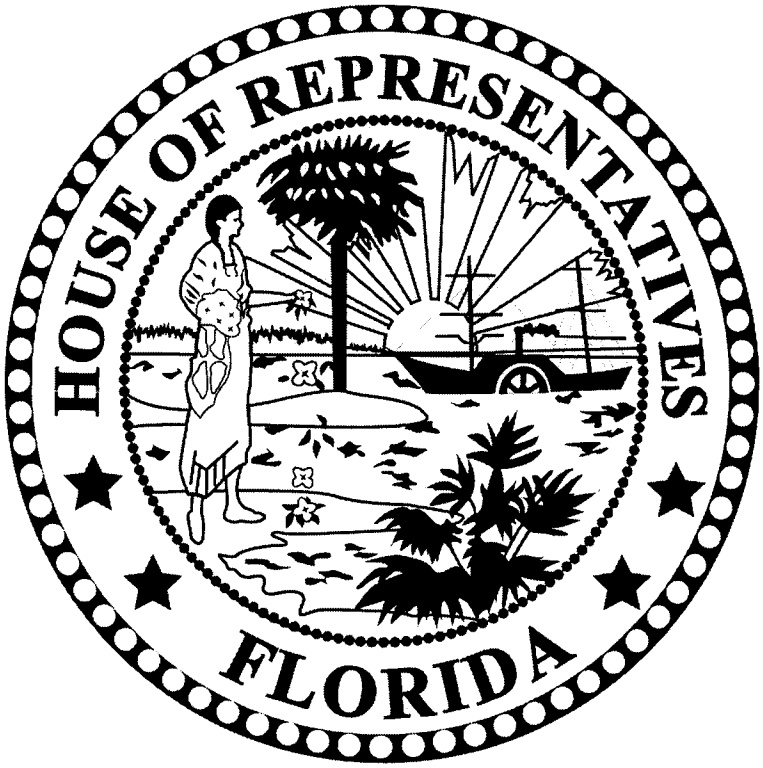

Economic Development, Trade & Banking Committee

Thursday, March 9, 2006
2:00 pm – 3:00 pm
306 HOB

Allan G. Bense
Speaker

Gus Bilirakis
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Economic Development, Trade & Banking Committee

Start Date and Time:	Thursday, March 09, 2006 02:00 pm
End Date and Time:	Thursday, March 09, 2006 03:00 pm
Location:	306 HOB
Duration:	1.00 hrs

Consideration of the following bill(s):

HB 425 CS Florida Trust Code by Mahon
HB 593 Educational Loan Marketing by Coley
HB 821 Homeownership Assistance Contribution Tax Credit Program by Goodlette

Consideration of the following proposed committee bill(s):

PCB EDTB 06-02 -- Financial Entities Licensing
PCB EDTB 06-04 -- Registration & Protection of Trademarks Act

According to rule 7.22(c), non-appointed members must file amendments by 5 p.m., Wednesday, March 9, 2006. The Chairman requests that committee member amendments also be filed by 5 p.m., Wednesday, March 9, 2006.

NOTICE FINALIZED on 03/07/2006 11:40 by GOLDING.SARA

The Florida House of Representatives

Commerce Council

Economic Development, Trade & Banking Committee

Allan G. Bense
Speaker

Gus Michael Bilirakis
Chair

Agenda
March 9, 2006

I. Roll Call

II. Welcome and Opening Remarks

III. Consideration of the following bills :

HB 425 – Florida Trust Code
by Representative Mahon
HB 593 – Educational Loan Marketing
by: Representative Coley
HB 821 – Homeownership Assistance Contribution Tax Credit Program
by: Representative Goodlette

IV. Proposed Committee Bills:
PCB EDTB 06-02 – Financial Entities Licensing
PCB EDTB 06-04 – Registration & Protection of Trademarks Act

V. Adjourn

308 House Office Building, 402 South Monroe Street, Tallahassee, Florida 32399-1300
(850) 414-9782

HB 425
Mahon

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 425 CS Florida Trust Code
SPONSOR(S): Mahon; Stargel
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1170

