

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 573 Fiduciary Duty of Care for Appointed Public Officials and Executive Officers
SPONSOR(S): State Affairs Committee, Public Integrity & Elections Committee, Beltran and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/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	12 Y, 0 N	Helpling	Topp
3) State Affairs Committee	21 Y, 0 N, As CS	Toliver	Williamson

SUMMARY ANALYSIS

The Florida Business Corporation 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. In discharging their duties, corporate board members are required to exercise the care that an ordinary prudent person in a like position would reasonably believe appropriate under similar circumstances.

Florida's Code of Ethics for Public Officers and Employees (Code) is intended to promote the public interest and to 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. The Code contains provisions that establish standards for the conduct of elected and appointed officials and government employees and requires constitutional officers, elected municipal officers, and community redevelopment agency commissioners to complete four hours of ethics training on an annual basis.

The bill establishes fiduciary duty of care standards applicable to appointed public officials and executive officers. 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. The bill specifies content for the required training and categories of authorized training providers.

The bill mandates the appointment of an executive officer or general counsel be subject to approval by a two-thirds 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 requires the governing body of a governmental entity to determine, on the record at a properly noticed meeting, whether the entity should obtain an outside opinion for any measure that will require the entity to make any of the following expenditures:

- An amount in excess of \$1 million in any fiscal year;
- An amount in excess of \$5 million in the aggregate; or
- An amount in excess of \$250,000 in total annual compensation.

Lastly, the bill specifies that nothing in the bill can be construed to create a private cause of action against an executive officer, appointed public official, or governmental entity.

The bill may have an indeterminate, but likely insignificant negative fiscal impact on state and local entities to provide or contract for a board governance training program.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Fiduciary Duties Generally

A fiduciary is a person who is required to act for the benefit of another person on all matters within the scope of their relationship or a person who exercises a high standard of care in managing another's money or property. The Florida Business Corporation Act (Act)¹ 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.² 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.³ In taking such actions, the Act allows corporate board members to rely on reliable and competent corporate employees, legal counsel, or public accountants, or other persons retained by the corporation with relevant skills or expertise, to supply information, opinions, reports, statements, or other financial data to assist their decisionmaking.⁴ Among other duties, the Act imposes on corporate officers certain duties to the board, such as 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.⁵

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.⁶ 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.⁷

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,⁸ and the responsibility 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

¹ See s. 607.0101(1), F.S.

² Ss. 607.0830(1) and 607.08411(1), F.S.

³ S. 607.0830(2), F.S.

⁴ S. 607.0830(3) – (5), F.S.

⁵ S. 607.08411(3), F.S.

⁶ S. 607.0831(1), F.S.

⁷ See s. 768.28(9)(a), F.S.

⁸ A "fiduciary relationship" is a relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship. Fiduciary relationships – such as trustee-beneficiary, guardian-ward, principal-agent, and attorney-client – require an unusually high degree of care. *Blacks Law Dictionary*, 1098 (9th ed. abr. 2010).

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.⁹

Another example of a fiduciary relationship is between the Board of Governors (BOG) and state universities. Florida law requires the 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 statutory, regulatory, and fiduciary obligations of the board.¹⁰ Additionally, statutes impose on members of other boards including Triumph Gulf Coast¹¹ and Florida Is For Veterans,¹² a fiduciary duty either to the board or to the people 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.¹³

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,¹⁴ elected municipal officers, and community redevelopment agency commissioners to complete four hours of ethics training on an annual basis.¹⁵ 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

⁹ S. 112.656, F.S.

¹⁰ 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.

¹¹ S. 288.8014(6), F.S.

¹² S. 295.21(4)(f), F.S.

¹³ S. 112.311(1), F.S.

¹⁴ The term "constitutional officer" means 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. Section 112.3142(1), F.S.

¹⁵ S. 112.3142, F.S.

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, municipality, or political subdivision of the state, 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 officers¹⁶ and appointed public officials of governmental entities.¹⁷ Pursuant to the bill, 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 commissions¹⁸ that do not spend significant funds and pension and retirement boards¹⁹ already under significant fiduciary duties. Specifically, an appointed public official would include any of the following individuals:

- Local Officers:²⁰
 - 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

¹⁶ The bill defines the term "executive officer" to mean the chief executive officer of a governmental entity.

