.
- FDFC must add a public (non-disabled) call in number for each board meeting to its meeting notices.
- FDFC must hold the two board meetings to discuss bond projects in the affected county (single site project) or two affected counties (multi-site project).
- FDFC must post its operating budget online. This practice would be consistent with other entities that do not receive a state appropriation, such as the State Board of Administration.

ENHANCE DATA REPORTING TO INCREASE ACCOUNTABILITY

OPTION 2 – Amend s. 288.9610, *F.S.*, related to the requirements for the FDFC’s annual report to include the following data. FDFC currently meets statutory reporting requirements by submitting its annual audit reports, which are necessarily limited. The elements listed below could add more visibility into FDFC’s operations.

- Economic effects of funded projects, such as actual versus projected jobs created, dollar value and list of capital investments made, and dollar value of average wages (compared to average wages in the county).
- Terms of current bonds including original bond amount, type of business, and reason for changes in payments.
- Statement of anticipated significant revenues or expenses.
- List of contracts with professional staff.

OPTION 3 – Amend s. 288.0001, *F.S.*, to add review of FDFC to OPPAGA’s annual economic development program review schedule.

OPTION 4 – Amend Ch. 288 Part X, *F.S.*, to require FDFC to make an annual presentation of its annual report and budget to the Joint Legislative Auditing Committee.

ESTABLISH EXECUTIVE BRANCH OVERSIGHT MECHANISMS TO IMPROVE GOVERNANCE

OPTION 5 – Require that FDFC submit its budget to the Legislature.

OPTION 6 – Require that FDFC add additional members to its board from an executive agency. Members could be appointed from the Department of Economic Opportunity. This would parallel the model used for the board of the Florida Housing Finance Corporation.

OPTION 7 – Establish FDFC as an independent unit within an executive agency, without state appropriation. Given FDFC’s economic development and financing functions, the Department of Economic Opportunity might be a feasible choice. This could introduce additional accountability mechanisms, such as fiscal or operational review by the Auditor General.

Source: OPPAGA analysis.