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	7 Y, 0 N, w/CS	Shaddock	Bond
2) Elder & Long-Term Care Committee	8 Y, 0 N	Walsh	Walsh
3) Economic Development, Trade & Banking Committee		Olmedillo	Carlson
4) Justice Council			
5)			

SUMMARY ANALYSIS

The Trust Code is that portion of the Florida Statutes which pertains to the administration of trusts. Committee Substitute for HB 425 repeals Chapter 737, F.S., and creates Chapter 736, F.S., a comprehensive new trust code loosely modeled on the Uniform Trust Code of 2000, with a number of changes that center primarily on updating current Florida law. The CS includes the requirements for trust creation, the treatment of revocable trusts, and the rights of creditors within this new Trust Code. Some current provisions of the trust code -- in particular, those dealing with representation and with trust modification, termination and reformation -- are updated and expanded.

The CS proposes significant changes to current law including:

- A lower standard for collecting child support and alimony notwithstanding spendthrift provisions of a trust;
- A person who receives a trust distribution is deemed to submit to personal jurisdiction of Florida courts on any matter involving the distribution by simply accepting a distribution from the trust;
- A presumption that a trust is revocable unless the terms specifically provide that the trust is irrevocable;
- A trustee who commits a breach of trust is liable for the greater of the profit made by reason of the breach and the amount required to restore the trust to the position it would have been in had the breach not occurred;
- Trust modifications that currently require court approval may be effective upon agreement of the parties to the trust without court approval; and
- A trustee is permitted to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company and receiving additional compensation for that investment.

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

The CS specifies that the Code takes effect on July 1, 2007, and includes specific rules relating to retroactive application.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill will provide a trustee with additional flexibility in administering a trust.

Safeguard Individual Liberty -- This bill increases the options of an individual, organization or association regarding the conduct of his/her own affairs in the trust arena.

Personal Responsibility -- This bill expands the ability of a person to collect alimony and child support from an obligor who is the beneficiary of a trust.

B. EFFECT OF PROPOSED CHANGES: [1]

Background

A trust is generally defined as:

> a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.[2]

A "grantor" is "one who creates or adds to a trust and includes 'settlor' or 'trustor' and a testator who creates or adds to a trust."[3] The term "trustee" as used in a technical or legal sense means the person who takes and holds the legal title to trust property for the benefit of another.[4] "Trustee" refers to "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."[5]

Trusts may be classified as express trusts or as trusts by operation of law. Another classification of trusts, from the aspect of whether they become effective after the death of the settlor or during his or her life, is into testamentary and *inter vivos* trusts. Express trusts have been divided into passive trusts, sometimes known as "nominal" or "dry" trusts, and active trusts, otherwise called "live" or "operative" trusts. Trusts may also be classified as either private or charitable.[6]

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[1] The bulk of this analysis is specifically derived from "Florida Trust Code Executive Summary" and "Florida Trust Code Scrivener's Summary" which was graciously supplied by The Ad Hoc Trust Code Revision Committee, hereinafter referred to as the "Committee". The Committee labored for four years to prepare a thorough new trust code for Florida. The Committee was co-chaired by Brian J. Felcoski and Laird A. Lile. Other members included William F. Belcher, Debra L. Boje, Sandra F. Diamond, Robert W. Goldman, John G. Grimsley, Rohan Kelley, William R. Lane, Jr., William T. Marks, Barry F. Spivey, F. Gordon Spoor, Laura P. Stephenson, Bruce M. Stone, Donald R. Tescher, Marjorie E. Wolasky and G. Charles Wohlust. Professor David F. Powell of the Florida State University College of Law served as Committee Scrivener.
[2] 55A Fla. Jur. 2d Trusts s.1.
[3] Section 731.201(17), F.S.
[4] 90 C.J.S. Trusts s.2.
[5] Section 731.201(35), F.S.
[6] 55A Fla. Jur. 2d Trusts s.2.

