

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: CS/SB 568

INTRODUCER: Banking and Insurance Committee and Senator Richter

SUBJECT: Family Trust Companies

DATE: March 30, 2015

REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 568 amends the Florida Family Trust Company Act. Chapter 662, F.S., 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., authorized 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:

- 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 does not allow an audit to substitute for an examination conducted by the office;
- Remove the requirement that the office conduct examinations of unlicensed family trust companies;
- Require that a court determine there has been a breach of fiduciary duty or trust before the Office of Financial Regulation (“OFR” or “the office”) may enter a cease and desist order;
- Require all family trust companies in operation on October 1, 2015, to 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, 2015.

- Make legislative findings that 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 such companies are provided only to family members and not to the general public;
- Require the management of a licensed family trust company to have at least three directors or managers and require that at least one of those directors or managers be a Florida resident;
- Provide that a family trust company registration application must state that trust operations will comply with statutory provisions relating to requirements in organizational documents and relating to minimum capital requirements;
- Provide 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;
- Require that a registration application for a foreign licensed family trust company must 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 OFR for review at least 30 days before it is filed or effective;
- Create a mechanism for the automatic reinstatement of lapsed licenses and registrations by payment of appropriate fees and any fines imposed by the OFR; and
- Allow family trust companies, licensed family trust companies, and foreign licensed family trust companies to file annual renewal applications within 45 days after the end of each calendar year.

II. Present Situation:

The Family Trust Company

A family trust company provides trust services to a group of related 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, and 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 takes effect on October 1, 2015.² At least 14 other states currently have statutes governing the organization and operation of family trust companies.

¹ Chapter 2014-97, Laws of Fla.

² *Id.*

Types of Family Trust Companies

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

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 ch. 662, F.S., and has been issued a license that has not been revoked or suspended by the OFR.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., provides that a family trust company and a licensed family trust company may, for its eligible members and individuals:

- Act as a sole or copersonal 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 cofiduciary and possess, purchase, sell, invest, reinvest, safekeep, 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.

³ Chapter 662, F.S., was created by 2014-97, L.O.F.

⁴ See s. 662.111(12), F.S.

⁵ See s. 662.111(16), F.S.

⁶ See s. 662.111(15), F.S.

- Perform all acts necessary for exercising these powers.

Capital Requirements

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

Licensed Family Trust Companies

Section 662.121, F.S., requires a company seeking 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 a 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 exclusive authority to manage a licensed family trust company is vested in a board of directors, if a corporation, or 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.

⁷ See s. 662.1215(4), F.S.

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.

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.⁹ If these companies do not qualify for the “bank exemption,” they will be required to register as investment advisers with the federal regulator.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:

Section 1 of this bill amends the findings of the Family Trust Company Act to clarify 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.

⁸ See s. 662.141(2), F.S.

⁹ 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).

¹⁰ *Id.*

¹¹ See s. 662.143(2), F.S.

Changes to Licensed Family Trust Companies

Section 5 of the bill amends s. 662.1215, F.S., to include within the OFR initial licensure investigation of an applicant seeking to be recognized as a licensed family trust company, verification that the management of a licensed family trust company complies with s. 662.125, F.S. That statute 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 of this bill 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 does not allow an audit to substitute for an examination conducted by the office.

Section 12 of this bill 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 of this bill provides that a family trust company registration application 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 requirements.

Section 11 of this bill removes the requirement that the office conduct examinations of unlicensed family trust companies. The OFR may conduct examinations of such entities at any time it deems necessary to determine whether the entities have engaged in activities prohibited by statute.

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 a stand-alone statute for family trust companies. It further provides that this does not limit the office’s power to investigate any entity to determine compliance with ch. 662 or applicable provisions of the financial institutions codes.

Section 4 of this bill provides that the designated relatives in licensed family trust company may not have a common ancestor within three generations instead of the current five generations.¹²

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

¹² “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.

Section 7 of this bill 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, 2015, 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, 2015.

Section 8 of this bill requires amendments to certificates of formation or certificates of organization to be submitted to the OFR at least 30 days before it is filed or effective. It removes the requirement that bylaws or articles of organization be submitted to this OFR.

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

Section 10 of the bill 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 13 of this bill 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 of this bill 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 of this bill 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 of this bill provides an effective date of October 1, 2015.

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:

Proponents of the bill 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 FTCs, which may benefit the investment, accounting, legal, and advisory support service professions.¹³

C. Government Sector Impact:

The OFR does not anticipate a fiscal impact on state government.¹⁴

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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, 662.145, 662.150, and 662.151.

This bill creates section 662.113 of the Florida Statutes.

¹³ Real Property, Probate, and Trust Law Section of the Florida Bar, *supra* note 9.

¹⁴ Office of Financial Regulation, *Senate Bill 568 Fiscal Analysis* (Feb. 27, 2015) (on file with the Senate Committee on Judiciary).

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 family trust companies operating on October 1, 2015, must apply for licensure or registration by December 30, 2015. It allows a family trust company or licensed family trust company to make purchases as a fiduciary directly from broker-dealers. The CS also expands the scope of examinations of licensed family trust companies and provides procedures for reinstatements of licenses or registrations.

- B. **Amendments:**

None.