

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 573 Fiduciary Duty of Care for Appointed Public Officials and Executive Officers

**SPONSOR(S):** Public Integrity & Elections Committee, Beltran

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 758

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Public Integrity & Elections Committee	13 Y, 1 N, As CS	Rubottom	Rubottom
2) State Administration & Technology Appropriations Subcommittee			
3) State Affairs Committee			

### SUMMARY ANALYSIS

The bill establishes fiduciary duty of care standards applicable to 'appointed public officials' and 'executive officers'. According to the bill's legislative findings and purpose, codifying a fiduciary duty of care will require appointed public officials and executive officers stay adequately informed of affairs, perform due diligence, perform reasonable oversight, and practice fiscal responsibility regarding decisions involving corporate and proprietary commitments on behalf of a governmental entity.

Beginning January 1, 2022, the bill also requires certain appointed public officials and executive officers to complete a minimum of five hours of board governance training within 180 days of appointment. Those appointed prior to January 1, 2022, must complete such training by December 31, 2022. The bill specifies minimum content for the required training and specifies categories of authorized training providers.

The bill requires a certification by each trained official and officer acknowledging training, familiarity with governing laws and policies and a commitment to uphold such laws and policies and faithfully discharge the fiduciary duties imposed by the bill.

The bill contains exceptions to the training and certification requirement for appointed public and officials and executive officers:

- Of governmental entities whose annual revenues are less than \$100,000;
- Who hold elected office in another capacity;
- Who are graduates of an accredited law school and are members in good standing of the Florida Bar;
- Who are certified public accountants licensed under Florida's Public Accountancy laws;
- Who hold a master's degree in business administration from an accredited college or university;
- Who have at least 3 years of service on the board of a publicly traded corporation;
- Who are subject to licensure or registration by the federal Securities and Exchange Commission.

The bill mandates the appointment of an executive officer or general counsel be subject to approval by a majority vote of the governing body of the governmental entity. The bill requires all legal counsel and lobbyists employed by a governmental entity to represent the legal interest of the governmental entity's governing board and not the interest of any individual or employee.

The bill will have an indeterminate fiscal impact on governmental entities, which must provide or contract for a board governance training program that meets the bill's requirements.

The bill is effective July 1, 2021.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### *Current Situation*

##### Fiduciary Duties Generally

The Florida Business Corporation Act (Act) imposes certain duties on members and officers of corporate boards, such as a duty to act in good faith and in a manner reasonably believed to be in the best interest of the corporation.<sup>1</sup> In discharging their duties, the Act generally requires corporate board members to exercise the care that an ordinary prudent person in a like position would reasonably believe appropriate under similar circumstances.<sup>2</sup> In taking such actions, the Act allows corporate board members to rely on reliable and competent corporate employees and/or legal counsel or financial or accounting-type employees, to supply information, opinions, reports, statements, or other financial data to assist their decisionmaking.<sup>3</sup> Among other duties, the Act imposes on corporate officers certain duties to the board, such as, but not limited to, the duty to inform of actual or material violations of law involving the board, material breaches of duty to the corporation by an officer, employee, or agent, or other material information about corporate affairs.<sup>4</sup> In carrying out these duties, the Act also allows corporate officers to rely on reliable and competent employees and/or legal counsel.<sup>5</sup>

In some cases, a corporate board member may be legally liable for a breach of their board duty. Generally, the Act provides a board member is not personally liable for monetary damages to the corporation or any other person for action or non-action as a board member, unless, among other things, their breach or failure to perform their duties violates criminal laws, they derive an improper personal benefit, or their behavior displays conscious disregard for the best interest of the corporation, willful or intentional misconduct, recklessness, bad faith, malicious purpose, or wanton and willful disregard of human rights, safety, or property.<sup>6</sup> This standard is similar to a Florida law that shields officers, employees, or agents of the state or any political subdivision from personal liability unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.<sup>7</sup>

Generally, a relationship in which one person is under a duty to act in accordance with the above, is referred to as a fiduciary relationship, and duty is referred to as a fiduciary duty.

