

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 Governmental Oversight and Accountability

BILL: CS/SB 346

INTRODUCER: Commerce and Tourism Committee and Senator Stargel

SUBJECT: Fictitious Name Registration

DATE: March 3, 2017

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------------|----------------|-----------|--------------------|
| 1. | <u>Harmsen</u> | <u>McKay</u> | <u>CM</u> | <u>Fav/CS</u> |
| 2. | <u>Peacock</u> | <u>Ferrin</u> | <u>GO</u> | <u>Pre-meeting</u> |
| 3. | _____ | _____ | <u>RC</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 346 updates the Florida Fictitious Name Act, s. 865.09, F.S., which requires any person or business entity doing business in Florida under a name other than their legal name to register a fictitious name with the Division of Corporations of the Department of State. Specifically, the bill:

- Defines the term “registrant” to clarify and standardize who is required to file a fictitious name;
- Clarifies that foreign business entities must be in active status with the Division of Corporations to file a fictitious name;
- Updates the process for cancellation, registration, and renewal of a fictitious name, including clarifying the term of registration;
- Standardizes language to include varied business entities, rather than just corporations;
- Changes the penalty for failure to comply with the Fictitious Name Act from a misdemeanor to a noncriminal violation; and
- Makes technical and conforming changes throughout.

The bill takes effect on July 1, 2017.

II. Present Situation:

The Florida Department of State

The Florida Department of State (Department) consists of six divisions: the Division of Elections; Division of Historical Resources; Division of Library and Information Services; Division of Cultural Affairs; Division of Administration; and Division of Corporations.¹

The Division of Corporations (Division) maintains a registry for recording and retrieving commercial information that is filed or registered with the Department. In total, the Division maintains more than eight million records, including a variety of business entity filings such as articles of incorporation or other forms of business entity organization, annual reports, trade and service mark registrations, judgment lien filings, and fictitious name registrations.² The Division determines whether submitted filings and forms meet the pertinent statutory requirements and then records and indexes those filings in its database of records.

Florida Fictitious Name Act

A fictitious name is any name other than the person's or business entity's legal name (a business entity's legal name is that which is registered with the Department of State).³ A fictitious name is also known as a "doing business as," "dba," or "assumed" name.⁴

The Florida Fictitious Name Act⁵ (Act) was enacted in 1941 to provide notice to the public and creditors of the names and addresses of those conducting business under a fictitious name.⁶ From 1941 through 1990, the Act required a business to register its fictitious name in the county circuit court located in the business' principal place of business. This decentralized process made it difficult for interested parties to search for a business' fictitious name. As a result, the Legislature transferred the duty of registering fictitious names to the Florida Department of State (Department) in 1991.⁷ As of January 2017, the Division had 606,586 active registered fictitious names; in 2016 alone, the Division processed 101,604 fictitious name registrations.⁸

The current Act requires any person or business entity to register their fictitious name with the Division prior to conducting business in Florida by:

- Advertising the intention to register the business at least once in a newspaper in the county where the business' principal place of business is located;

¹ Section 20.10, F.S.

² Florida Department of State, *Overview of the Division of Corporations*, (Dec. 2016), (on file with the Committee on Commerce and Tourism).

³ Section 865.09(2)(a), F.S.

⁴ United States Small Business Administration, *Starting and Managing a Business; Register Your Business Name*, available at <https://www.sba.gov/starting-business/choose-register-your-business/register-your-business-name> (last visited Feb. 21, 2017).

⁵ Section 865.09, F.S. This act was formerly known as the "Florida Fictitious Name Statute." *See*, s. 865.09, F.S.(1990).

⁶ *Jackson v. Jones*, 423 So. 2d 972, 973 (Fla. 4th DCA 1982), rev. denied, 436 So. 2d 99 (Fla. 1983).

⁷ Ch. 90-267, Laws of Fla.

⁸ Florida Department of State, Division of Corporations, *Yearly Statistics, from 2011 to Present*, (Jan. 23, 2017). Available at <http://dos.myflorida.com/sunbiz/about-us/yearly-statistics/> (last visited Feb. 21, 2017).

