

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 169 Fictitious Name Registration
SPONSOR(S): Commerce Committee, Careers & Competition Subcommittee, White
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 346

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Careers & Competition Subcommittee	14 Y, 0 N, As CS	Wright	Anstead
2) Commerce Committee	26 Y, 0 N, As CS	Wright	Hamon

SUMMARY ANALYSIS

The 'Fictitious Name Act,' s. 865.09, F.S., requires anyone doing business in Florida under a name other than the person's legal name to register the alternate name, or 'fictitious name,' with the Division of Corporations (Division) of the Department of State (Department).

The bill:

- negates the need for a sworn statement when registering a fictitious name;
- clarifies what documentation and information is needed from a registrant when registering a fictitious name;
- clarifies the process for cancellation of the registration;
- clarifies the time period for which a registration is valid;
- bars the renewal of a registration under certain conditions;
- adds an exemption from registration for limited liability companies if the company conducts business in a name that is licensed or registered;
- changes the penalty for failing to comply from a misdemeanor to a noncriminal violation;
- prohibits the use of certain words, abbreviations, and designations relating to limited partnerships, limited liability limited partnerships, limited liability partnerships, and limited liability companies in a fictitious name unless the registrant actually qualifies as that particular type of entity.

The bill does not appear to have a fiscal impact on state or local governments.

The bill has an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The 'Fictitious Name Act,' s. 865.09, F.S., requires anyone doing business in the state of Florida under a name other than the person's legal name to register the alternate name, or 'fictitious name,' with the Division.¹ This provides notice to anyone dealing with that business and identifies the real party in interest.²

Prior to 1990, fictitious names were registered with the clerk of the circuit court where the principal place of business was located. To preserve the name throughout the state, a user had to register in every county in the state. The registration now takes place with the Division, and thus provides statewide notice.³

Section 865.09(2)(a), F.S. defines 'fictitious name' as any name under which a person transacts business in this state, other than the person's legal name. 'Business' means any enterprise or venture in which a person sells, buys, exchanges, barter, deals, or represents the dealing in any thing or article of value, or renders services for compensation.

Current Situation

In order to operate a business in the state under a fictitious name, a sworn statement must be filed with the Division listing:

- the name to be registered;
- the mailing address of the business;
- the name and address of each owner;
- if a corporation, its federal employer's identification number (FEIN) and Florida incorporation or registration number;
- certification that the applicant has advertised an intent to register the fictitious name in a newspaper located in the county of primary business;
- and any other information deemed necessary.⁴

The Division charges a \$50 fee for registration of a fictitious name, a \$50 fee for cancellation and reregistration of a fictitious name, a \$50 fee for renewal of a fictitious name, and a \$30 fee for furnishing a certified copy of a fictitious name document.⁵ All funds collected by the Department are deposited into the General Revenue Fund.⁶

A fictitious name registered with the Division is valid for 5 years, expiring on December 31 of the 5th year. A fictitious name renewal must occur on or after January 1 and on or before December 31 of the expiration year, and, upon timely renewal, is in effect for another 5 years. If the registrant fails to timely renew the fictitious name, it expires and the Division removes the fictitious name from the Division's records. The Division must notify the owner of the expiration of the registered name during the last year of the registration, but failure to receive the notification does not constitute grounds to appeal the expiration or removal.⁷

¹ s. 865.09(3)(a), F.S.

² *Jackson v. Jones*, 423 So. 2d 972, 973 (Fla. 4th DCA 1982).

³ Michael W. Gordon, *Florida Corporations Manual*, Ch. 6 § 19.1 (2016).

⁴ s. 865.09(3), F.S.

⁵ s. 865.09(12), F.S.

⁶ s. 865.09(13), F.S.

⁷ s. 865.09(5), F.S.

A business formed by an active Florida-licensed attorney, by an active licensee of either the Department of Business and Professional Regulation or the Department of Health, or by any corporation, partnership, or other commercial entity that is actively organized or registered with the Department is not required to register a fictitious name, unless business is being conducted under a different name than is licensed or registered.⁸

If there is a change of ownership of a registered business, the owner of record must file a cancellation and any applicable reregistration within 30 days.⁹

A fictitious name registered with this section is for public notice only. There is no presumption of the registrant's rights to own or use the name registered, nor does it affect trademark, service mark, trade name, or corporate name rights previously acquired by others in the same or a similar name. Registration under this section does not reserve a fictitious name against future use.¹⁰

A business and its members may not pursue any action, suit, or proceeding concerning such business until properly registered. A party harmed by a noncomplying business may be awarded attorney fees and court costs. Any person who fails to comply with this section commits a second-degree misdemeanor.¹¹

A registered fictitious name may not contain the words 'corporation,' 'incorporated,' 'Corp,' or 'Inc.' unless the registered person or business is incorporated or has obtained a certificate of authority pursuant to part I of chapter 607 or chapter 617, F.S.¹² Currently, there is no similar prohibition on words associated with limited partnerships, limited liability limited partnerships, limited liability partnerships, or limited liability companies.

