

**HOUSE OF REPRESENTATIVES  
FINAL BILL ANALYSIS**

<b>BILL #:</b>	CS/CS/CS/HB 1267	<b>FINAL HOUSE FLOOR ACTION:</b>	
<b>SPONSOR(S):</b>	Regulatory Affairs Committee; Government Operations Appropriations Subcommittee; Insurance & Banking Subcommittee; McBurney	112 Y's	1 N's
<b>COMPANION BILLS:</b>	CS/CS/CS/HB 1269; CS/SB 1238	<b>GOVERNOR'S ACTION:</b>	Approved

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**SUMMARY ANALYSIS**

CS/CS/CS/HB 1267 passed the House on April 30, 2014, as CS/SB 1238.

The bill creates the Florida Family Trust Company Act to authorize families to form and operate a family trust company (FTC), a licensed FTC, or a foreign licensed FTC in this state, subject to varying regulatory requirements, including a license or registration with the Office of Financial Regulation (OFR), maintenance of minimum capital accounts for FTCs with a principal place of business in Florida, and certain reporting requirements. The bill prohibits all three FTC types from advertising and conducting trust business with the public. The bill authorizes the OFR to investigate applications for licensure or registration, require annual renewals and other regulatory filings from licensees and registrants, and to conduct periodic examinations of all three family trust company types.

This bill provides that an applicant for licensure as a licensed family trust company must pay a \$10,000 application fee and a licensed family trust company must pay a \$1,500 annual renewal fee. Applicants for registration as a family trust company or foreign licensed family trust company must pay a \$5,000 registration fee. A family trust company must pay a \$750 annual renewal fee and a foreign licensed family trust company must pay a \$1,000 annual renewal fee. This bill requires a licensed family trust company, family trust company, and foreign licensed family trust company to pay the OFR a fee for the costs of examinations required under this bill. All fees collected pursuant to this bill are deposited in the Financial Institutions Regulatory Trust Fund.

The bill was approved by the Governor on June 13, 2014, ch. 2014-97, L.O.F., and will become effective on October 1, 2015.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Current Situation

##### Trusts

A trust is generally defined as, "a fiduciary relationship 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."<sup>1</sup> A trust must have three interest holders - a settlor (also called a "grantor"), a trustee, and a beneficiary. The settlor is the party creating the trust. The beneficiary has an equitable interest in property subject to trust, enjoying the benefit of the administration of the trust by a trustee.<sup>2</sup> The trustee holds legal title to the property held in trust for the benefit of the beneficiary.<sup>3</sup> A trust company may offer its services to the general public to serve as trustee of private trusts.

##### Public/Commercial Trust Companies

The Florida Office of Financial Regulation's (OFR) Division of Financial Institutions charters and regulates entities that engage in financial institution business in Florida, in accordance with the Florida Financial Institutions Codes (Codes; chs. 655-667, F.S.).<sup>4</sup> The Codes define "trust company" as:

[A]ny business organization, other than a bank or state or federal association, which is authorized by lawful authority to engage in *trust business*. A bank or state or federal association conducting business pursuant to lawful authority, which also by lawful authority has authority to engage in trust business, is the functional equivalent of a trust company with respect to performance of fiduciary services, and may assume fiduciary duties under appointive instruments that establish fiduciary relationships.<sup>5</sup>

"Trust business" is defined as:

[T]he business of acting as a fiduciary when such business is conducted by a bank, state or federal association, or a trust company, and also when conducted by any other business organization as its sole or principal business.<sup>6</sup>

The OFR considers "trust business" to mean that a trust business is a "for profit" entity that is providing fiduciary services to the general public.

##### Family Trust Companies (FTCs)

Essentially, a FTC (also known as a private trust company) is a business entity, such as a corporation or a limited liability company, which provides trust services for a single family. By acting as a family-owned enterprise, a FTC combines attributes of both institutional and individual trustees, and offers fiduciary,

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<sup>1</sup> 55A Fla.Jur.2d Trusts s.1; *see also* s. 731.201(38), F.S.

<sup>2</sup> *Id.*

<sup>3</sup> 55A Fla.Jur.2d Trusts s.1.

<sup>4</sup> Pursuant to s. 20.121(3)(a), F.S., the Financial Services Commission (the Governor and Cabinet) serves as the agency head for purposes of rulemaking and appoints the OFR's Commissioner, who serves as the agency head for purposes of final agency action for all areas within the OFR's regulatory authority.

<sup>5</sup> Section 658.12(21), F.S.

