

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 Judiciary

BILL: SB 80

INTRODUCER: Senator Richter

SUBJECT: Family Trust Companies

DATE: November 16, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	Favorable
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Favorable
3.	_____	_____	<u>FP</u>	_____

I. Summary:

SB 80 amends the Florida Family Trust Company Act codified in ch. 662, F.S. The act was created in 2014 to allow families to form and operate private or family trust companies that provide trust services similar to those that can be provided by an individual trustee or a financial institution. Family trust companies are owned exclusively by family members and may not provide fiduciary services to the public. These private, family trust companies are generally formed to manage the wealth of high net-worth families in lieu of traditional individual or institutional trustee arrangements for a variety of personal, investment, regulatory, and tax reasons.

Chapter 662, F.S., authorizes the creation of three types of family trust companies: licensed family trust companies, foreign family trust companies, and unlicensed family trust companies. This bill amends ch. 662, F.S., to:

- Require all family trust companies in operation on October 1, 2016, to either apply for licensure as a licensed family trust company, register as a family trust company, register as a foreign licensed family trust company, or cease doing business in this state by December 30, 2016;
- Increase application requirements such that a family trust company must acknowledge in its registration application that its trust operations comply with the statutory provisions for organizational documents and minimum capital account amounts;
- Require a foreign licensed family trust company that applies for registration to provide proof that the company is in compliance with the family trust company laws and regulations of its principal jurisdiction;
- Require that amendments to certificates of formation or certificates of organization be submitted to the Office of Financial Regulation (OFR or office) at least 30 days before they are filed or effective;
- Increase the time period to 45 days from 30 days after the end of each calendar year for companies to timely file an annual renewal application;

- Create a mechanism for the automatic reinstatement of lapsed licenses and registrations by payment of appropriate fees and any fines imposed by the OFR;
- Provide that the office must conduct an examination of a licensed family trust company every 36 months instead of the current 18 months.
- Delete a provision that allows the office to accept an audit prepared by a certified public accountant in lieu of an examination conducted by the office.
- Remove the requirement that the office conduct examinations of registered family trust companies;
- Require that a court determine there has been a breach of fiduciary duty or trust before the OFR enters a cease and desist order;
- Require that the management of a licensed family trust company have at least three directors or managers and require that at least one of those directors or managers be a Florida resident;
- Limit who may serve as a designated relative for a family trust company by providing that the designated relatives in a licensed family trust company may not have a common ancestor within three generations instead of the current five generations; and
- Clarify that the OFR is responsible for the regulation, supervision, and examinations of licensed family trust companies but that for unlicensed or foreign family trust companies the role of the OFR is limited to ensuring that services provided by unlicensed or foreign family trust companies are provided only to family members and not to the general public.

II. Present Situation:

The Family Trust Company

A family trust company provides trust services to a related group of people but is prohibited from providing services to the general public. This includes serving as a trustee of trusts held for the benefit of the family members, as well as providing other fiduciary, investment advisory, wealth management, and administrative services to the family. A family might wish to form a family trust company in order to keep family matters more private than they would be if turned over to an independent trustee, to gain liability protection, to establish its own trust fee structure, or to obtain tax advantages. Traditional trust companies require regulatory oversight, licensing of investment personnel, public disclosure and capitalization requirements considered by practitioners to be overbroad and intrusive for the family trust.

In 2014, the Legislature authorized the creation of family trust companies in Florida.¹ The legislation took effect on October 1, 2015.² At least 14 other states have statutes governing the organization and operation of family trust companies.

Types of Family Trust Companies

Chapter 662, F.S., authorizes three types of family trust companies: family trust companies, licensed family trust companies, and foreign licensed family trust companies.³

¹ Chapter 2014-97, Laws of Fla.

² *Id.*

³ Chapter 662, F.S., was created by ch. 2014-97, Laws of Fla.