An express trust is a trust intentionally created by the direct and positive act of the settlor, by some writing, deed, or will, or oral declaration. Express trusts are distinguishable from trusts by operation of law, resulting and constructive, in that the latter are respectively founded on an intention of the parties to a transaction implied in law, or on fraud or wrong irrespective of the intention of the parties concerned.[7]

Chapter 737, F.S., which is entitled "Trust Administration," is the current statutory scheme that governs trusts. This chapter encompasses: trust registration; the jurisdiction of the courts; the duties and liabilities of trustees; the powers of the trustee; charitable trusts; and rules of construction for trusts. It also sets forth the default rules for trust administration which can generally be limited or altered by the settlor.

CS for HB 425 repeals Chapter 737, F.S., and creates Chapter 736, F.S., a comprehensive new trust code loosely modeled on the Uniform Trust Code of 2000, with a number of changes that center primarily on updating current Florida law. The CS includes the requirements for trust creation, the treatment of revocable trusts, and the rights of creditors within this new Trust Code. Some current provisions of the trust code -- in particular, those dealing with representation and with trust modification, termination and reformation -- are updated and expanded.

What Is Different Under CS for HB 425?[8]

By way of preview, the following is a brief catalogue of some of the more important changes CS for HB 425 (hereinafter "FTC" or "Code") makes to existing Florida law. Each of these is examined in greater depth later in this Analysis.

- **Representation**: The FTC includes the very useful representation provisions found in the Uniform Code but expands the provision dealing with representation by a holder of a power of appointment[9] and adds a new provision permitting a settlor to designate a representative (e.g., a trust protector).[10]

- **Trust Creation**: The requirement that trusts containing land be evidenced by a signed writing is affirmed; the unique Florida requirement that the testamentary aspects of trusts be executed with the formalities required for a will is limited to revocable trusts;[11] and the capacity needed to create a revocable trust is specified to be the same as that required for the execution of a will.[12]

- **Trust Modification**: In general, the FTC includes the Uniform Code provisions dealing with trust creation, modification and termination, although UTC section 411, which has been the subject of considerable discussion on estate planning list serves, was replaced with Florida's existing trust modification provisions.[13]

- **Charitable Trusts**: The authority the Attorney General has at common law to enforce charitable trusts is codified[14] and standing to enforce charitable trusts is extended to the settlors who create them[15] and to charitable organizations designated in an instrument to receive distributions from them.[16]

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[7] *Id.* at s.8
[8] The Committee estimated that Florida Trust Code is comprised about 40 percent of provisions found in prior Florida law and about 60 percent of provisions based on the Uniform Trust Code (the Uniform Trust Code of 2000 has been enacted in fifteen states and is under consideration in several others). Of the provisions in this latter group, almost a third were revised in some substantive respect.
[9] *See* s. 736.0302, F.S. discussed infra at p. 14.
[10] See s. 736.0306, F.S. discussed infra at p. 15.
[11] *See* s. 736.0403, F.S. discussed infra at p. 18.
[12] *See* s. 736.0601, F.S. discussed infra at p. 27.
[13] *See* ss. 736.4113 - .412, F.S. discussed infra beginning at p. 19.
[14] *See* s. 736.0110(3), F.S.
[15] *See* s. 736.0405(3), F.S.
[16] *See* s. 736.0110(1), F.S.

- **Creditor's Rights**: For trusts created after the effective date of the Code, a spendthrift clause must restrain both voluntary and involuntary alienation,[17] and the exceptions for child support and alimony are no longer "last resort" exceptions.[18] Note that the Code does NOT permit the creation of self-settled asset protection trusts or adversely affect the asset protection features of third-party trusts.

- **Revocable Trusts**: With respect to revocable trusts, the Code provides that trusts are revocable by default,[19] that a method of revocation expressed in an instrument is exclusive,[20] and that while a trust is revocable, the trustee owes duties only to the settlor.[21] This last principle also applies when a beneficiary has a right of withdrawal over trust property. That is, a holder of a right of withdrawal is treated as a settlor while the power is exercisable.[22]

- **Affiliated Services**: A trustee is permitted to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company[23] and receiving additional compensation for that investment.[24]

- **Miscellaneous and Conforming**: The existing antilapse statute for *inter vivos* trusts is replaced with a new provision more broadly applicable to the descendibility of future interests in both testamentary and *inter vivos* trusts;[25] the Worthier Title Doctrine is abolished;[26] sections 731.103 (evidence of death or status) and 731.201, F.S. (definitions) now apply to chapter 736; a new definition for "power of appointment" has been added to section 731.201, F.S.; section 731.303, F.S. (representation) no longer applies to proceedings involving trusts; and section 732.603, F.S. (antilapse) now applies only to outright devises and appointments.[27]

What Is the Same?