<sup>6</sup> Section 658.12(20), F.S. CS/HB 673 and CS/1012 (2014), which are currently pending in the Florida Legislature, amends the definition of "trust business" to clarify that the trust business is conducted for compensation *that the OFR does not consider to be de minimis*. The OFR has indicated that it has received inquiries on behalf of individuals engaging in estate and trust planning activities whereby fiduciaries serve as trustees with only minimal compensation and expense reimbursement. In these situations, the OFR has opined that such individuals are not engaging in the trust business as professional fiduciaries, and the bill provides clarification to that effect.

investment advisory, wealth management, and administrative services. Unlike trust companies, however, FTCs cannot transact trust business with the general public, nor can they accept deposits.

As such, FTCs are generally subject to fewer state regulatory requirements such as reduced capital requirements and regulatory filings, and may enjoy federal tax benefits depending on the FTC's governance structure and the extent of family control.<sup>7</sup> However, the initial formation and ongoing administration of FTCs can still entail significant expense. Thus, FTCs are generally utilized by only larger, wealthier families as long-term, multigenerational trustees for the following reasons:<sup>8</sup>

- To handle specialized, often illiquid or volatile assets (such as agricultural properties, family-owned businesses, or alternative investments, including, but not limited to, private equity or venture capital investments) that commercial trustees may be less willing to oversee, due to regulatory or fiduciary restrictions surrounding investment discretion;<sup>9</sup>
- To provide self-governance and more flexibility for a family; and
- To promote non-family financial objectives, including family succession planning and wealth education for younger generations.

At least 14 other states have laws and regulations governing the organization and operation of FTCs.<sup>10</sup> Currently, no Florida statutes authorize the formation of a family trust company, although a family wishing to use this wealth management vehicle could apply to the OFR to be licensed as a "state trust company" under the Codes to conduct general trust business. However, the statutory and regulatory framework for forming and operating a "state trust company" may be viewed by some as unwieldy, overbroad and intrusive for almost all families who would like to set up a trust company that will limit its services to the family. For instance, a state trust company must: (a) maintain \$3 million of capital,<sup>11</sup> (b) file quarterly financial reports with the OFR,<sup>12</sup> (c) have an annual CPA audit and submit the audit report to the OFR,<sup>13</sup> and (d) be examined by an OFR examination at least every 18 months.<sup>14</sup>

On a case-by-case basis, the OFR exempts "family trust companies" from statutory licensing and supervision as a public or commercial trust company, by way of the family entering into an agreement with the OFR stating that they will not operate a "for profit" trust company and will limit the trust company's services to the family (and, conversely, will not offer these services to the general public). However, such an exemption may trigger another regulatory requirement – that is, under the federal Investment Adviser Act.

### Federal Investment Advisers Act of 1940 and Family Offices

A family that is exempt from state trust company regulation may still need to register with the U.S. Securities and Exchange Commission (SEC) as an "investment adviser" under the federal Investment Advisers Act (IAA).<sup>15</sup> An "investment adviser" is any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities

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<sup>7</sup> I.R.S. Notice 2008-63, 2008-31 I.R.B. 261. See also Alan V. Ytterberg and James P. Weller, *Managing Family Wealth Through a Private Trust Company*, 36 Actec Law Journal 501, 511-512 (2010).

<sup>8</sup> Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper on Proposed Family Trust Companies Act, new Florida Statutes Chapter 659 and Legislative Position Request Form*, on file with the Insurance & Banking Subcommittee staff.

<sup>9</sup> Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 Seton Hall L. Rev. 467, 507 (2010).

<sup>10</sup> State FTC regulatory schemes have been described as one of three categories: lightly regulated (Alaska, South Dakota, Delaware, and New Hampshire), non-regulated (Virginia, Colorado, and Wyoming), and hybrid (Massachusetts, Nevada, and Wyoming). See fn. 1, *supra*, at 21-22.

<sup>11</sup> Section 658.21, F.S.

<sup>12</sup> Rule 69U-120.0451, F.A.C.

<sup>13</sup> Section 655.045(3), F.S.

<sup>14</sup> Section 655.045(1), F.S.

<sup>15</sup> 15 U.S.C. §80b-2(a)(11)(G).

or as to the advisability of investing in, purchasing, or selling securities.<sup>16</sup> SEC registration requirements and regulations may include: (1) filing a Form ADV with the SEC, which must be kept current with periodic updates; (2) annual filings with the SEC of an audited balance sheet; (3) undergoing an annual surprise examination by an independent public accountant to verify client assets; and (4) inspections and examinations by SEC staff.<sup>17</sup> The extent to which a family's financial matters would be subject to public scrutiny as a result of SEC registration is uncertain at this time, but presumably such financial matters would be exposed.<sup>18</sup>

Historically, families have not been required to register with the SEC under the IAA because of an exemption provided to investment advisers with fewer than 15 clients.<sup>19</sup> However, the federal Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010<sup>20</sup> eliminated this exemption effective July 2011, so that the SEC can regulate hedge fund and other private fund advisers. To avoid forcing private family trust companies to register, the Dodd-Frank Act created a new exemption from registration under the IAA for any "family office" and directed the SEC to promulgate rules defining the term family office in a way that is consistent with previous exemptive orders issued by the SEC and recognizes the range of organizational, management, and employment structures employed by family offices.<sup>21</sup> The SEC's "family office" rule, which became effective on August 29, 2011, somewhat restrictively defined "family office," and for many families this definition would exclude certain in-laws, aunts and uncles, and cousins.<sup>22</sup> Thus, a family office serving those individuals would typically fail the SEC's "family office" definition, subjecting it to burdensome SEC registration as an investment adviser.