A number of particular provisions of Florida law impose a fiduciary duty on certain appointees to public boards. Most of those provisions apply to individuals responsible for the administration of public employee retirement or pension plans and those who sit on specific boards that have the authority to spend large amounts of public money. For example, the 'Florida Protection of Public Employee Retirement Benefits Act' requires a fiduciary to discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan.<sup>8</sup>

Florida law requires the Board of Governors of the State University System (BOG) to develop and annually deliver a training program for members of each state university board of trustees that addresses the role of such boards in governing institutional resources and protecting the public interest and, among other things, must include information on trustee responsibilities relating to meeting the

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<sup>1</sup> SS. 607.0830(1) and 607.08411(1), F.S.

<sup>2</sup> S. 6070830(2), F.S.

<sup>3</sup> S. 607.0830(3) – (5), F.S.

<sup>4</sup> S. 607.08411(3), F.S.

<sup>5</sup> S. 607.08411(6), F.S.

<sup>6</sup> S. 607.0831(1), F.S.

<sup>7</sup> S. 768.28(9)(a), F.S.

<sup>8</sup> S. 112.656, F.S.

statutory, regulatory, and fiduciary obligations of the board.<sup>9</sup> Additionally, statutes impose on members of particular other boards including Triumph Gulf Coast<sup>10</sup> and Florida Is For Veterans<sup>11</sup> a fiduciary duty either to the board or to the people of the of Florida.

However, there does not appear to be a provision of Florida law that imposes a fiduciary duty of care on appointed board members or executive officers as a class.

### Ethical Standards Applicable to Board Appointees and Executive Officers

Florida's Code of Ethics for Public Officers and Employees (Code) is set forth in part III, chapter 112, F.S. Foremost among the goals of the Code is to promote the public interest and maintain the respect of the people for their government. The Code is also intended to ensure that public officials conduct themselves independently and impartially, not using their offices for private gain other than compensation provided by law.<sup>12</sup>

The Code contains provisions that establish standards for the conduct of elected and appointed officials and government employees including, but not limited to, the following:

- Prohibited actions or conduct – including prohibitions on the solicitation or acceptance of gifts, unauthorized compensation, misuse of public position, disclosure or use of certain information, and solicitation or acceptance of honoraria;
- Prohibited employment and business relationships – including prohibitions on dual public employment, doing business with one's agency, as well as conflicting employment or contractual relationships;
- Misuse of public position;
- Anti-nepotism;
- Post-office holding/post-employment restrictions;
- Voting conflicts of interest;
- Financial disclosure; and
- Ethics training.

With respect to ethics training, the Code requires 'constitutional officers,'<sup>13</sup> elected municipal officers, and community redevelopment agency commissioners to complete four hours of ethics training on an annual basis.<sup>14</sup> The required ethics training must include instruction on s. 8, Art. II of the Florida Constitution, the Code of Ethics for Public Officers and Employees, and the public records and public meetings laws. This requirement may be met by attending a continuing legal education class or other continuing professional education class, seminar, or presentation if the required subjects are covered.

As a class of officers, the Code does not require appointed public officers or executive officers to receive annual ethics training; however, Florida law does not preclude such individuals from receiving ethics training from the board's or governmental entity's legal counsel.

### Government Legal Representation

Florida law authorizes the state and local governments to provide legal representation for officers and employees. Specifically, s. 111.07, F.S., authorizes "any agency of the state, or any county,

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<sup>9</sup> S. 1001.706(3)(j), F.S. The statute does not specify what actual fiduciary obligations exist. This may be an example of moral training rather than imposing any legal obligation.

<sup>10</sup> S. 288.8014(6), F.S.

<sup>11</sup> S. 295.21(4)(f), F.S.

<sup>12</sup> S. 112.311(1), F.S.

<sup>13</sup> Per s. 112.3142(1), F.S., the term "constitutional officer" is defined as the Governor, the Lieutenant Governor, the Attorney General, the Chief Financial Officer, the Commissioner of Agriculture, state attorneys, public defenders, sheriffs, tax collectors, property appraisers, supervisors of elections, clerks of the circuit court, county commissioners, district school board members, and superintendents of schools.