The short answer is quite a lot. As was mentioned previously, almost 40 percent of the Code consists of provisions carried over from chapter 737, F.S. with either no or only slight modification. An informative but nonexclusive list of these carryover provisions includes:

- Section 737.204, F.S. dealing with the employment of agents and the review of compensation.[28]

- Section 737.206, F.S. dealing with the effect of fraud, duress, mistake and undue influence.[29]

- Sections 737.4031 and 737.4032, F.S dealing with judicial and nonjudicial modification of trusts.[30]

- Sections 737.3054 and 737.308, F.S. dealing with a trustee's duty to pay the expenses and obligations of a settlor's estate and to provide a notice of trust at the settlor's death.[31]

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[17] *See* s. 736.0502(1), F.S., discussed infra at p. 26.
[18] *See* s. 736.0503(2), F.S., discussed infra at p. 25.
[19] *See* s. 736.0602(1), F.S., discussed infra at p. 27.
[20] *See* s. 736.0602(3)(b), F.S., discussed infra at p.27 .
[21] *See* s. 736.0603(1), F.S., discussed infra at p. 27.
[22] *See* s. 736.0603(2), F.S., discussed infra at p. 27.
[23] *See* s. 736.0802(5), F.S., discussed infra at p. 39.
[24] *See* s. 736.0802(5), F.S..
[25] *See* s. 736.0926, F.S., discussed infra at p. 27.
[26] *See* s. 689.175, F.S., discussed infra at p. 27. Black's defines this doctrine as "[t]he common-law doctrine that if a beneficiary of a will would receive an identical interest as an heir under the laws of intestacy, the person takes the interest as an heir rather than as a beneficiary." Black's Law Dictionary, 1639 (rev. 8th ed. 2004).
[27] *See* s. 732.603, F.S., discussed infra at p. 27.
[28] *See* s. 736.0206, F.S., discussed infra at p. 12.
[29] *See* s. 736.0406, F.S., discussed infra at p. 16.
[30] *See* ss. 736.04113 through .0412, F.S., discussed infra beginning at p. 19.

- Section 737.306(6), F.S. dealing with the protection of successor trustees.[32]
- Section 737.3035, F.S. dealing with the contents of a trust accounting.[33]
- Section 737.402(4), F.S. dealing with certain powers involving a conflict of interest.[34]
- Section 737.4025, F.S. dealing with powers relating to environmental and human health and contaminated property.[35]
- Section 737.208, F.S. dealing with administration pending the outcome of a contest or other proceeding.[36]
- Sections 737.727, 737.2035, and 737.2041, F.S. dealing with costs and fees.[37]
- Sections 737.307 and 737.3061, F.S. dealing with limitations on actions against trustees in general and against a revocable trust, its beneficiaries and its trustees after the settlor's death.[38]
- Section 737.209, F.S. dealing with liability for improper distributions.[39]

There is much more that is the same. For example, the above list makes no mention of a trustee's powers to split and merge trusts, not because such powers are not important, but because the Code uses the UTC provision in this area, rather than the provision from Chapter 737, F.S. There are numerous other instances of the same thing. The discussion that begins next tells a more complete story.

The Code in Depth

In the interest of uniformity, the Florida Trust Code borrows its structure from the Uniform Trust Code.[40] The Code consists of 13 parts, which correspond in title and content to the eleven articles that make up the Uniform Code, plus two additional parts covering rules of construction and charitable trusts respectively.