The family may desire to avoid being subjected to supervision by the SEC, by instead subjecting its trust company to supervision by the state banking regulator. A FTC licensed under Florida law would not be required to register as "an investment adviser," nor would an unlicensed FTC if the unlicensed FTC delegated its investment functions to an investment agent.<sup>23</sup> Thus, legislation creating a FTC regulatory structure could exempt Florida FTCs from burdensome federal registration and examination requirements typically reserved for financial institutions serving the public. As noted above, current Florida law does not expressly authorize FTCs.

### **Effect of the Bill**

The bill creates the Florida Family Trust Company Act (ch. 622, F.S.; "the Act") within the Codes, to address three different types of family trust companies with varying regulatory requirements. This bill provides that its purpose is to establish requirements for licensing private trust companies, to provide regulation of those persons who provide fiduciary services to family members of no more than two families and their related interests as a private family trust company, and establish the degree of regulatory oversight required of the OFR over such companies.

#### **1. (Unlicensed) Family trust company**

A FTC is a corporation or limited liability company exclusively owned by one or more family members, organized or qualified to do business in Florida, and acts as a fiduciary for one or more family

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<sup>16</sup> 15 U.S.C. §80b-2(a)(11).

<sup>17</sup> 15 U.S.C. §§80b-3 and 80b-4.

<sup>18</sup> Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper on Proposed Family Trust Companies Act, new Florida Statutes Chapter 659 and Legislative Position Request Form*, on file with the Insurance & Banking Subcommittee staff.

<sup>19</sup> "SEC Adopts Rule Under Dodd-Frank Act Defining 'Family Offices,'" at <http://www.sec.gov/news/press/2011/2011-134.htm> (last accessed March 11, 2014).

<sup>20</sup> Pub.L. 111-203, H.R. 4173; commonly referred to as the "Dodd-Frank Act."

<sup>21</sup> Section 409 of the Dodd-Frank Act amended 15 U.S.C. 80b-2(a)(11).

<sup>22</sup> To be codified at 17 C.F.R. pt. 275.

<sup>23</sup> See 15 U.S.C. §80b-2(a)(11)(A)(banks are excluded from the definition of "investment adviser) and 15 U.S.C. §80b-2(a)(2)(C)(defines "bank" to mean a "trust company... a substantial portion of the business which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks....and which is supervised and examined by State or Federal authority having supervision over banks...and which is not operated for the purpose of evading the provision of this subchapter")(emphasis added).

members. A FTC may not serve as a fiduciary for a non-family member, except that it may provide such fiduciary services for up to 35 individuals who are not family members, but who are current or former employees of the FTC or of trusts, companies, or other entities that are family members.

2. *Foreign licensed family trust company*

A foreign licensed FTC has its principal place of business outside of Florida, and is licensed, operating, and supervised by a state other than Florida or by the District of Columbia, and is not owned by or a subsidiary of a business entity that is organized in or licensed by any foreign country as defined by the international banking chapter of the Codes.<sup>24</sup>

3. *Licensed family trust company*

A licensed FTC operates under a current (not revoked or suspended) license issued by the OFR.

Section 662.111, F.S., creates various definitions for words and terms used throughout the Act.

Section 662.120, F.S., specifies the maximum allowable number of *designated relatives*, which the persons designated in the application for license, and are against whom degrees of kinship are measured for purposes of determining “*family members*” that comprise licensed and unlicensed FTCs; they can be living or deceased.

- The maximum number of designated relatives for licensed FTCs is two, while the maximum number for unlicensed FTCs is one.
  - This strict limitation on the number of *designated relatives* is to guard against any risk of a FTC being used to provide trust company services to the general public.
- The definition of *family member* is intended to include certain lineal and collateral relatives of the designated relative, certain spouses and former spouses of a family member and certain members of their lineal relatives, family affiliates, certain trusts if all of the qualified beneficiaries are themselves family members or charities, probate estates of family members and certain non-family members, and certain charitable organizations.
  - The definition is intended to include a reasonable number of persons and entities that are related to the designated relative, so as to prevent abuse of the FTC provisions.
  - Licensed FTCs include a larger number of persons in the definition of family member than unlicensed FTCs.