- Filing a sworn statement with the Division that lists the name to be registered, the business' mailing address, the name and address of each business owner, and, if a corporation, its federal employer's identification number (FEIN) and Florida incorporation or registration number; and
- Paying a \$50 filing fee to the Division.⁹

A fictitious name registration is valid for five years, but expires on December 31 of the fifth year.¹⁰ As a result, depending on when the business initially registers its fictitious name, it may not realize a full five-year registration term. Should a business operating under a fictitious name change ownership during this period, the current owner is obligated to file a cancellation and reregistration to notify of the new ownership within 30 days after the occurrence of such change.¹¹

Businesses that fail to register a fictitious name under which they are doing business may not maintain any action, suit, or proceeding in any Florida court until they comply with the Act.¹² Additionally, any person who fails to comply with the Act commits a second-degree misdemeanor.¹³ No business may register a fictitious name with the words "corporation," "incorporated," or any form thereof unless the business is actually incorporated.¹⁴

Certain businesses are exempt from registration under the Act,¹⁵ including:

- Entities registered with the Department that also operate under their full, registered name;
- Any business formed by and operated under the name of an attorney licensed by the Florida Bar, for the purpose of practicing law; and
- Any person or business actively licensed by the Department of Business and Professional Regulation or the Department of Health for the purpose of practicing said licensed profession; the person or entity must conduct business under the name as licensed with the State.

The Rise of Non-Corporate Business Entities

Non-corporate business entity structures have risen in popularity since the IRS clarified tax rules governing such entities in the 1990's and states adopted permitting legislation.¹⁶ These structures include the limited liability company (LLC), limited liability partnership (LLP), and the limited liability limited partnership (LLLP). Businesses have begun to favor these alternate business

⁹ Section 865.09(3), F.S.

¹⁰ Section 865.09(5), F.S.

¹¹ Section 865.09(4), F.S.

¹² Section 865.09(9)(a), F.S.

¹³ Section 965.09(9)(c), F.S.

¹⁴ Section 865.09(14), F.S.

¹⁵ Section 865.09(7), F.S.

¹⁶ Stephen Bainbridge, *the Inexorable (?) Rise of the LLC* (June 9, 2010). Available at: <http://www.professorbainbridge.com/professorbainbridgecom/2010/06/the-inexorable-rise-of-the-llc.html> (last visited Feb. 21, 2017). See also, Florida Department of State, Division of Corporations, *Yearly Statistics, from 2011 to Present*, (Jan. 23, 2017). Available at <http://dos.myflorida.com/sunbiz/about-us/yearly-statistics/> (last visited Feb. 21, 2017). The total number of domestic LLCs registered with the Division has risen from 145,780 in 2011 to 233,077 in 2016.

structures because they provide flexibility for purposes of taxation, and protection of the partners' personal assets.¹⁷

An LLC is a hybrid business entity that provides its members with limited liability against the entity's debts and obligations, as a corporation does, but also provides its members with the flexibility to choose the federal income tax classification of the entity.¹⁸ An LLC must file Articles of Incorporation with the Division to commence its legal existence.¹⁹ A Professional Limited Liability Company ("PLLC" or "PL") is an LLC that is formed by licensed professionals for the specific purpose of practicing business in that licensed area.²⁰

An LLP is a general partnership that limits the liability of each partner (but not the general partner) from liabilities of the other, and is taxed like a partnership.²¹ A partnership that agrees to operate as an LLP must file a statement of qualification with the Division to be granted legal status as an LLP.²²

An LLLP is a partnership that limits the liability of all of its partners, and instead places the duty of any obligations of the LLLP on the partnership itself. The LLLP is also taxed like a partnership.²³

Some business entities choose to remain under the corporate form as a Professional Association ("PA" or "chartered" corporation). A PA consists of shareholders who are licensed to perform a licensed service, and who formed their business entity for the purpose of practicing said service.²⁴

III. Effect of Proposed Changes:

Section 1 of the bill makes changes throughout Florida's Fictitious Name Act, s. 865.09, F.S., to incorporate clarifications and other recommendations made by the Division and the Business Law Section of the Florida Bar (Business Law Section).²⁵

Defines "Registrant"

The bill defines a "registrant" as a person who registers a fictitious name with the division. The bill adopts this term throughout the Act to standardize the language formerly used to refer to those who may register a fictitious name, including "applicant," "owner," and "person."

¹⁷ Susan Pace Hamill, *The Story of LLCs: Combining the Best Features of a Flawed Business Tax Structure*. Available at: [https://www.law.ua.edu/misc/hamill/Chapter%2010--Business%20Tax%20Stories%20\(Foundation\).pdf](https://www.law.ua.edu/misc/hamill/Chapter%2010--Business%20Tax%20Stories%20(Foundation).pdf) (last visited Feb. 21, 2017).

¹⁸ *Id.*

¹⁹ Section 605.0201, F.S.

²⁰ Section 621.03(3), F.S.