GENERAL PROVISIONS AND DEFINITIONS (PART I)

Among the more important things,[41] the several sections of Part I of the FTC address the scope and applicability of the Code;[42] the meaning of important terms;[43] and the relative weight to be given to the

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[31] *See* ss. 736.0505 and .05055, F.S., discussed infra at p. 27.
[32] *See* s. 736.08125, F.S., discussed infra at p. 27.
[33] *See* s. 736.08135, F.S., discussed infra at p. 27.
[34] *See* s. 736.0814(2) and (3), F.S., discussed infra at p. 27.
[35] *See* s. 736.08163, F.S., discussed infra at p. 27.
[36] *See* s. 736.08165, F.S., discussed infra at p. 27.
[37] *See* s. 736.0904 through .09047, F.S., discussed infra at p.27.
[38] *See* s. 736.0905 and .09103, F.S., discussed infra at pp. 27.
[39] *See* s. 736.0914, F.S., discussed infra at p. 27.
[40] To the extent possible, the Code also borrows its section numbering scheme from the UTC. For example, FTC section 736.0101 covers the same subject as UTC section 101, FTC s. 736.0102 the same as UTC s. 102, etc. In the many instances where an FTC section is identical to or is based on a corresponding section of the UTC, the extensive comments to the UTC section provide important additional guidance and authority. The parallel numbering scheme used in the FTC should facilitate reference to the appropriate UTC comment. Unfortunately though, it was not possible to continue the parallel numbering scheme throughout the entire Code. Under the numbering scheme used in the UTC, a section such as 1010 would appear in Article Ten. Under the numbering scheme dictated by the Florida statutes, a section 736.01010 would appear in Part I, somewhere between sections 736.0101 and 736.0102. Accordingly, the desired parallelism between the two codes breaks down beginning with Part X of the Code.

Code, common law, and the terms of a trust.[44] Also covered are the rules defining when a person or an organization is considered to have knowledge of a fact;[45] the methods of giving and waiving notice;[46] the rules for determining and changing a trust's principal place of administration;[47] and the validity and permissible scope of nonjudicial settlement agreements.[48]

Scope and Applicability

The "scope" of the Code is identical to that of Chapter 737, F.S. It applies to charitable and noncharitable express trusts and to trusts created by statute, judgment or court decree. It does not apply to implied trusts,[49] business trusts, land trusts, or to any other arrangement that does not meet the definition of a trust under s. 731.201(34), F.S.[50] Consistent with that, and except as otherwise provided in Part XIII or in a particular section, the provisions of the Code apply retroactively to all Florida trusts.[51]

For express trusts having contacts in more than one jurisdiction, the Code provides that the law of the jurisdiction designated in the terms of the trust provided there is a sufficient nexus to the designate jurisdiction at the time of creation of the trust or during the trust administration.[52] In the absence of a designation in the terms of the trust, the law of the jurisdiction where the settlor resided at the time the trust was created is controlling.[53] However, a designation in the terms of the trust is not controlling as to any matter for which the designation would be contrary to the strong public policy of Florida.[54]

Important Definitions

Section 736.0103, F.S. includes definitions for terms that are used in more than one section of the Code. These definitions are supplemented by other definitions in individual Code sections and by the definitions found in s. 731.201, F.S. which a conforming amendment makes applicable to new Chapter 736, F.S.

Beneficiaries and Qualified Beneficiaries

Most of the definitions in s. 736.0103, F.S. are sufficiently obvious or straightforward that there is little need to examine them directly. The terms "beneficiary" and "qualified beneficiary," however, are used so pervasively throughout the Code that extended examination of these terms is desirable. And it is informative, at least, to catalog a few other terms as well.

Beneficiary: The term "beneficiary" refers to the universe of persons who have a beneficial interest in a trust as well as to any person who has a power of appointment over trust property in a capacity other than as