Section 662.112, F.S., describes the calculation for determining degrees of kinship. The degrees are counted by adding the number of steps from a designated relative to the family member.<sup>25</sup>

- For example, if the designated relative is a grandparent and the family member is a grandchild, the degree of kinship between the individuals is two. This is *lineal kinship*.
- However, if the designated relative is an uncle and the family member is a nephew, the degree of kinship between the individuals is three. This is *collateral kinship*.

*Common Requirements for all FTC Types*

Section 662.115, F.S., describes the different applications of the Act to a licensed FTC, an unlicensed FTC, and a foreign licensed FTC. All sections of the chapter apply to licensed FTCs and unlicensed FTCs, unless otherwise stated in the sections. Only sections that expressly state that they apply to foreign licensed FTCs shall apply to such foreign licensed FTCs.

Under the bill, all three FTC types are subject to the following:

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<sup>24</sup> See s. 663.01(3), F.S.

<sup>25</sup> A “Degrees of Kinship” chart is included in the Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper on Proposed Family Trust Companies Act, new Florida Statutes Chapter 659 and Legislative Position Request Form*, on file with the Insurance & Banking Subcommittee staff.

- Section 662.1225, F.S., which requires:
  - A principal office physically located in Florida, where all records and accounts of the FTC are available for the OFR’s examination.<sup>26</sup>
  - A registered agent with an office in Florida.
  - All applicable state and local business licenses, charters, and permits.
- Section 662.128, F.S., which requires annual renewal with varying disclosures and renewal fees.
  - The renewal fees are \$750 for a FTC, \$1,500 for a licensed FTC, and \$1,000 foreign licensed FTC.
- Section 662.131, F.S., contains a prohibition on all FTC types from engaging in “commercial banking,” other than establishing accounts at other financial institutions for their own purposes or on behalf of family members to which it provides services, and from engaging in fiduciary services with the public, unless licensed under ch. 658, F.S., to do so.
- Sections 662.131(3) and (4), F.S., prohibit all FTC types from serving as either a personal representative of any probate estate administered in Florida or an attorney-in-fact or agent under a power of attorney pursuant to ch. 709, F.S.
- Section 662.132(9), F.S., provides that the duty of loyalty provisions in s. 736.0802, F.S., will apply to all FTC types that are serving as a trustee of a trust administered under ch. 736, F.S., only to the extent that such provisions are not inconsistent with Subsections 4 through 8 of s. 662.132, F.S.
- Section 662.134, F.S., prohibits all FTC types from advertising their services to the public.
- Section 662.141(1), F.S., allows the OFR to examine the books and records of any FTC types at any time to the extent necessary to determine compliance with the Act, the Codes, and rules adopted by the Financial Services Commission pursuant to either the Act or the Codes, and requires the OFR to conduct an examination at least every 18 months.
  - Section 662.141(2), F.S., allows the OFR to accept an audit in lieu of an examination.
  - Subsection (3) requires the FTC being examined to pay examination fees, which shall be deposited into the Financial Institutions’ Regulatory Trust Fund. The fee for examination is limited to the costs incurred by the OFR, including the salary and travel expenses directly attributable to any staff conducting the examination. The bill gives the OFR authority to levy administrative fines for late payments of examination fees.
- Section 662.143, F.S., permits the OFR to issue a cease and desist order to any FTC type found to be in violation of any applicable sections of this Act.
- Section 662.144, F.S., which subjects all three FTC types to administrative fines if reports and annual renewals required by this chapter or any rule are not timely filed with the OFR. The bill also provides that such trust company will automatically terminate and revoke if the annual renewal is not provided within 60 days after the end of each calendar year.
- Section 662.146(1), F.S., provides that the books and records of any FTC type are confidential, and may only be examined (1) by the OFR or its duly authorized representative; (2) by any authorized person of the FTC; (3) if compelled by a court or in accordance with state or federal laws, by the party seeking the examination; (4) if compelled by legislative subpoena as provided by law; (5) as authorized by the board of directors or the managers; or (6) as provided in subsection (2) discussed below.<sup>27</sup>
- Section 662.146(2), F.S., provides that each customer, stockholder, or member has the right to inspect books and records that pertain to the person’s accounts or determination of the person’s voting rights. These records will be kept confidential and will only be released with the express authorization of the involved person. However, information may be released without authorization to verify or corroborate the existence or amount of a customer’s account if that information is

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<sup>26</sup> This section permits branch offices within or outside of Florida

<sup>27</sup> This provision is patterned after s. 655.059, F.S., which requires financial institutions to make their books and records confidential. It should be noted that this merely creates a recordkeeping duty on a regulated private entity, and is not an exemption from public records law. Private organizations, such as financial institutions and family trust companies, generally are not subject to the Sunshine Law unless they have been created by a public entity, have been delegated the authority to perform some governmental function, or play an integral part in the decision-making process of a public entity. See art. I, s. 24(a), Fla. Const.; s. 119.01(2), F.S., (defining “agency” to include a private entity that acts on behalf of any public agency; and Attorney General Opinion 07-27.

reasonably provided to meet the needs of commerce and to ensure accurate credit information. Any person who willfully violates this section is guilty of a third degree felony.