A “family trust company” is a corporation or limited liability company (LLC) that is exclusively owned by one or more family members, is organized or qualified to do business in Florida, acts or proposes to act as a fiduciary to serve one or more family members, and does not serve as a fiduciary for a person, entity, trust, or estate that is not a family member, except that 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 family trust company or one or more trusts, companies, or other entities that are family members.⁴

A “licensed family trust company” means a family trust company that operates in accordance with this chapter and has been issued a license that has not been revoked or suspended by the Office of Financial Regulation.⁵

A “foreign licensed family trust company” means a family trust company that is licensed by a state other than Florida, has its principal place of business in a jurisdiction in the United States other than Florida, is operated in accordance with family or private trust company laws of a jurisdiction other than Florida, and is subject to statutory or regulatory mandated supervision by the jurisdiction in which the principal place of business is located.⁶

Powers of a Family Trust Company

Section 662.130, F.S., authorizes a family trust company and a licensed family trust company to:

- Act as a sole or co-personal representative, executor, or curator for probate estates being administered in a state or jurisdiction other than Florida.
- Act as an attorney-in-fact or agent under a power of attorney, other than a power of attorney governed by ch. 709, F.S.
- Act within or outside of Florida as sole fiduciary or co-fiduciary and possess, purchase, sell, invest, reinvest, safe-keep, or otherwise manage or administer the real or personal property of eligible individuals and members.
- Exercise the powers of a corporation or LLC incorporated or organized under Florida law, or qualified to transact business as a foreign corporation or LLC under Florida law, which are reasonably necessary to enable it to fully exercise, in accordance with commonly accepted customs and usages, a power conferred by the Florida Family Trust Company Act.
- Delegate duties and powers, including investment functions under s. 518.112, F.S., in accordance with the powers granted to a trustee under ch. 736, F.S., or other applicable law, and retain agents, attorneys, accountants, investment advisers, or other individuals or entities to advise or assist the family trust company, licensed family trust company, or foreign licensed family trust company in the exercise of its powers and duties.
- Perform all acts necessary for exercising these powers.

⁴ See s. 662.111(12), F.S.

⁵ See s. 662.111(16), F.S.

⁶ See s. 662.111(15), F.S.

Capital Requirements

Section 662.124, F.S., provides minimum capital account requirements. A family trust company or a licensed family trust company that has one designated relative may not be organized with an owners' capital account of less than \$250,000.

Licensed Family Trust Companies

Section 662.121, F.S., requires a company wishing to be licensed as a licensed family trust company to file an application with the OFR. When a company files an application for licensure as a licensed family trust company, s. 662.1215, F.S., requires the OFR to conduct an investigation to confirm that persons who will serve as directors or officers of the corporation or, if the applicant is an LLC, managers or members acting in a managerial capacity, have not:

- Been convicted of, or entered a plea of nolo contendere to, a crime involving fraud, misrepresentation, or moral turpitude;
- Been convicted of, or pled nolo contendere to, a violation of the financial institutions codes or similar state or federal laws;
- Been directors or executive officers of a financial institution licensed or chartered under the financial institutions codes or by the Federal Government or any other state, the District of Columbia, a territory of the United States, or a foreign country, whose license or charter was suspended or revoked within the 10 years preceding the date of the application;
- Had a professional license suspended or revoked within 10 years preceding the application; or
- Made a false statement of material fact on the application.

The OFR must also confirm that the name of the proposed company complies with naming requirements, that capital accounts of the proposed company conform to relevant law, that the fidelity bonds and errors and omissions insurance coverage required are issued and effective, and that the articles of incorporation or articles of organization conform to applicable law. If the OFR determines the application does not meet statutory criteria, it must issue a notice of intent to deny the application and offer the applicant an opportunity for an administrative hearing.⁷

Management of Family Trust Companies

Section 662.125, F.S., provides that the exclusive authority to manage a licensed family trust company is vested in a board of directors, if a corporation, or in a board of directors or managers, if a limited liability company. A licensed family trust company must have at least three directors or managers and at least one director or manager of the company must be a resident of this state.

Renewal of Licensure or Registration

Section 662.128, F.S., requires family trust companies, licensed family trust companies, and foreign licensed family trust companies to file renewal applications with the OFR within 30 days after the end of each calendar year.