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[41] Sections 736.0101 and 736.0112, F.S. are not discussed in this summary. The former merely specifies a citation form and internal title for the Florida Trust Code. Section 736.0112,.F.S. dispenses with local qualification for certain foreign trustees who receive distributions from a local estate. The section is identical to s. 737.105, F.S.
[42] *See* s. 736.0102, F.S.
[43] *See* s. 736.0103, F.S.
[44] *See* s. 736.0105 and .0106, F.S.
[45] *See* s. 736.0104, F.S.
[46] *See* s. 736.0109, F.S.
[47] *See* s. 736.0108, F.S.
[48] *See* s. 736.0111, F.S.
[49] *I.e.*, resulting and constructive trusts.
[50] *See* s. 736.0102, F.S.
[51] On the retroactive application of the Code, see "*Effective date*", infra p. 27.
[52] The designation is ineffective if it is contrary to a strong public policy of this state. *See* s. 736.0107(3), F.S.
[53] In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust was first created will control. Section 736.0107(2), F.S. With respect to any particular matter, the designation is not effective if it is contrary to a strong public policy of this state. Section 736.0107(3), F.S.
[54] Section 736.0107(3), F.S.

trustee.[55] It is immaterial for this purpose whether the beneficial interest is present or future, vested or contingent, or whether the person having the interest is ascertainable or even living.[56]

> **Example 1 — Meaning of Beneficiary**. At his death, ninety-year-old D leaves $1,000,000 to T as trustee "to pay the income to D's spouse S for life, then to distribute trust property to such of D's descendants as S by will appoints, and in default of appointment in continuing trust to spray income among D's children from time to time living, and at the death of the last to distribute all trust property *per stirpes* to D's then living descendants and if there be none, to D's alma mater, QB University." D is survived by S, by two children, C1 and C2, by a grandson Bob (C1's child) and by a great-granddaughter Fay (Bob's child). On these facts, the beneficiaries of D's trust include S, C1, C2, Bob, Fay, QB University, and an indeterminate and unascertainable class of as yet unborn descendants of D. Note that T's power to spray trust income among D's children does not make T a beneficiary because T holds that power as a trustee.[57]

Qualified Beneficiary: The term "beneficiary" is to be contrasted with "qualified beneficiary."[58] The latter encompasses only a limited subset of all trust beneficiaries. In effect the class is limited to living persons who are current beneficiaries, intermediate beneficiaries, and first line remainder beneficiaries, whether vested or contingent.[59] An example may be helpful.

> **Example 2 — Meaning of Qualified Beneficiary**. Same facts as **Example 1**. The qualified beneficiaries of D's trust, *as of his death*, include S, C1, C2 and Bob. S is included because she is a permissible distributee.[60] C1 and C2 are included because they would become permissible distributees were S's interest to terminate at D's death (i.e., were she to die at that time).[61] Bob is also a qualified beneficiary because he would take the trust property were the trust to terminate at D's death (because of the death of S, C1 and C2).[62] As of D's death, neither Fay nor QB University are qualified beneficiaries. Note however, that if Bob were to die after D's death, Fay would then become a qualified beneficiary because she would be entitled to trust property as a consequence of a hypothetical trust termination at that time. That is, the determination of who is a qualified beneficiary is made as of a specific point in time and can change over time.

Charitable trusts are created to benefit the community at large rather than for the benefit of ascertainable beneficiaries. Accordingly, the comments to UTC section 103 adopt the view that persons, including designated charitable organizations, receiving distributions from charitable trusts are not beneficiaries as that

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[55] *See* s. 736.0103(3), F.S.

[56] Nor is it relevant how the person acquired the beneficial interest. The term 'beneficiary' includes persons who received their interests by assignment, exercise of a power of appointment, resulting trust, or by operation of an antilapse statute. *See* generally the discussion of "beneficiary" in the comments to UTC s. 103.

[57] Suppose S's power in this example extended to D's descendants and their spouses. Would a current or future spouse of the descendants be beneficiaries by virtue of the fact that they are permissible objects of S's power? The better answer is no because, under traditional property law, the objects of a power of appointment have no beneficial interest in the property subject to the power; they have a mere expectancy.

[58] It is this latter term that the Code employs in the various provisions dealing with notice and consent.

[59] More precisely, the term includes only living beneficiaries who are either present distributees (or present permissible distributees) of trust income or principal or who would become present or permissible distributees if the interests of present distributees or the trust itself terminated on the date the class of qualified beneficiaries is being determined. *See* s. 736.0103(14), F.S.

[60] Section 736.0105(14)(a), F.S.

[61] Section 736.0105(14)(b), F.S.

