

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 872

INTRODUCER: Senator Smith

SUBJECT: Fictitious Names

DATE: April 20, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Cooper	CM	Favorable
2.	Gizzi	Maclure	JU	Favorable
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill repeals s. 15.16 (6), F.S., which provides a conditional waiver by the Department of State of the requirement that an applicant, wanting to do business under a fictitious name, advertise the intention to register such fictitious name in a newspaper in the county in which the principal place of business will be located. Should this bill become law, a business wanting to do business under a fictitious name will be required to publish its intent to use a fictitious name in a local newspaper and for a specific length of time.

This bill repeals subsection (6) of s. 15.16, Florida Statutes.

II. Present Situation:

The Fictitious Name Act

The Fictitious Name Act, under s. 865.09, F.S., provides certain registration requirements for business entities that conduct business under a fictitious name.¹ Section 865.09(2)(a), F.S., defines a fictitious name to mean “any name under which a person transacts business in this state, other than the person’s legal name.” The term “business” is defined to include any “enterprise or venture in which a person sells, buys, exchanges, barter, deals, or represents the dealing in any thing or article of value, or renders services for compensation.”²

¹ Section 865.09, F.S.

² Section 865.09(2)(b), F.S.

Registration Requirement

The purpose of the Fictitious Name Act is to provide public notice as to ownership of businesses that use a fictitious name.³ Currently, s. 865.09, F.S., requires anyone engaging in business under a fictitious name to first register with the Department of State, Division of Corporations by filing a sworn statement listing:

- a) The name to be registered;
- b) The mailing address of the business;
- c) The name and address of each owner and, if a corporation, its federal employer's identification number and Florida incorporation or registration number;
- d) Certification by the applicant that the intention to register such fictitious name has been *advertised at least once in a newspaper*, as defined in ch. 50, F.S., in the county where the principal place of business of the applicant will be located; and
- e) Any other information the division may deem necessary to adequately inform other governmental agencies and the public as to the persons so conducting business.⁴

In addition to these requirements, s. 865.09(14), F.S., states that a fictitious name “may not contain the words ‘Corporation’ or ‘Incorporated,’ or the abbreviations ‘Corp.’ or ‘Inc.,’ unless the person or business for which the name is registered is incorporated or has obtained a certificate of authority to transact business in this state pursuant to chapter 607 or chapter 617.”⁵

In 2001, the Legislature created s. 15.16(6), F.S., which granted the Department of State the authority to waive the advertising requirement under s. 865.09(3)(d), F.S., if the department indexes the fictitious name registration in a central database that is available to the public on the Internet.⁶

In the 2007-08 fiscal year, the Division of Corporations reported a total of 134,794 recorded fictitious name filings, which included both new filings and renewals.⁷ A fictitious name registration is only valid for a period of five years and must be renewed on or before December 31 of the fifth year to prevent the expiration of name registration.⁸ The processing fee for both initial registration and renewal of a fictitious name registration is \$50.⁹

³ Division of Corporations, *Fictitious Names-Frequently Asked Questions*, at <https://efile.sunbiz.org/ficfaq.html> (last visited on April 16, 2009). See also s. 865.09(8), F.S. (“... registration under this section is for public notice only ...”).

⁴ Section 865.09(3), F.S.

⁵ Section 865.09(14), F.S.

⁶ See s. 1, ch. 2001-200, L.O.F. These public records may be accessed at <http://sunbiz.org>, through the department's website, <http://www.dos.state.fl.us/>, or through <http://myflorida.com>.

⁷ See Fla. Senate, Committee on Commerce, Issue Brief 2009-308, *Agency Sunset Review of the Division of Corporations of the Department of State*, 7 (Oct. 2008), http://www.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-308cm.pdf (last visited on Apr. 17, 2009).

⁸ Section 865.09(5)-(6)(a), F.S.

⁹ Section 865.09 (12), F.S.

Exceptions to Registration Requirement

According to the Florida Department of State, fictitious names are not required to be registered under the following circumstances:

- When the applicant is registered with the Department of Business and Professional Regulation and the applicable licensing board has not imposed requirements for the registration as a fictitious name.
- When the applicant is a corporation, partnership, or other legal entity filed or registered and in good standing with the Division of Corporations and is not transacting business under any other name.
- When the applicant is a federally chartered corporation and is not transacting business under any other name.
- If the name(s) (first and last) of the owner(s) is/are included in the business name. Example: Susan Brown's Flower Shop is not required to register. Susan's Flower Shop must register. John Smith and Joe Brown Plumbing is not required to register. Smith and Brown Plumbing must register.¹⁰

Failure to Register

If a business fails to comply with the fictitious name registration requirements under s. 865.09, F.S., the business, its members, and those interested in doing such business may not maintain any action, suit, or proceeding in any court of this state until there is compliance with those requirements.¹¹ Additionally, an action, suit, or proceeding may not be maintained in any court in Florida by any successor or assignee of such business on any right, claim, or demand arising out of the transaction of business by such business in this state until the requirements in s. 865.09, F.S., have been met.¹²