⁷ See s. 662.1215(4), F.S.

Examinations and Investigations by the OFR

Section 662.141, F.S., provides that the office may conduct an examination or investigation of a family trust company, licensed family trust company, or foreign licensed family trust company at any time it deems necessary to determine whether a family trust company, licensed family trust company, or foreign licensed family trust company has violated or is about to violate any provision of ch. 662, F.S., any relevant administrative rules, or any applicable provision of the financial institution codes. Section 662.141(1), F.S., requires the office to conduct an examination of a licensed family trust company, family trust company, and foreign licensed family trust company at least once every 18 months. The office may accept an audit in lieu of conducting an entire examination in certain circumstances.⁸

There is concern among practitioners that the current regulatory scheme in ch. 662, F.S., does not allow licensed family trust companies to qualify for the “bank exemption” with the federal Securities and Exchange Commission because the existing state licensure and examination requirements may be insufficient.⁹ If these companies do not qualify for the “bank exemption,” they will be required to register as investment advisers with the United States Securities and Exchange Commission.¹⁰

Cease and Desist Authority

Section 662.143, F.S., gives the OFR the power to order a family trust company, licensed family trust company, or foreign licensed family trust company to cease and desist from engaging in specified activities or practices. If the OFR believes there could be a violation, it must give the entity notice of the violation and an opportunity for an administrative hearing.¹¹ One of the specific practices that the OFR can take action against is if it has reason to believe that a family trust company, licensed family trust company, or foreign licensed family trust company is engaging in or has engaged in an act of commission or omission or a practice that is a breach of trust or of fiduciary duty.

III. Effect of Proposed Changes:

General Responsibility and Authority of the Office of Financial Regulation

Section 1 clarifies that the OFR is responsible for the regulation, supervision, and examinations of licensed family trust companies but that the office’s role is limited to ensuring that services provided by unlicensed or foreign family trust companies are provided to family members and not to the general public.

Changes to Regulation of Licensed Family Trust Companies

Section 5 amends s. 662.1215, F.S., to add one additional piece of information that the office must verify when investigating a licensed family trust company’s initial application. The office

⁸ See s. 662.141(2), F.S.

⁹ See Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper on Proposed Changes to the Florida Family Trust Company Act* (on file with the Senate Committee on Judiciary).

¹⁰ *Id.*

¹¹ See s. 662.143(2), F.S.

must investigate and confirm that the company's management structure complies with the provisions of s. 662.125, F.S., which requires a family trust company or licensed family trust company to have at least three directors or managers and requires that at least one of those directors or managers be a Florida resident.

Section 11 amends s. 662.141, F.S., to provide that the office must conduct an examination of a licensed family trust company every 36 months instead of the current 18 months. The bill amends existing law and no longer allows an audit by a certified public accountant to substitute for an examination conducted by the office. This change to require examinations instead of audits may constitute sufficient state regulatory oversight to ensure that family trust companies qualify for the bank exemption from regulation from the Securities and Exchange Commission.¹²

Section 12 amends s. 662.142, F.S., to clarify that a licensed family trust company is entitled to an administrative hearing pursuant to ch. 120, F.S., to contest a license revocation.

Changes to Unlicensed Family Trust Companies

Section 6 provides that a family trust company application for registration must state that its operations will comply with s. 662.123(1), F.S., relating to requirements in organizational documents, and s. 662.124, F.S., relating to minimum capital account requirements.

Section 11 removes the requirement that the office conduct examinations of registered family trust companies. However, the OFR may conduct examinations of those entities at any time it deems necessary to verify compliance with s. 662.131, F.S., prohibited actions, or s. 662.134, F.S., unlawful advertising.

Other Provisions of the Bill

Section 2 makes a technical change to the definition of "officer."