- Subsection (2) does not apply to foreign licensed FTCs, as the subsection provides that the law of the foreign licensed FTC's principal jurisdiction will apply to rights to inspection.
- Section 662.146(3), F.S., states that "books and records" includes, but is not limited to, the application and related documents, the initial registration documents of an unlicensed FTC or a foreign licensed FTC, the annual renewal, and any documentation submitted to the OFR related to a licensed FTC discontinuing its business.
- Section 662.147, F.S., sets forth requirements for records relating to the OFR's examination and places limited restrictions on public access.
  - Section 662.147(1), F.S., requires FTCs to keep records of the names and residences of all members.
  - Section 662.147(2), F.S., provides generally that reports of examinations, license applications, investigatory records, and other documentation submitted to the OFR is retained by the OFR for 10 years.
  - Section 662.147(3), F.S., provides that a copy of any document on file with the OFR which is certified by the OFR as being a true copy may be introduced in evidence as if it were the original.
  - Section 662.147(4), F.S., provides for the treatment of confidential records or information used in judicial or administrative proceedings and the procedures for in camera inspection prior to an order to produce such confidential records or information.
- The bill amends existing s. 736.0802, F.S., regarding voidable transactions which violate a trustee's duty of loyalty. This section is amended to allow any FTC type to act a trustee to engage in certain transactions authorized by s. 662.132, F.S., without violating its duty of loyalty.

#### Licensed vs. Unlicensed Family Trust Companies

A family would likely choose to form a licensed FTC in the event they plan to provide trust or fiduciary services to a large family or two families, desired to avoid SEC regulation, or are of the opinion that a licensed FTC provides greater transfer tax advantages to the patriarch or matriarch. Also, as the scope of its operations expands, a family with an unlicensed FTC may choose to convert it to a licensed FTC. Currently, families who reside in states that subject trusts to state income tax are forming and operating regulated FTCs in tax-friendly jurisdictions in order to avoid state income taxation. Using a licensed FTC provides a strong nexus to the state which regulates the FTC and should strengthen the case that the trust (and perpetuity) law of that state governs trust administration.

A family interested in forming an unlicensed FTC might be one who perhaps recently experienced an increase in liquidity (due to the sale of a family business or an initial public offering) and would like to establish a more formal framework for managing family wealth for a limited number of family members, but find traditional trustee options unsuitable for a close-knit family. In addition, an unlicensed FTC can delegate its investment functions to an investment agent, thereby avoiding having to register with the SEC as an investment adviser.

Section 662.130(1), F.S., lists the powers of a licensed FTC and an unlicensed FTC. Either FTC may:

- Serve as a personal representative or curator for an estate administered outside of Florida.
- Serve as an attorney-in-fact or agent pursuant to a power of attorney, except when such instrument is governed by ch. 709, F.S. (relating to powers of attorney and similar instruments).
- Exercise various permissible trustee activities within or outside this state.
- Exercise the powers of a corporation or limited liability company, as the case may be.
- Retain agents and delegate duties and powers, specifically including the ability to retain a public trust company or bank trust department to assist the FTC in carrying out investment and administrative functions.
- Perform any acts necessary or incidental to effectuate the provisions of this Act and any other Florida laws applicable to the operation of a licensed FTC or an unlicensed FTC.

### Specific Requirements for Licensed FTCs

As stated above, s. 662.10, F.S., limits the number of designated relatives for licensed FTCs to two. If a licensed FTC chooses to have two designated relatives, such designated relatives may not have a common ancestor within five generations. According to the bill's proponents, the purposes for allowing two families to form one licensed FTC include:

- Many families own interests in closely-held businesses with other families. For instance, a Florida developer, agriculture business or biotech company may be privately owned by two families, with perhaps this ownership structure being in place for many decades. For the reasons identified above, these families may desire to extend their business arrangement into a licensed FTC to maintain continuity of business dealings through the provision of a shared fiduciary.
- It likely is more cost-effective for two families to combine their resources to form and operate one licensed FTC.

