

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 Committee on Fiscal Policy

BILL: CS/SB 568

INTRODUCER: Banking and Insurance Committee and Senator Richter

SUBJECT: Family Trust Companies

DATE: April 8, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	Fav/CS
2.	Davis	Cibula	JU	Favorable
3.	Jones	Hrdlicka	FP	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 568 amends the Florida Family Trust Company Act (act), which was created in 2014, but not effective until October 1, 2015, to allow families to form and operate a family trust company (FTC). The bill:

- Clarifies legislative findings.
- Provides designated relatives for licensed FTC may not have a common ancestor within three generations.
- Requires the initial licensure investigation by Office of Financial Regulation (OFR) to review the management structure of the FTC.
- Clarifies several provisions of the act, including when the financial institutions codes apply to FTCs, registration requirements for unlicensed and foreign licensed FTCs, use of the term “affiliate,” and references to “broker-dealers.”
- Increases the time for FTCs to renew licenses or registrations from within 30 days to 45 days of the end of the year.
- Creates a mechanism for the automatic reinstatement of lapsed licenses or registrations.
- Repeals the requirement for submission of proposed amendments to bylaws or articles of organization of an unlicensed or licensed FTC to the OFR and instead requires submission of amendments to a certificate of formation or a certificate of organization.
- Requires examinations of licensed FTCs occur every 36 months instead of every 18 months and no longer allows an audit to substitute for an examination.

- Clarifies that a licensed FTC is entitled to an administrative hearing pursuant to ch. 120, F.S., to contest a license revocation.
- Requires a court to determine a breach of fiduciary duty or trust before the issuance of a cease and desist order or order of suspension or revocation of a license.

The bill has no fiscal impact on state government.

II. Present Situation:

Florida Family Trust Company Act

In 2014, the Legislature created the Florida Family Trust Company Act (act), which is effective October 1, 2015.¹ The act allows families to form and operate a family trust company (FTC) and created three types of FTCs:

- **(Unlicensed) FTC** is a corporation or limited liability company (LLC) organized or qualified to do business in Florida, exclusively owned by one or more family members, and that acts as a fiduciary for one or more family members. A FTC may not act as a fiduciary for a non-family member, except it may serve as a fiduciary for up to 35 individuals who are not family members if the individuals are current or former employees of the FTC or trusts, companies, or other entities that are family members.
- **Licensed FTC** is a FTC that operates under a current license that has not been revoked or suspended by the OFR.
- **Foreign licensed FTC** is licensed, operated, and has its principal place of business in another state or the District of Columbia. A foreign licensed FTC is subject to statutory or regulatory mandated supervision by the jurisdiction where its principal place of business is located. It cannot be owned by or be a subsidiary of a company organized or licensed by a foreign country.²

The act's purpose is to:

- Establish requirements for licensing private trust companies;
- 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 FTC; and
- Establish the degree of regulatory oversight required of the OFR over FTCs.³

Licensure and Registration of FTCs

The act does not require a FTC to become licensed, however to be licensed in Florida, a FTC must apply to the OFR.⁴ Also, to operate in Florida, unlicensed and foreign licensed FTCs are required to register with the OFR.⁵ Applications for licensure or registration require the FTCs to list a designated relative.⁶ A designated relative is a common ancestor of the family, who may be

¹ Chapter 2014-97, L.O.F.

² Section 662.111, F.S.

³ Section 662.102, F.S.

⁴ Sections 662.114 and 662.121, F.S.

⁵ See s. 662.122, F.S.

⁶ Sections 662.121(17) and 662.122(1)(a), F.S.

living or deceased.⁷ Unlicensed FTCs may not have more than one designated relative, whereas licensed FTCs may not have more than two designated, which cannot have a common ancestor within five generations.⁸

Once a FTC has applied for licensure the OFR conducts an investigation of the directors or officers, if the FTC is a corporation, or the managers or members, the FTC is a LLC, and confirms that the application conforms to ch. 662, F.S.⁹

The act requires FTCs to renew licenses or registrations within 30 days after the end of the year.¹⁰ If a FTC fails to renew or file any other report required by the act, the OFR may impose a \$100 fine for each day the renewal or report is overdue. Failure to renew within 60 days after the end of the year results in the automatic termination of the license or registration. The act does not provide for the automatic termination of a foreign licensed FTC's registration for failure to renew.¹¹