Section 3 provides that the financial institutions codes do not apply to family trust companies, licensed family trust companies, or foreign family trust companies unless specifically made applicable by ch. 662, F.S., in order to make ch. 662, F.S., a stand-alone statute for family trust companies. It further provides that this does not limit the OFR's power to investigate any entity to determine compliance with ch. 662, F.S., or applicable provisions of the financial institutions codes.

Section 4 provides that the designated relatives in a licensed family trust company may not have a common ancestor within three generations instead of the current five generations.¹³ The purpose in reducing the scope of the definition from five to three generations is to aid families in identifying relatives.¹⁴ Most families are able to identify relatives over a three generation span, but it is more difficult to trace family members over a span of five generations.

¹² See Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 9.

¹³ "Designated relative" means a common ancestor of a family, who may be a living or deceased person, and who is so designated in the application for a license.

¹⁴ Email from Stephen Vogelsang, Esq., Member of the Real Property, Probate, and Trust Law Section of The Florida Bar, (Nov. 10, 2015) (on file with the Senate Committee on Judiciary).

Section 6 requires that an application for registration by a foreign licensed family trust company provide proof that the company is in compliance with the family trust company laws and regulations of its principal jurisdiction.

Section 7 requires a foreign licensed family trust company to be in compliance with the laws of its principal jurisdiction in order to operate in Florida. The bill requires all family trust companies in operation on October 1, 2016, to either apply for licensure as a licensed family trust company, register as a family trust company, register as a foreign licensed family trust company, or cease doing business in this state. The application or registration must be filed by December 30, 2016. This language, in substantially similar form, currently appears in existing s. 662.151, F.S. Section 17 of the bill removes the language from existing s. 662.151, F.S., and it is reinserted here, as part of s. 662.1225, F.S.

Section 8 requires amendments to certificates of formation or certificates of organization of a family trust company to be submitted to the OFR at least 30 days before they are filed or effective. It removes the requirement that proposed amendments to bylaws or articles of organization be submitted to the OFR.

Section 9 allows family trust companies, licensed family trust companies, and foreign licensed family trust companies to file annual renewal applications within 45 days of the end of each calendar year. Current law allows 30 days. This bill also requires the application for the renewal of a family trust company's registration to certify compliance with capital requirements and statutes relating to organizational documents.

Section 10 removes references to the term "affiliate" and replaces it with "parent" or "subsidiary company" in s. 662.132, F.S., to prevent confusion with the term "family affiliate" defined in s. 662.111, F.S. It also provides that a family trust company or licensed family trust company may purchase bonds and securities directly from broker-dealers when acting as a fiduciary.

Section 11 grants rulemaking authority to the Financial Services Commission to establish the requirements necessary to demonstrate conformity with ch. 662, F.S.

Section 13 allows the OFR to serve a complaint against a family trust company, licensed family trust company, or foreign licensed family trust company if a court has determined that there has been a breach of trust or fiduciary duty.

Section 14 provides a mechanism to reinstate the license or registration of a family trust company, licensed family trust company, or foreign licensed family trust company that was terminated for failure to timely file an annual renewal. The bill provides that a family trust company may have its license or registration automatically reinstated by submitting the renewal application, renewal fee, a \$500 late fee, and any fine imposed by the OFR. Fees and fines collected pursuant to this section will be deposited into the Financial Institutions' Regulatory Trust Fund to administer the chapter.

Sections 15 and 16 of this bill make technical changes.

Section 17 repeals s. 662.151(3), F.S., relating to licensure and registration. The bill transfers this provision of law to s. 662.1225, F.S.

Section 18 provides that the bill takes effect upon becoming law.

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:

The bill's proponents expect that, as a result of this legislation, high net worth families who are not located in Florida may select Florida as the jurisdiction to establish family trust companies.¹⁵

C. Government Sector Impact:

The OFR anticipates that the revenues from the late fees created by the bill will be \$1,500 to \$3,000 annually after the first year.¹⁶

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

¹⁵ See Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper on Proposed Changes to the Florida Family Trust Company Act* (on file with the Committee on Judiciary).

¹⁶ See SB 80 2016 Legislative Bill Analysis, Office of Financial Regulation.

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 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.