### *Application for licensure and renewal*

The bill contains the following application requirements to become a licensed FTC:

- Section 662.121, F.S., requires an application for license and a \$10,000 application fee, and sets forth required information to be disclosed in the application, including detailed information on each individual who owns or may vote at least 10% of the proposed licensed FTC and a sworn statement regarding the activities of the proposed FTC and that proposed management has not been subject of specified criminal and regulatory history.
- Section 662.1215, F.S., describes the OFR's investigation process of an application for a license. The application must include all the required information and any additional information requested by the OFR during the investigation. The purpose of the investigation is to determine the character and good standing of the FTC's managers as they attested in an application. If the investigation confirms that the applicant meets the requirements, the OFR will issue a license. If the OFR denies the application, it shall serve notice of its intent to deny the application and the right to request a hearing pursuant to ch. 120, F.S. (the Administrative Procedures Act).
  - The bill amends s. 120.80, F.S., providing that in proceedings for a license, an application for a new licensed FTC must be approved or denied within 180 days after receipt of the original application or receipt of timely requested additional information.
- Section 662.128, F.S., requires a licensed FTC to file within 30 days following the last day of the calendar year, an annual renewal application with the OFR, together with an annual renewal fee of \$1,500. The renewal application for licensed FTCs shall set forth that the operations for the calendar year have been in compliance with ch. 896, F.S. and other applicable state and federal laws and regulations, and shall describe any changes in operations, management, designated relatives or principal place of business since the end of the preceding calendar year.

### *Organizational documents*

Section 662.123, F.S., provides the information which must be contained within the organizational documents of a Florida-licensed FTC, including statements that the licensed FTC will not offer services to the general public and will not amend the organizational documents (to allow the company to offer its services to a non-family member) without prior written consent from the OFR. If the term "trust" is included in the name adopted by a FTC, it must be immediately preceded by the term "family" so as to distinguish the entity from a trust company operating under ch. 658, F.S. This section also requires the licensed FTC to seek regulatory approval from the OFR before changing its articles of incorporation, articles of organization, bylaws, or operating documents of a FTC, and provides that using the word "family trust" in a licensed FTC's name will not disqualify the name as a permissible corporate or limited liability company name.

### *Minimum capital account*

Section 662.124(1), F.S., provides that the minimum capital account of a licensed FTC with one designated relative is \$250,000. The minimum capital account of a licensed FTC with two designated relatives in the application for a certificate of authority or in the annual renewal is \$350,000. This section also specifies permissible asset groups in calculating the initial minimum capital account.



Section 662.132, F.S., imposes requirements on the assets that form a licensed FTC's minimum capital:

- Generally, the minimum capital account must be retained in liquid investments, and the aggregate market value of these assets must be at least 100% of the company's required capital account. There is a five-day curing period, in the event that the capital account falls below the required minimum.
- A licensed FTC may purchase or rent real or personal property for use in the conduct of the business or other activities of the company.
- A licensed FTC or an unlicensed FTC may invest its funds for its own account, other than the minimum capital account, in any type or character of equity securities, debt securities, or other assets.
- Subsections (4) through (7) set forth certain restrictions and requirements on a licensed FTC or an unlicensed FTC, to the extent it desires to purchase or invest as a fiduciary for a fiduciary estate in securities of which the licensed FTC or unlicensed FTC or a "family affiliate" has an interest.
  - The licensed FTC's or unlicensed FTC's interest in these securities includes: (i) issuance by the licensed FTC or unlicensed FTC; (ii) the underwriting or distribution of these securities by the licensed FTC or unlicensed FTC; and (iii) the licensed FTC or unlicensed FTC providing services to the investment company or investment trust which issued the securities and receiving compensation for these services.
- Subsection (8) lists certain actions a licensed FTC or an unlicensed FTC may perform which are not presumed to be affected by a conflict between the personal and fiduciary interests of the fiduciary. This subsection permits the FTC to interact with and invest in the family business without conflict of interest restrictions.

#### *Management*

Section 662.125, F.S., provides that the management of the FTC resides exclusively with the board of directors or managers. The board must be comprised of at least three directors or managers, and at least one director or manager must be a Florida resident, which is intended to ensure the FTC has an actual nexus to Florida. The FTC must notify the OFR of a proposed appointment of a member to the board, or the appointment of an individual officer or manager or member acting in managerial capacity at least 60 days before the appointment or employment becomes effective. The OFR is required to issue a notice of disapproval if it finds that the proposed appointment would result in the licensed FTC to be out of compliance with initial licensing requirements.

#### *Fidelity bonds, errors and omissions coverage, other insurance*

Section 662.126, F.S.:

- Generally requires a licensed FTC to obtain fidelity bonds totaling not less than \$1,000,000, in connection with the business to indemnify against loss, but allows a licensed FTC to increase its minimum capital account by \$1,000,000 as an alternative.
- Requires a licensed FTC to obtain errors and omissions insurance policies of not less than \$1,000,000.
- Authorizes licensed FTCs to obtain other insurance policies necessary or desirable in connection with the business of the FTC. The cost of any loss, error, or omission not covered by a fidelity bond or an errors and omissions insurance policy will be borne solely by the family that owns and is served by the licensed FTC.

#### *Books and records; segregation of assets*

Section 662.127, F.S.:

- Requires licensed FTCs to maintain their fiduciary books and records separate from other records and to segregate all assets held in any fiduciary capacity from any other assets.
- Provides that the assets received or held by the FTC in a fiduciary capacity are not liable for the debts or obligations of the FTC.