Regulation of FTCs

The act regulates FTCs in numerous ways. For example, the act provides the management structure for unlicensed and licensed FTCs. The management structure is identical for unlicensed and licensed FTCs and is dependent on whether it is a corporation or a LLC. If a corporation, exclusive management authority is vested in a board of directors comprised of at least three directors, one being a resident of Florida. If a LLC, exclusive management authority is vested in a board of directors or managers comprised of at least three directors or managers, one being a resident of Florida.¹²

The act also requires any proposed amendments to unlicensed or licensed FTCs' articles of incorporation, articles of organization, or bylaws be submitted to the OFR.¹³

The act allows the OFR to conduct an examination or investigation of a FTC at any time it deems necessary to determine whether a FTC has violated or is about to violate any provision of ch. 662, F.S., any applicable provision of the financial institution codes, or any relevant administrative rules. The OFR is required to conduct an examination of FTCs at least once every 18 months and in lieu of conducting an examination, may accept an audit of a FTC in certain circumstances.¹⁴

The OFR may issue and serve a FTC with a complaint stating charges that it believes the FTC is engaging or has engaged in conduct prohibited by the act. For example, the OFR can issue a complaint if it believes a FTC is engaging in or has engaged in an act of commission, omission or practice that is a breach of trust or of fiduciary duty. The complaint must contain a notice of

⁷ Section 662.111(9), F.S.

⁸ Section 662.120, F.S.

⁹ See s. 662.1215, F.S.

¹⁰ Section 662.128, F.S.

¹¹ Section 662.144, F.S.

¹² Section 662.125, F.S.

¹³ Section 662.123, F.S.

¹⁴ Section 662.141, F.S.

the FTC's opportunity for a hearing. If no hearing is requested, or if a hearing is held and the OFR finds the charges are true, the OFR may enter a cease and desist order.¹⁵

The act places restrictions on the purchases of bonds or other security instruments by an unlicensed or licensed FTC from affiliate of the FTC.¹⁶

According to a white paper from Real Property, Probate, and Trust Law Section (RPPTL) of the Florida Bar, "there is no public interest served by having the OFR regulate FTCs."¹⁷ A concern raised by the RPPTL of the Florida Bar is that the current regulatory scheme in ch. 662, F.S., does not allow licensed FTCs to qualify for the "bank exemption" with the federal Securities and Exchange Commission. If these companies do not qualify for the "bank exemption," they will be required to register as investment advisers with the federal regulator.¹⁸

III. Effect of Proposed Changes:

Section 1 amends the findings of the Family Trust Company Act to clarify that the OFR is responsible for the regulation, supervision, and examination of licensed FTCs, and that the OFR's role is limited to ensuring that services provided by unlicensed or foreign licensed FTCs are to family members and not to the general public. The OFR is not responsible for examining the safety or soundness of the operations of an unlicensed or foreign licensed FTC.

Licensure and Registration of FTCs

Section 4 provides that designated relatives for licensed FTC may not have a common ancestor within three generations instead of the current limitation of five generations.

Section 5 requires the OFR to include in its initial licensure investigation of an applicant, verification that the management structure of a licensed FTC complies with the act.

Section 6 provides that an unlicensed FTC's registration application must state that its operations will comply with s. 662.123(1), F.S., relating to requirements in organizational documents, s. 662.124, F.S., relating to minimum capital requirements, and s. 662.127, F.S., relating to the segregation of books, records, and assets. A foreign licensed FTC's registration application must prove that it is in compliance with the FTC laws and regulations of its principal jurisdiction of operations and state that it complies with s. 662.127, F.S., relating to the segregation of books, records and assets.

Section 7 requires FTCs in operation on October 1, 2015, to apply for licensure as a licensed FTC, register as an unlicensed or foreign licensed FTC, or cease business in Florida. The application or registration must be filed by December 30, 2015. This provision is transferred from s. 662.151(3), F.S. (Section 17). A foreign licensed FTC must be in compliance with the laws and regulations of its principal jurisdiction.

¹⁵ Section 662.143, F.S.

¹⁶ Section 662.132, F.S.

¹⁷ Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper on Proposed Changes to the Florida Family Trust Company Act, Florida Statutes Chapter 662* (2015) (on file with the Senate Committee on Judiciary).

¹⁸ *Id.*

Section 9 increases the time for FTCs to renew a license or registration to within 45 days after the end of each year from 30 days. All verified statements in renewal applications must be by an “authorized representative of the trust company.” An unlicensed FTC’s registration renewal application must state that its operations comply with s. 662.123(1), F.S., relating to requirements in organizational documents, s. 662.124, F.S., relating to minimum capital requirements, and s. 662.127, F.S., relating to the segregation of books, records and assets.

