

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 961 Electronic Noticing of Trust Accounts

SPONSOR(S): Civil Justice Subcommittee; Broxson

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1314

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Robinson	Bond
2) Judiciary Committee	17 Y, 0 N	Robinson	Havlicak

SUMMARY ANALYSIS

A Florida trustee has a duty to keep the qualified beneficiaries (hereinafter "beneficiaries") of an irrevocable trust reasonably informed of the trust and its administration. Specifically, the trustee must provide beneficiaries with an accounting of the trust at specified periods, disclosure of documents related to the trust, and notice of specific events related to the administration of the trust.

The Florida Trust Code currently provides that the only permissible methods of sending notice or a document to such persons are by first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed facsimile or other electronic message. However, for many reasons, some beneficiaries prefer to receive, store, and access correspondence and documents through secured websites and accounts. Trustees also prefer to provide sensitive financial information through secured web accounts rather than through electronic messages which carry greater security risks. Although financial institutions commonly use secure websites for providing statements and other disclosures related to bank or credit accounts, such methods are rarely used for trust accounts due to a perceived lack of authorization within current law.

The bill authorizes a trustee to post required documents to a secure website or account if a beneficiary opts in to receiving electronic documents through a secure website or account. The bill also specifies when notice or the delivery of a document by electronic message or posting is complete and presumed received by the intended recipient for purposes of commencing a limitations period for breach of trust claims.

The bill does not appear to have a fiscal impact on state or local government.

The bill has an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

“A trust is a fiduciary relationship¹ with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.”² A trust involves three interest holders: the settlor³ who establishes the trust; the trustee⁴ who holds legal title to the property held for the benefit of the beneficiary; and lastly, the beneficiary⁵ who has an equitable interest in property held subject to the trust.

The Florida Trust Code⁶ (the "code") requires a trustee to administer the trust “in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with [the] code,”⁷ and also imposes a duty of loyalty upon the trustee.⁸ The violation by a trustee of a duty owed to a beneficiary is a breach of trust.⁹

Disclosure and Notice of Trust Administration

To be able to enforce the trustee's duties, the beneficiary of a trust must know of the existence of the trust and be informed about the administration of the trust:

If there were no duty to inform and report to the beneficiary, the beneficiary might never become aware of breaches of trust or might be unaware of breaches until it is too late to obtain relief. In addition, providing information to the beneficiary protects the trustee from claims being brought long after events that allegedly constituted a breach, because the statute of limitations or the doctrine of laches will prevent the beneficiary from pursuing stale claims. As a result, the duty to inform and report to the beneficiary is fundamental to the trust relationship.¹⁰

Accordingly, section 736.0813, F.S., imposes a duty on a Florida trustee to keep the qualified beneficiaries¹¹ (hereinafter “beneficiaries”) of an irrevocable trust reasonably informed of the trust and its administration. The duty includes, but is not limited to:¹²

- Notice of the existence of the irrevocable trust, the identity of the settlor or settlors, the right to request a copy of the trust instrument, the right to accountings, and applicability of the fiduciary lawyer-client privilege.

¹ *Brundage v. Bank of America*, 996 So. 2d 877, 882 (Fla. 4th DCA 2008) (trustee owes a fiduciary duty to settlor/beneficiary).

² 55A FLA. JUR.2D *Trusts* § 1.

³ “Settlor” means a person, including a testator, who creates or contributes property to a trust. s. 736.0103(18), F.S.

⁴ “Trustee” means the original trustee and includes any additional trustee, any successor trustee, and any cotrustee. s. 736.0103(18), F.S.

⁵ “Beneficiary” means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. s. 736.0103(4), F.S.

⁶ ch. 736, F.S.

⁷ s. 736.0801, F.S.

⁸ s. 736.0802(1), F.S.

⁹ s. 736.1001(1), F.S.

¹⁰ Kevin D. Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 Real Property, Probate and Trust J. 373 (Summer 2005), available at

http://www.americanbar.org/content/dam/aba/publications/real_property_trust_and_estate_law_journal/V40/02/2005_aba_rpte_journal_v40_no2_summer_master.pdf, (last accessed March 9, 2015).

¹¹ The term “qualified beneficiary” encompasses only a limited subset of all trust beneficiaries. The class is limited to living persons who are current beneficiaries, intermediate beneficiaries, and first-line remainder beneficiaries, whether vested or contingent. s. 736.0103(16), F.S.

¹² s. 736.0813, F.S.