However, the failure of a business to comply with s. 865.09, F.S., does not impair the validity of any contract, deed, mortgage, security interest, lien, or act of such business and does not prevent such business from defending any action, suit, or proceeding in any court of this state.¹³ Nevertheless, a party aggrieved by a non-complying business may still be awarded reasonable attorney's fees and court costs necessitated by the non-complying business.¹⁴ Failure to comply with s. 865.09, F.S., amounts to a second-degree misdemeanor.¹⁵

III. Effect of Proposed Changes:

This bill repeals subsection (6) of s. 15.16, F.S., which allows the Department of State to waive the requirement that a business entity operating under a fictitious name advertise the intention to

¹⁰ See Division of Corporations, *Fictitious Names-Frequently Asked Questions*, at <https://efile.sunbiz.org/ficfaq.html> (last visited on Apr. 16, 2009).

¹¹ See s. 865.09(9), F.S.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Sections 775.082 and 775.083, F.S., provide that a second-degree misdemeanor carries a penalty of a jail sentence of not more than 60 days and a fine of not more than \$500.

register such fictitious name in a newspaper in the county in which the principal place of business will be located.

Under the language of this bill, a business entity that wishes to engage in business under a fictitious name would be required to publish its intention at least once in a newspaper as defined in ch. 50, F.S., in the county where its principal place of business is located. Section 50.031, F.S., states that a legal notice is not considered “published” unless the legal notice has been published:

- Published in for the statutory prescribed period of time;
- In a newspaper which at the time of such publication shall have been in existence for 1 year, and shall have been entered as periodicals matter at a post office in the county where published; or
- In a newspaper which is a direct successor of a newspaper which together have been so published.¹⁶

If no paper exists in the county where a business has its principal place of business, a person or business may meet the advertisement requirements “by posting three copies thereof in three different places in said county, one of which shall be at the front door of the courthouse, and by publication in the nearest county in which a newspaper is published.”¹⁷

Proof of publication must be made by uniform affidavit in accordance to the format provided under ss. 50.041 and 50.051, F.S.¹⁸ Additionally, all counties having a population in excess of 450,000 people, according to the latest official decennial census, may have a charge of up to \$2 for the preparation and execution of each proof of publication or publisher’s affidavit.¹⁹

Under s. 50.061, F.S., any newspaper that publishes such legal advertisements is required to charge the specified rate indicated in subsection (2) of s. 50.061, F.S., without rebate, commission, or refund.²⁰

This bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹⁶ Section 50.031, F.S.

¹⁷ Section 50.021, F.S.

¹⁸ Sections 50.041 and 50.051, F.S.

¹⁹ Section 50.041(3), F.S.

²⁰ This information is discussed in detail under the “Private Sector Impact” section of this bill analysis.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

Should the bill become law, businesses wanting to use a fictitious name will be required to publish legal notices in a local newspaper and, therefore, will incur costs associated with publishing those notices.

Under subsection (2) of s. 50.061, F.S., the “charge for publishing each such official public notice or legal advertisement shall be 70 cents per square inch for the first insertion and 40 cents per square inch for each subsequent insertion.”²¹ However, this rate increases with the size of the county’s population.

The publishing charge for counties with a population of more than 304,000, in accordance with the latest official decennial census, is 80 cents per square inch for the first insertion and 60 cents for each subsequent insertion. For counties that have a population of more than 450,000, the publishing charge is 95 cents per square inch for the first insertion and 75 cents for each subsequent insertion.²²

As a result, if one-fifth of all businesses that have registered fictitious names with the department were to renew their registration, under the proposed law, the total average cost for those businesses to publish fictitious name legal notices would be at least \$218,250.²³

C. Government Sector Impact:

The Department of State has indicated that this bill has no estimated fiscal impact on state agencies or local governments.²⁴

VI. Technical Deficiencies:

None.

²¹ Section 50.061(2), F.S.

²² *Id.*

²³ Cost estimate based on research by professional staff of the Senate Commerce Committee on three major Florida papers’ legal notice pricing.

²⁴ Department of State, *Senate Bill 872 Fiscal Analysis* (on file with the Senate Committee on Judiciary).

VII. Related Issues:

At one time, the newspaper notice requirement was the best option for disseminating information to the public, at large. However, “in today’s age of interstate commerce, it is commonplace that much of a company’s business is not conducted locally.” Therefore, a local newspaper publication may not provide notice to the audience the bill is designed to protect.²⁵

The Department of State maintains a database via the Internet that is a cost-free option to consumers and businesses, and the notice is available when the information is needed to both people located locally or otherwise. To the extent that the public has access to the Internet, the department database provides an efficient mechanism for providing notice.

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

None.

B. Amendments:

None.

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

²⁵ The Florida Bar, Business Law Section’s opinion on an unrelated matter, as it pertains to newspaper publications of legal notices. Document on file with the Senate Commerce Committee.