Effect of Proposed Changes

The bill adds a definition for 'registrant,' which means a person who registers a fictitious name with the Division. Throughout the bill, this term generally replaces 'applicant,' 'owner,' and 'person' to provide consistency in terminology and clarify that information needed relates to a registrant of a fictitious name.

The bill replaces 'sworn statement' with 'registration,' negating the need for a notarized document for registration and provides that any additional registration information required by the Division must be reasonable.

The bill clarifies what is needed of a business entity to apply for a fictitious name. If the entity was required to file incorporation or similar documents upon organization, the entity must be registered with the Division, have an active status with the Division, and provide its FEIN, if applicable.

The bill clarifies the identity of the registrant if the registrant is a general partnership. When a general partnership which is not registered with the Division registers a fictitious name, its partners are the registrants, and not the partnership entity. When a general partnership that is registered with the Division registers a fictitious name, the partnership is the registrant. A registered general partnership must be in active status with the Division at the time the name is registered

The bill clarifies the time periods for which fictitious name registrations are valid. Instead of stating a blanket 5 year term of validation for all registrations, the amendment bifurcates the terms for initial registration and renewal of registration. An initial registration will be valid from the date of registration to

⁸ s. 865.09(7), F.S.

⁹ s. 865.09(4), F.S.

¹⁰ s. 865.09(8), F.S.

¹¹ s. 865.09(9), F.S.

¹² s. 865.09(14), F.S.

December 31 on the 5th calendar year. A renewal of registration will be valid for a period of 5 years, beginning January 1 of the year following the prior registration expiration date to December 31 of the 5th calendar year. The bill requires the Division to notify a registrant of an upcoming fictitious name expiration by September 1 of that year. The Division must only notify one of the partners of a general partnership where the partners are the registrants of the fictitious name.

The bill adds an exemption for active status limited liability companies. Like corporations, limited liability companies will not be required to register with the Division if they conduct business in the name that is licensed or registered. In addition, the bill prohibits certain words, abbreviations, or designations related to limited partnerships, limited liability limited partnerships, limited liability partnerships, limited liability companies, professional associations, and professional limited liability companies unless the person or business for which the name is registered is actually that particular type of entity. The bill also requires the Division to bar the renewal of a registered fictitious name if the name contains the same words, abbreviations, or designations relating to the same types of business entities unless the registrant is the particular entity at the time of renewal.

The bill clarifies what documentation a registrant who ceases to engage in business under the registered fictitious name must file with the Division and that a cancelation must be filed within 30 days of cessation of use. If the cessation is in connection with a transfer of the fictitious name, the transferee may reregister the name at the same time the cancelation is filed. The bill clarifies that cancellation is a separate fee from cancelation paired with reregistration of the fictitious name. Both options are the same fee amount.

The bill clarifies who is subject to any penalties for failing to comply with this section. It specifies that unless this section is complied with, neither the business nor the person(s) engaging in the business may maintain any action, suit, or proceeding in any court of this state with respect to or on behalf of such business.

The bill also removes language that deems a violation of this section to be a misdemeanor of the second degree. Instead, failure to comply with this section will be a noncriminal violation as defined by s. 775.08, F.S.

The bill has an effective date of July 1, 2017.

B. SECTION DIRECTORY:

Section 1 Amends s. 865.09, F.S., relating to definitions, registration requirements, expiration, prohibitions, renewal, and penalties.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

II. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 8, 2017, the Careers and Competition Subcommittee adopted a strike-all amendment and reported the bill favorably as a subcommittee substitute. The amendment adds the following to the original bill:

- Provides that any additional registration information required by the Division must be reasonable.
- Gives a date by which the Division must notify a registrant of an upcoming expiration.
- Prohibits the use of certain words, abbreviations, and designations relating to professional associations and professional limited liability companies in a fictitious name unless the registrant actually qualifies as that particular type of entity.

On March 9, 2017, the Commerce Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment adds the following to the bill:

- Clarifies that when a general partnership which is not registered with the Division registers a fictitious name, its partners are the registrants, and not the partnership entity. When a general partnership that is registered with the Division registers a fictitious name, the partnership is the registrant; a registered general partnership must be in active status with the Division at the time the name is registered.
- Permits the transferee of a general partnership interest to reregister the fictitious name at the same time the transferor's fictitious name cancellation is filed.
- Requires the Division to only notify one of the partners of a general partnership where the partners are the registrants of an upcoming expiration of a fictitious name registration.

This analysis is drafted to the committee substitute as passed by the Commerce Committee.