#### *Discontinuation of licensed FTC business*

If a licensed FTC desires to discontinue business, s. 662.129, F.S., requires it to furnish to the OFR a resolution of the board authorizing the action.

#### *Oaths, affidavits, and acknowledgements*

To the extent a licensed FTC is required to make an oath, affirmation, affidavit or acknowledgment, s. 662.133, F.S., identifies the representatives to perform such acts on behalf of the licensed FTC.

#### *Service as a court-appointed fiduciary; bond requirements*

Section 662.135, F.S., expressly provides that a licensed FTC is not required to provide or post bond or other surety to serve as a court-appointed fiduciary in any Florida court proceeding. This section is silent as to unlicensed FTCs, and therefore allows a court's discretion to require that an unlicensed FTC post bond.

#### *Grounds for revocation of license*

Section 662.142, F.S., provides for grounds for revocation of the license of a licensed FTC for violating certain sections of the Act, ch. 896, F.S., rules or orders of the commissions, or orders of the OFR, breach of a written agreement with the OFR, prohibited act under s. 662.131, F.S., a failure to provide information or documents to the office upon written request, or an act of the commission or omission or a practice that is a breach of trust or of fiduciary duty.

#### *Removal of FTC-affiliated parties*

Section 662.145, F.S., allows the OFR to remove from his or her position any officer, director, manager, member, employee or agent of a FTC who knowingly or willfully neglects to perform any duty required by this Act or other applicable law, or fails to conform to any material requirement made by the OFR.

#### *Guardians and bonding requirements*

Currently, s. 744.351, F.S., requires persons appointed as guardians of the property to file a bond. The bill amends this section to coincide with the authority granted under the Act for a licensed FTC to serve as a guardian of the property for family members, without filing a bond.

### *Specific Requirements for Unlicensed FTCs*

In addition to the common requirements discussed above, some of the same requirements for licensed FTCs also apply to unlicensed FTCs, with some minor differences:

- Section 662.120, F.S., limits the maximum number of designated relatives to one.
- Section 662.122, F.S., provides that even if a FTC does not wish to be licensed, it must register with the OFR before it begins its operations. The registration includes the name of the designated relative, a statement that the FTC and its operations comply with specific sections of the Act, a current telephone number and street address of the physical location where books and records will be maintained, the name and current street address in the state of its registered agent. In addition, the bill requires a \$5,000 non-refundable registration fee, to be deposited in the Financial Institutions' Regulatory Trust Fund.
- Section 662.123, F.S., requires regulatory approval prior to any changes to organizational documents.
- Section 662.124, F.S., requires a capital account of at least \$250,000 and specifies allowable assets to constitute that capital account.
- Section 662.125, F.S., sets forth management requirements for unlicensed FTCs.
- Section 662.126, F.S., does not require, but authorizes unlicensed FTCs to maintain fidelity bonds and errors and omissions coverage, as well as any other insurance policies necessary or desirable for the operation of the FTC.
- Section 662.127, F.S., requires unlicensed FTCs to maintain certain books and records and to segregate their assets.

- Section 662.128, F.S., requires unlicensed FTCs to renew their registration with the OFR on an annual basis, along with an annual renewal fee of \$750 and a completed renewal application.
- Section 662.132, F.S., sets forth permissible investments for both licensed and unlicensed FTCs.
- Section 662.133, F.S., sets forth provisions regarding oaths, affirmations, and acknowledgements.
- Section 662.135, F.S., expressly provides that a licensed FTC is not required to provide or post bond or other surety to serve as a court-appointed fiduciary in any Florida court proceeding. This section is silent as to unlicensed FTCs, and therefore allows a court's discretion to require that an unlicensed FTC post bond.
- Section 662.141, F.S., sets forth books and records and examination requirements by the OFR.
- Section 662.145, F.S., contains provisions removal of FTC-affiliated parties.

### Foreign Licensed FTCs

Permitting foreign licensed FTCs will allow FTCs already established in other states to relocate part of their operations to Florida. In addition to the common requirements described above, foreign licensed FTCs must comply with the following specific requirements.