¹⁷ 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

¹⁸ S. 112.3145(1)(a)2.c.-d., F.S.

¹⁹ S. 112.3145(1)(a)2.e., F.S.

²⁰ Approximately 15,195 individuals are included in this category.

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:²¹
 - 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 the following six fiduciary duties:

- Acting in accordance with the laws, ordinances, rules, policies, and terms governing his or her office or employment;
- Acting with the care, competence, and diligence normally exercised by private business professionals in similar corporate and proprietary circumstances;
- Acting only within the scope of his or her authority;
- Refraining from conduct that is likely to damage the financial or economic interests of the governmental entity;
- Using reasonable efforts to maintain public records in accordance with applicable laws;
- Maintaining 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
- Obtaining sufficient information about decisionmaking functions, affairs, and performance of the governmental entity's officers, agents and employees.

The bill requires governmental entities to provide appointed public officials and executive officers the opportunity to complete five hours of board governance training. The governmental entity must give those individuals notice that the training is available within 30 days of appointment, reappointment, hiring, or any contract entered into or renewed on or after July 1, 2021. If an appointed public official or executive officer requests board governance training the governmental entity must provide the training within 180 days after such request.

The bill sets the minimum content requirements for the training and specifies that training may 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 less than \$1 million to have the training provided through in-house legal counsel or by the unit of government that created the entity.

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 requires the governing body of a governmental entity to determine, on the record at a properly noticed meeting, whether the entity should obtain an outside opinion for any measure that will require the governmental entity to make any of the following expenditures:

- An amount in excess of \$1 million in any fiscal year;
- An amount in excess of \$5 million in the aggregate; or

²¹ Approximately 1,590 individuals are included in this category.

- An amount in excess of \$250,000 in total annual compensation.

Lastly, the bill specifies that nothing in the bill can be construed to create a private cause of action against an executive officer, an appointed public official, or a governmental entity.

B. SECTION DIRECTORY:

Section 1. Creates part IX of ch. 112, F.S., entitled “Fiduciary Duty of Care” and creates s. 112.91, Florida Statutes, relating to the fiduciary duty of care for appointed public officials and executive officers.

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, but likely insignificant, fiscal impact on state government to provide or contract for the 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, but likely insignificant, fiscal impact on local government to provide or contract for the 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 county/municipality mandates provision of Art. VII, s. 18 of the Florida Constitution may apply because this bill requires local governments to spend funds to provide state mandated board governance training. However, general laws having an insignificant fiscal impact are exempt from Art. VII, s. 18. The fiscal impact to local governments is indeterminate, but likely insignificant.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

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.

It is unclear whether failure to meet one or more of the fiduciary duties outlined in the bill 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.²² 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.²³ In addition, it is unclear if a governmental entity can contract with any suitable provider or whether the bill limits such entities to contracting with a Florida College System institution, a state university, an accredited law school, or a nationally recognized entity.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 18, 2021, the Public Integrity & Elections Committee adopted two amendments and reported the bill favorably 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 exercise significant spending powers²⁴ and pension boards and retirement boards,²⁵ 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.

On April 19, 2021, the State Affairs Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment:

- Removed the requirement that certain appointed public officials and executive officers complete board governance training and made board governance training voluntary.
- Required the governmental entity to notify an appointed public official or executive officer of the opportunity for board governance training within 30 days of the initial appointment, reappointment, hiring, or any new or extended contract.
- Increased the threshold at which board governance training may be provided by in-house counsel from \$300,000 to \$1 million.
- Required the governing body of a governmental entity to determine whether the entity should obtain an outside opinion for any measure that will require an expenditure of an amount in excess of \$1 million in any fiscal year, an amount in excess of \$5 million in the aggregate, or an amount in excess of \$250,000 in total annual compensation.

²² S. 768.28(9)(a), F.S.

²³ *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”).

²⁴ S. 112.3145(1)(a)2.c.-d., F.S.

²⁵ S. 112.3145(1)(a)2.e. F.S.

- Removed a provision that permitted certification that an appointed public official or executive officer completed board governance training, or the failure to obtain such a certification, was admissible in evidence in a civil action.
- Specified that nothing in the bill can be construed to create a private cause of action against an executive officer, appointed public official, or governmental entity.

This staff analysis is drafted to the committee substitute as approved by the State Affairs Committee.