<sup>14</sup> S. 112.3142, F.S.

municipality, or political subdivision of the state, is authorized to provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents for an act or omission arising out of and in the scope of his or her employment or function, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

### *Effect of Proposed Changes*

The bill establishes fiduciary duty of care standards applicable to ‘executive officers’ and ‘appointed public officials’ of ‘governmental entities’. The bill defines the term, ‘governmental entity’ to mean the entity, or a board, a council, a commission, an authority, or other body thereof, to which an appointed public official or an executive officer is appointed or hired. Pursuant to the bill, the term, ‘executive officer’ means the chief executive officer of a governmental entity and the term, ‘appointed public official’ includes certain ‘local officers’ and ‘state officers’ that must file a Statement of Financial Interest, otherwise known as a FORM 1 under the Code, excepting certain local boards and commissions<sup>15</sup> that do not spend significant funds and pension and retirement boards<sup>16</sup> already under significant fiduciary duties. Specifically, an appointed public official would include any of the following individuals:

- **Local Officers**<sup>17</sup>:
  - Any appointed member of any of the following boards, councils, commissions, authorities, or other bodies of any county, municipality, school district, independent special district, or other political subdivision of the state:
    - The governing body of the political subdivision, if appointed;
    - A community college or junior college district board of trustees;
    - A board having the power to enforce local code provisions;
    - A planning or zoning board, board of adjustment, board of appeals, community redevelopment agency board, or other board having the power to recommend, create, or modify land planning or zoning within the political subdivision, except for citizen advisory committees, technical coordinating committees, and such other groups who only have the power to make recommendations to planning or zoning boards;
    - A pension board or retirement board having the power to invest pension or retirement funds or the power to make a binding determination of one’s entitlement to or amount of a pension or other retirement benefit; or
    - Any other appointed member of a local government board who is required to file a statement of financial interests by the appointing authority or the enabling legislation, ordinance, or resolution creating the board.
- **State Officer**<sup>18</sup>:
  - An appointed member of each board, commission, authority, or council having statewide jurisdiction, excluding a member of an advisory body.
  - A member of the Board of Governors of the State University System or a state university board of trustees, the Chancellor and Vice Chancellors of the State University System, and the president of a state university.

The bill provides for six fiduciary duties, which are the following:

- Act in accordance with the laws, ordinances, rules, policies, and terms governing his or her office or employment;
- Act with the care, competence, and diligence normally exercised by private business professionals in similar corporate and proprietary circumstances;

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<sup>15</sup> S. 112.3145(1)(a)2.c.-d., F.S.

<sup>16</sup> S. 112.3145(1)(a)2.e., F.S.

<sup>17</sup> Approximately 15,195 individuals are included in this category.

<sup>18</sup> Approximately 1,590 individuals are included in this category.

- Act only within the scope of his or her authority;
- Refrain from conduct that is likely to damage the financial or economic interests of the governmental entity;
- Use reasonable efforts to maintain public records in accordance with applicable laws;
- Maintain reasonable oversight of any delegated authority and discharge his or her duties with the care that a reasonably prudent person in a like private business position would believe appropriate under the circumstances, and
- Obtain sufficient information about decisionmaking functions, affairs and performance of the governmental entity's officers, agents and employees.

It is unclear whether failure to meet one or more of these fiduciary duties would subject an appointed public official or executive officer to legal liability. Further, it is unclear what impact exposure, or the risk of exposure to, potential legal liability will have on one's willingness to serve as an appointed public official or executive officer. However, Florida law shields officers, employees, or agents of the state or any political subdivision from personal liability unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.<sup>19</sup> Standing may also be an issue in any suit alleging a board member or executive officer has breached his or her fiduciary duty as Florida case law suggests that, absent a constitutional challenge, a taxpayer would need to show a special injury distinct from that suffered by any other taxpayer to challenge successfully a public board's decision.<sup>20</sup>

Beginning January 1, 2022, the bill requires appointed public officials and executive officers to complete a minimum of five hours of board governance training within 180 days of appointment. Individuals serving in these positions as of December 31, 2021, must complete the training before December 31, 2022. Those who begin their terms after January 1, 2022, must complete the training within 180 days after they begin service.

The bill sets the minimum content requirements for the training. The bill requires that training be provided by a Florida College System institution, a state university, an accredited law school, or a nationally recognized entity specializing in board governance education. However, the bill allows governmental entities with annual revenue between \$100,000 - \$300,000 to have the training provided through in-house legal counsel or by the unit of government that created the entity.

Within 30 days after completion of the required training, the bill requires each appointed public official and executive officer to certify under oath, in writing or electronic form, to the Commission on Ethics that he or she has:

- Completed the required training;
- Read the laws and policies applicable to his or her position;
- Will work to uphold such laws and policies to the best of his or her ability; and
- Will faithfully discharge his or her fiduciary responsibility.