- Notice of the acceptance of the trust, the full name and address of the trustee, and the applicability of the fiduciary lawyer-client privilege.
- Disclosure of a copy of the trust instrument upon reasonable request.
- An annual accounting of the trust to each beneficiary and an accounting on termination of the trust or on change of the trustee. The accounting must address the cash and property transactions in the accounting period and what trust assets are currently on hand.¹³
- Disclosure of relevant information about the assets and liabilities of the trust and the particulars relating to administration upon reasonable request.
- Such additional notices and disclosure requirements related to the trust administration as required by the Florida Trust Code.¹⁴

A beneficiary must bring an action for breach of trust as to any matter adequately disclosed within an accounting or any other written report of the trustee, also known as trust disclosure documents,¹⁵ within 6 months of *receiving* the trust disclosure document or a limitation *notice*¹⁶ from the trustee that applies to that trust disclosure document, whichever occurs later.¹⁷ A limitation notice informs the beneficiary that an action against the trustee for breach of trust based on any matter adequately disclosed in the trust disclosure document may be barred unless the action is commenced within 6 months.

The code prescribes the permissible methods of sending a document or notice for receipt by a beneficiary.

Methods of Disclosure or Notice

Current law requires that notice or sending a document to a person under the code must be accomplished "in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document."¹⁸ However, s. 736.0109, F.S., specifies that the only permissible manners of providing notice, except notice of a judicial proceeding, or sending a document to a person under the code are:

- First-class mail;
- Personal delivery;
- Delivery to the person's last known place of residence or place of business; or
- A properly directed facsimile or other electronic message.

Notice of a judicial proceeding must be given as provided in the Florida Rules of Civil Procedure.¹⁹

The current methods of permissible notice or service of documents under the code restricts the ability of trustees to meet increasing beneficiary demands to receive information electronically. There is little

¹³ ss. 736.0813 and 736.08135, F.S.

¹⁴ See, e.g., s. 736.0108(6), F.S. (notice of a proposed transfer of a trust's principal place of administration); s. 736.04117(4), F.S. (notice of the trustee's exercise of the power to invade the principal of the trust); s. 736.0414(1), F.S. (notice of terminating certain minimally funded trusts); s. 736.0417(1), F.S. (notice prior to combining or dividing trusts); s. 736.0705 (notice of resignation of trustee); s. 736.0802, F.S. (disclose and provide notice of investments in funds owned or controlled by trustee; the identity of the investment instruments, and the identity and relationship to the trustee to any affiliate that owns or controls the investment instruments; and notice to beneficiaries whose share of the trust may be affected by certain legal claims); and s. 736.0902(5), F.S. (notice of the non- application of the prudent investor rule to certain transactions).

¹⁵ "Trust disclosure document" means a trust accounting or any other written report of the trustee. A trust disclosure document adequately discloses a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter. s. 736.1008(4)(a), F.S.

¹⁶ "Limitation notice" means a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later. s.736.1008(4)(c),F.S.

¹⁷ s. 736.1008(2), F.S.

¹⁸ s. 736.0109(1), F.S.

¹⁹ s. 736.0109(4), F.S.

guidance in the code as to how the sending of notice or a document by electronic message (hereinafter "email") can and should be accomplished, nor even when it is accomplished, implicating when the limitations period commences for a notice or document provided by email.²⁰

Trustees have expressed concern regarding protecting confidential information and the privacy hazards inherent in the delivery of financial information via email.²¹ Some trustees, sensitive to these privacy concerns, deliver required documents, such as a trust account statement, to beneficiaries by emailing notice that a trust statement is available to be viewed and downloaded on a secured website or account and providing a password for the beneficiary to access the account.²² However, it is not clear that by using this method, although more secure than email, the trustee technically complies with the duty to provide a trust accounting under s. 736.0813, F.S., since the document itself is not delivered by the email but rather delivers information on how to access the document through a secured website. The failure to provide a trust accounting may be actionable as a breach of trust under the code if a beneficiary denies receipt of statements provided by this method. Further it is not clear that trust documents posted on a secured website have the benefit of the 6 months limitations period for matters adequately disclosed in a trust disclosure documents as they are provided in a manner that may not be permissible under the code. If the limitations period does not apply, a trustee may be subject to a breach of trust claim, even if the matters were adequately disclosed in the trust document, for up to four years.²³

Due to the uncertainty regarding when the limitations period runs for notice or trust disclosure documents delivered by electronic message or posted on a secured website and whether attempts to provide trust disclosure documents through a secured website or account technically comply with the statutory duty to provide certain documents to a beneficiary, trustees have little incentive to respond to beneficiary requests for electronic communications. Prudent trustees that offer electronic delivery of trust disclosure documents via email or through a secured website may find it necessary to continue providing physical documents in order to comply with notice and disclosure requirements under the code and to secure the protection of the 6 months limitations period for breach of trust claims.