²¹ Section 620.8306(3), F.S.; Gregory Yadley, Christina Nethero, *1-1 Florida Small Business Practice*, s. 1.3 (2013 edition).

²² Section 620.9001, F.S.

²³ Gregory Yadley, Christina Nethero, *1-1 Florida Small Business Practice*, s. 1.3 (2013 edition).

²⁴ Section 621.05, F.S.

²⁵ Stefan Rubin, Florida Bar Business Law Section, *Proposed Amendments to Florida Statute Section 865.09, Fictitious Name Act: Executive Summary*, (Oct., 2016) (Copy on file with the Committee on Commerce and Tourism).

The bill clarifies that the registrant of a general partnership that is not registered with the Division are the partners, not the partnership entity; however, the registrant of a general partnership that is registered and in active status with the Division is the partnership itself.

Registration, Renewal, and Cancellation of a Fictitious Name

The bill amends the registration process to require a “registration” rather than a “sworn statement.” According to the Business Law Section, this amendment conforms the law to current practice, as the Division does not currently require submission of a sworn statement.²⁶

The bill clarifies the term of initial registration to be a period of “up to five years,” and that the first year of registration is the period from initial registration through December 31 of that year. The bill additionally requires the Division to notify registrants of fictitious names that their registered fictitious name is due to expire by September 1 of the fifth year.

The bill clarifies that business entity registrants, including foreign entities, must be in active status with the Division. The bill further requires business entity registrants to provide the Division with their Florida incorporation number and FEIN. This requirement does not apply to general partnerships that are not registered with the Division, but does apply to general partnerships that have chosen to register under the permissive registration statute.²⁷

The bill amends the process to transfer ownership of a fictitious name. Under the bill, a current owner is only obligated to file a notice of cancellation with the Division; the new owner may file a reregistration in accordance with the Act at the same time of the cancellation. This conforms to the Division’s use of one form for both the cancellation and reregistration of a fictitious name.²⁸

Non-Corporate Business Entities

The bill generally replaces the term “corporation” with “business entity” to broaden application of the Act to not only corporate entities, but also LLC’s, LLP’s, LLLP’s, and other business entities. For the same purpose, the bill expands the words prohibited from use in a fictitious name to include “Limited Partnership,” “Limited Liability Limited Partnership,” “Limited Liability Partnership,” “Limited Liability Company,” “Professional Associations,” “Professional Limited Liability Companies,” and any other forms thereof, in cases where the business entity is not legally registered or organized as such. The words “corporation” and “incorporated” are already prohibited if the business entity is not registered as a corporation.

Under the bill, a fictitious name may not be renewed if it is prohibited under the Act at the time of its renewal.

²⁶ Stefan Rubin, Florida Bar Business Law Section, *Proposed Amendments to Florida Statute Section 865.09, Fictitious Name Act: Executive Summary*, (Oct., 2016) (Copy on file with the Committee on Commerce and Tourism).

²⁷ Section 620.8105, F.S. “A partnership may file a partnership registration statement with the Department of State...”

²⁸ See, Florida Department of State, *Application for Registration of Fictitious Name*. Available at: <http://form.sunbiz.org/pdf/CR4E001.pdf> (last visited Feb. 21, 2017).

Penalties

The bill reduces the penalty for failure to comply with the Act from a second-degree misdemeanor to a noncriminal violation, which is punishable only by a fine, forfeiture, or other civil penalty.²⁹

Section 2 provides an effective date of July 1, 2017.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

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:

None.

C. Government Sector Impact:

The Department foresees a minimal impact required to make necessary changes to the Division's Sunbiz online filing system to prevent the use of prohibited terms in fictitious names.³⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

²⁹ Section 775.08, F.S. Noncriminal violations do not constitute a crime.

³⁰ Department of State, *Senate Bill 346 Agency Analysis* (Feb. 6, 2017). On file with the Committee on Commerce and Tourism.

VIII. Statutes Affected:

This bill substantially amends section 865.09 of the Florida Statutes.

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

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

CS by Commerce and Tourism on February 21, 2017:

- Removes a requirement that foreign business entities file their incorporation number, document registration number, or other identifying number from their home jurisdiction;
- Clarifies that the entity must be in active registered status with the Florida Division of Corporations and must provide a Florida incorporation number with its fictitious name registration;
- Requires the Division to notify registrants of an upcoming expiration of a fictitious name by September 1 of the last year of the fictitious name's term of registration;
- Prohibits the use of "Professional Association," "Professional Limited Liability Company," and any form thereof in fictitious names where the business entity is not legally registered or organized as such; and
- Makes technical and conforming changes throughout.

B. Amendments:

None.