The bill provides that the required certification, and the absence of such certification,

The bill contains significant exceptions to the training and certification requirements:

- Appointed public officials and executive officers of governmental entities whose annual revenues are less than \$100,000
- Appointed public officials who hold elected office in another capacity;

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<sup>19</sup> S. 768.28(9)(a), F.S.

<sup>20</sup> *Dep't of Rev. v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981); see also *Rickman v. Whitehurst*, 74 So. 205, 207 (Fla. 1917) (Generally, for a taxpayer to have standing to challenge a government's compliance with the law, the taxpayer must establish a "special damage to his individual interests, distinct from that of every other inhabitant"); *School Bd. of Volusia Co. v. Clayton*, 691 So. 2d 1066, 1068 (Fla. 1997) (requirement of special injury for taxpayer standing is "consistent with long established precedent").

- Appointed public officials who are graduates of an accredited law school and are members in good standing of the Florida Bar;
- Appointed public officials who are certified public accountants licensed under Florida's Public Accountancy laws;
- Appointed public officials who hold a master's degree in business administration from an accredited college or university;
- Appointed public officials who have at least 3 years of service on the board of a publicly traded corporation;
- Appointed public officials who are subject to licensure or registration by the federal Securities and Exchange Commission.

The bill mandates the appointment of an executive officer or general counsel (in-house or outside) be subject to approval by a two-thirds vote of the governing body of the governmental entity. The bill further requires all legal counsel and lobbyists employed by a governmental entity represent the legal interest and position of the governmental entity's governing board and not the interest of any individual or employee.

The bill is effective July 1, 2021.

#### B. SECTION DIRECTORY:

**Section 1** Creates part IX of Chapter 112, Florida Statutes, entitled "Fiduciary Duty of Care" and creates s. 112.91, Florida Statutes, providing legislative findings and purpose, definitions, training relating to fiduciary duty of care applicable to 'appointed officers' and 'executive officers' of government entities, exceptions, requirements for employment of an executive officer, general counsel, auditors or accounting firms and standards for legal counsel and lobbyists.

**Section 2** provides an effective date of July 1, 2021.

### II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

The bill may have an indeterminate fiscal impact on state government. Expenditures will be required of state governmental entities provision of required training. However, cooperation between agencies and revision of existing training programs may minimize such costs.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

The bill may have an indeterminate fiscal impact on local government. Expenditures will be required of state governmental entities provision of required training. However, cooperation between entities and revision of existing training programs may minimize such costs.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill may implicate the provisions of Art. VII, s. 18. Article VII, s. 18 provides local governments are not bound by general laws requiring them to spend funds or take action requiring the expenditure of funds unless certain specified exemptions or exceptions are met.

Pursuant to the bill's provisions, local governments may face costs related to mandated board governance training. However, general laws having an insignificant fiscal impact are exempt from Article VII, s. 18. The fiscal impact to local governments is indeterminate. If the bill's fiscal impact is not insignificant, the bill's provisions may still bind local governments if the bill contains a finding of important state interest and applies to local and state governmental entities or is enacted by 2/3s of the membership of each house.

2. Other:

The exemptions from the training and certification requirements may raise equal protection questions, but the standard applicable should be rational basis and most if not all exempt categories appear to have a clear rational basis.

B. RULE-MAKING AUTHORITY:

N/A

C. DRAFTING ISSUES OR OTHER COMMENTS:

While the bill defines the term, 'executive officer' to mean the chief executive officer of a governmental entity, the scope of the term's applicability is unclear. For example, it is unclear whether the term covers an executive director of an executive branch department headed by a board or by the Governor and Cabinet.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 18, 2021, the Public Integrity & Elections Committee adopted two amendments and proceeded to pass the bill as a committee substitute.

The first amendment narrowed the local government entities affected by the training requirement, removing a number of local boards and commissions that do not exercising significant spending powers<sup>21</sup> and pension boards and retirement boards<sup>22</sup> which are currently under strict fiduciary duties. The second amendment provided for the bill's certifications to be filed with the Commission on Ethics rather than the Department of State, to be consistent with other ethics filings of the affected officers.

This staff analysis is drafted to the Committee Substitute.

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<sup>21</sup> S. 112.3145(1)(a)2.c.-d., F.S.

<sup>22</sup> S. 112.3145(1)(a)2.e. F.S.