- Like unlicensed FTCs, foreign licensed FTCs must register with the OFR before beginning operations in this state, pay a \$5,000 non-refundable registration fee, and provide the applicable registration-related disclosures set forth in s. 662.122, F.S. A foreign licensed FTC also must state that its operations are in compliance with specific sections of the Act and that it is currently in compliance in its home jurisdiction.
- Section 662.128, F.S., requires a foreign licensed FTC to file, within 30 days following the last day of the calendar year, an annual renewal application with the OFR, together with an annual renewal fee of \$1,000 for a foreign licensed FTC. The renewal application for foreign licensed FTCs shall set forth that its operations were in compliance with applicable provisions of chs. 662 and 896, F.S., and other state and federal laws and regulations, and must provide the current street address and telephone number of its registered agent, its physical office in its principal jurisdiction, its principal place of operations in Florida, and any other offices located in Florida.
- Section 662.1225(2), F.S., lists the requirements for a foreign licensed FTC.
  - Must maintain an office in Florida which maintains accessible original material business records and accounts of the foreign licensed FTC which pertain to its Florida operations for examination by the OFR.
  - Must maintain (i) a registered agent with an office at a street address in Florida, (ii) deposit account with a Florida branch or principal office of a state chartered or national financial institution, and (iii) all applicable state and local business licenses, charters and permits.
- Section 662.151, F.S., describes the application for a foreign licensed FTC to commence operations in Florida. This section differs from s. 662.150, F.S., in that it pertains only to foreign FTCs wanting to do business in both Florida and its principal jurisdiction (and perhaps others). Only foreign licensed FTCs are granted this privilege. The foreign licensed FTC must be in good standing in its primary jurisdiction and must (1) file with the Department of State a certificate of authority under either ch. 605 or 607, F.S., and (2) file an initial registration to commence operations as a foreign licensed FTC under the requirements of this chapter. The bill requires a company in operation and meeting the definition of a FTC as of the effective date of the Act to apply for licensure or registration under this Act within 90 days of the Act, or to cease doing business in this state.
- Section 662.130(2), F.S., allows a foreign licensed FTC to exercise the powers and authorities granted to it under its principal jurisdiction, as well as remaining subject to any duties, restrictions, or limitations under its principal jurisdiction.
- The name requirements of s. 662.123, F.S., do not apply to a foreign licensed FTC using a registered fictitious name.
- Section 662.150, F.S., describes "domestication" as a foreign licensed FTC's application to become a Florida FTC. The foreign licensed FTC must be in good standing in its primary jurisdiction, and must (1) file with the Department of State a certificate of domestication and articles of incorporation if a corporation or a certificate of conversion and articles or organization if a limited

liability company (under either ch. 605 or 608, F.S., as applicable); and (2) file an application for a certificate of authority to commence operations as a licensed FTC or register as an unlicensed FTC. The application or registration may be completed prior to filing with the Department of State; however both requirements must be met before operations are commenced.

- Section 744.351, F.S., requires persons appointed as guardians of the property to file a bond. This section is amended to coincide with the authority granted under the Act for a foreign licensed FTC to serve as a guardian of the property for family members, without filing a bond.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

Revenues generated as a result of the regulatory requirements of the bill will be deposited into the Financial Institutions' Regulatory Trust Fund (trust fund) within the OFR and stem from an application fee at initial licensure and the renewal of a license, in addition to any administrative fines and penalties the OFR may impose for the late payment for examination costs, the late payment of an annual renewal, and the late submission of any report prescribed by rule or required by ch. 662, F.S.

The OFR projects that ten to twelve FTCs will apply for licensure in the first year, generating a projected \$100,000 to \$120,000 in additional revenue to be deposited into the trust fund in the first year. In addition, a projection of one to three FTCs will apply for licensure in subsequent years. The OFR also projects that annual license renewals will generate an additional \$15,000 to \$18,000 annually to be deposited into the trust fund.<sup>28</sup> These estimates are based on the application and renewal fees required by the bill:

- Initial application fees: \$5,000 for FTCs (corporation or LLC) and foreign licensed FTCs, and \$10,000 for licensed FTCs.
- Annual renewal fees: \$750 for FTCs (corporation or LLC), \$1,500 for licensed FTCs, and \$1,000 for foreign licensed FTCs.
- Fines for the late payment for examination costs: if unintentional, up to \$100 per day; if found to be intentional, up to \$1,000 per day.
- Fines for the late annual renewal or any report prescribed by rule or required by the Act: up to \$100 per day, until termination of registration or revocation of license at 60 days past due.
- Any "costs" associated with an examination that accrue while examining FTCs' books and records that will be paid by licensees and registrants.

#### 2. Expenditures:

The bill provides that any examination "costs" accrued while fulfilling the regulatory requirements of examining the books and records of FTCs shall be borne by the FTC under examination. The "costs" that accrue during examination would be the salary and travel expenses of field staff that are directly attributable to the examination of the FTC, in addition to the travel expenses of any supervisory or support staff required as a result of examination findings. In addition, the bill will increase legal case load associated with de novo applications and administrative actions involving family trust companies, licensed family trust companies, and foreign licensed family trust companies. However, the OFR indicates that existing OFR legal resources will be sufficient to absorb any increase in case load as a result of the bill.<sup>29</sup>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

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<sup>28</sup> Office of Financial Regulation bill analysis (March 24, 2014) on file with the Government Operations Appropriations Subcommittee.

<sup>29</sup> *Id.*

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could make Florida a more attractive jurisdiction for the establishment of FTCs.

D. FISCAL COMMENTS:

None.