Effect of the Proposed Changes

The bill authorizes a trustee to post documents that must be provided to a person under the code to a secure website or account if the person provides written authorization. The website or account must allow the recipient to download or print the posted document. A document provided solely through electronic posting must be retained on the website or account for at least 4 years after the date it is received. The written authorization to provide electronic posting of documents must:

- Be limited solely to posting documents on the electronic account or website.
- Enumerate the documents that may be posted on the electronic website or account.

²⁰ The Uniform Electronic Transactions Act ("UETA") also references the ability of a trustee to deliver notice or documents electronically (s. 668.50, F.S.). The UETA provides that information that must be delivered in writing to another person can be satisfied by delivering the information electronically if the parties have agreed to conduct a transaction by electronic means. However, the UETA may not apply to the delivery of most trust statements to beneficiaries. For the UETA to apply, the electronic records must relate to a "transaction". Under the UETA, "transaction" means an action or set of actions occurring between two or more persons relating to the *conduct of business, commercial, insurance, or governmental affairs*. To the extent that a trust administration, particularly the delivery of a trust statement, is considered the 'conduct of business', the UETA may apply. The drafters of the UETA noted that trusts can be used for both business and personal purposes, and that by virtue of the definition of "transaction", trusts used outside the area of business and commerce would not be governed by the UETA. This commentary does not consider banks or professional trustees that administer trusts as a business; although, arguably the fiduciary relationship between the trustee and the beneficiary takes the administration outside the scope of a "business" relationship. See *The Uniform Electronic Transactions Act (1999)* available at <http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ueta.pdf>.

²¹ *Subcommittee Report on Electronic Delivery of Trust Statements*, provided by the Florida Banker's Association to the Civil Justice Subcommittee on March 5, 2015 (on file with the Civil Justice Subcommittee, Florida House of Representatives).

²² *Id.*

²³ Section 736.1008(1), F.S., provides that the applicable limitations period is determined under ch. 95, F.S. That is, the normal limitations period will be the four year period described in s. 95.11(3), F.S.

- Contain specific instructions for accessing the electronic website or account, including any security measures.
- Advise that a separate notice will be sent, and the manner in which it will be sent, when a document is posted to the electronic website or account.
- Advise that the authorization may be amended or revoked at any time and provide instructions to amend or revoke authorization.
- Advise that the posting of a document on the electronic account or website may commence a limitations period as short as 6 months even if the recipient never access the electronic account, website, or document.

The trustee is required to send a notice to a person receiving trust documents by electronic posting, which notice may be made by any permissible method of notice under the code except electronic posting, at the following intervals:

- Each time a document is posted and the notice must identify each document that has been posted and how the person may access the document.
- Every 380 days (the "annual notice") to advise such persons that posting of a document commences a limitations period as short as 6 months even if the recipient never accesses the website, account, or document. The annual notice must also address the right to amend or revoke a previous authorization to post trust documents on a website or account. The bill provides the suggested form of the annual notice, which is substantially similar to the suggested form of a limitations notice provided in s. 736.1008(4)(c), F.S. The failure of a trustee to provide the annual notice at the required time will automatically revoke the person's authorization to post trust documents on an electronic website or account.

A document delivered by electronic posting is deemed received by the recipient on the earlier of the date that notice of the document's posting is received or the date that the recipient accesses the document on the electronic account or website. The posting of a document to an electronic account or website is only effective if done in compliance with the requirements of this bill. The trustee has the burden of demonstrating compliance with such requirements. If a trustee provides notice or sends a document to a person by electronic message, notice or sending of the document is complete when sent and presumed received on the date on which it is sent unless the sender has actual knowledge the electronic message did not reach the recipient.

The bill does not preclude the sending of a document by other permissible means under the code nor does it affect or alter the duties of a trustee to keep clear, distinct, and accurate records pursuant to s. 736.0810, F.S., or the time such records must be retained.

The bill also amends s. 736.0109(4), F.S., to more specifically delineate that notice and service of documents in a judicial proceeding related to a trust are governed by the Florida Rules of Civil Procedure rather than the code.

B. SECTION DIRECTORY:

Section 1 amends s. 736.0109, F.S., relating to methods and waiver of notice.

Section 2 provides an effect date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

Trustees may see a reduction in stationary, postage, and labor costs by providing required notices and documents electronically to qualified beneficiaries that opt in to receive electronic notices. The reduction may be offset by additional costs for the technology to provide electronic notices and documents.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 11, 2015, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Specified that documents may only be posted to a secure website or account.
- Required that a trustee provide notice every 380 days of the right to amend or revoke an authorization to post documents on a secure website or account.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.