Section 14 provides that a foreign licensed FTC’s failure to renew its registration within 60 days of the end of the year will result in an automatic termination of the registration. A FTC’s license or registration terminated for failure to timely renew can be automatically reinstated by submitting to the OFR, on or before August 31 of the year in which the renewal application is due, the renewal application and fee required under s. 662.128, F.S., a \$500 late fee, and any fine imposed by the OFR.¹⁹ A FTC that fails to renew or reinstate its license or registration must wind up its affairs before November 30 in the year which the failure occurs.

Regulation of FTCs

Section 3 creates s. 662.113, F.S., to provide that the financial institutions codes do not apply to FTCs unless specifically made applicable by ch. 662, F.S.²⁰

Section 8 repeals the requirement that proposed amendments to the bylaws or articles of organization of an unlicensed or licensed FTC be submitted to the OFR and requires amendments to a certificate of formation or a certificate of organization to be submitted to the OFR at least 30 days before they are filed or effective.

Section 10 repeals references to the term “affiliate” and replaces it with “parent” or “subsidiary company” to prevent confusion with the term “family affiliate” defined in s. 662.111, F.S. The bill clarifies that an unlicensed or licensed FTC may purchase bonds and securities directly from broker-dealers when acting as a fiduciary.

Section 11 provides that the OFR *must* conduct an examination of a *licensed FTC* every 36 months (instead of the 18 months) and no longer allows an audit to substitute for an examination by the OFR. These changes are believed to allow licensed FTCs to qualify for the “bank exception” with the Securities and Exchange Commission.²¹ The OFR *may* a conduct examination or investigation of an *unlicensed or foreign licensed FTC* at any time necessary to determine if it has engaged in any act prohibited by ss. 662.131 or 662.134, F.S. If the unlicensed or foreign licensed FTC has engaged in a prohibited act, the OFR must determine if any provision of the financial codes have been violated.

Section 12 clarifies that a licensed FTC is entitled to an administrative hearing pursuant to ch. 120, F.S., to contest a license revocation.

¹⁹ Fees and fines collected pursuant to this section will be deposited into the Financial Institutions’ Regulatory Trust Fund.

²⁰ This does not limit the OFR’s power to investigate compliance with ch. 662, F.S., or applicable provisions of the financial institutions codes.

²¹ *Supra* note 16.

Sections 12 and 13 require a court of competent jurisdiction determine if an act of commission or omission is a breach of trust or a fiduciary duty prior to the OFR issuing an order of suspension or revocation of a license or registration or a cease and desist order.

Technical Changes and Effective Date

Sections 2, 15, and 16 make technical changes to the act.

Section 10 moves a provision that the OFR may rely on certain documents from subsection (3) to (1), and consolidates rulemaking provisions to subsection (6).

Section 18 provides an effective date of October 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not affect counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

As a result of this legislation, high net worth families who are not located in Florida may select Florida as the jurisdiction to establish FTCs, which may benefit the investment, accounting, legal, and advisory support service professions.²²

C. Government Sector Impact:

The OFR does not anticipate a fiscal impact on state government.²³

²² *Supra* note 16.

²³ Office of Financial Regulation, *Senate Bill 568 Fiscal Analysis* (Feb. 27, 2015) (on file with the Senate Committee on Judiciary).

VI. Technical Deficiencies:

None.

VII. Related Issues:

The OFR will have to update its adopted rules to conform to the provisions of the bill, particularly the requirement that a foreign licensed FTC must submit satisfactory proof, as determined by the OFR, of compliance.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 662.102, 662.111, 662.120, 662.1215, 662.122, 662.1225, 662.123, 662.128, 662.132, 662.141, 662.142, 662.143, 662.144, 662.145, 662.150, and 662.151.

This bill creates section 662.113 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on March 4, 2015:

The committee substitute clarifies that the OFR may investigate any entity to determine compliance with ch. 662, F.S. The CS provides that FTCs operating on October 1, 2015, must apply for licensure or registration by December 30, 2015. It allows an unlicensed or or licensed FTC to make purchases as a fiduciary directly from broker-dealers. The CS also expands the scope of examinations of licensed FTCs and provides procedures for reinstatements of licenses or registrations.

B. Amendments:

None.