[62] Section 736.0105(14)(c), F.S.

term is used in the Code. As a consequence, charitable trusts have no qualified beneficiaries.[63] To address this concern:

- The Code extends the rights of a qualified beneficiary to any charitable organization expressly designated to receive distributions from a charitable trust if the organization would otherwise meet the definition of a qualified beneficiary.[64]

- In addition, the Code authorizes the Attorney General[65] to assert the rights of a qualified beneficiary with respect to charitable trusts.[66]

Other Important Terms

Much can be gained by browsing the other terms defined in s. 736.0103, F.S.:

- The term "affiliate" is defined as any person or entity that directly or indirectly through one or more intermediaries owns or controls, is owned or controlled by, or is under common control or ownership, with the fiduciary.[67]

- The term "settlor" includes anyone who either creates or transfers property to a trust, including a testator;[68]

- The term "trustee" includes additional, successor, and cotrustees;[69]

- A trust is "revocable" if it is revocable by the settlor without the consent of either the trustee or an adverse person;[70]

- A power of appointment[71] is a "general power" if it is exercisable in favor of its holder, the holder's estate, or the creditors of either the holder or the holder's estate;[72]

- The term "power of withdrawal" excludes powers exercisable by trustees "as trustee" and powers exercisable by others only with the consent of a trustee or a person having an adverse interest;[73]

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[63] A similar problem exists with trusts for the care of animals or for a specific noncharitable purpose, neither of which have ascertainable beneficiaries, but both of which are validated by other provisions of the Code. *See* s. 736.0408 (trust for animal) and s. 736.0409, F.S. (noncharitable trust without ascertainable beneficiary). The Code addresses this issue by extending the rights of a qualified beneficiary to any person appointed to enforce an animal or noncharitable purpose trust. *See* s. 736.0110(2), F.S.

[64] *See* s. 736.0110(1), F.S. The rights referred to in the section are the right to information and the right to participate in actions taken with the consent of the qualified beneficiaries.

[65] The Committee had extensive discussion about giving the Attorney General the rights of a qualified beneficiary with respect to charitable trusts. On the one hand, the Committee recognized the common law authority of the Attorney General to police charitable trusts on behalf of the public. On the other hand, the Committee saw no advantage to requiring trustees to send unwanted and unneeded information to the Attorney General. The approach adopted in the Code is a compromise. Under the Code, a trustee of a charitable trust has no duty to send notices, information, accountings, etc. to the Attorney General unless and until he or she asserts the rights of a qualified beneficiary with respect to the trust.

[66] *See* s. 736.0110(3), F.S.

[67] *See* s. 736.0103(2), F.S.

[68] *See* s. 736.0103(16), F.S.

[69] *See* s. 736.0103(21), F.S.

[70] *See* s. 736.0103(15), F.S.

[71] A conforming amendment to s. 731.201, F.S. defines "power of appointment" to be "an authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property." Accord, Restatement (Second) of Property: Donative Transfers s. 11.1 (1986).

[72] *See* s. 736.0103(6), F.S.

[73] *See* s. 736.0103(12), F.S.

- The definition of "ascertainable standard" tracks that used in the federal transfer tax system. It means a standard relating to health, education, support, or maintenance;[74]

- The term "trust instrument" refers to a written instrument executed by a settlor which contains the original or amended terms of a trust.[75] This should be contrasted with the more expansive "terms of a trust", which includes both the terms specified in a trust instrument and such terms as might be established by other evidence admissible in a judicial proceeding; and[76]

- The term "interest of the beneficiaries" refers to the collective beneficial interests of a trust as opposed to the individual interests or concerns of the beneficiaries.[77]

Sources of Trust Law; Default and Mandatory Rules

Although it is more comprehensive than Chapter 737, F.S., the Code does not try to anticipate all possible issues that can arise with respect to trusts. Instead, for matters not addressed in the Code, section 736.0106, F.S. provides that the Code is supplemented by the common law of trusts and by principles of equity.

The Code can, and usually will, be supplemented by the terms of a trust as well. Or, more accurately, the terms of the trust will be supplemented by the Code. The latter is more accurate because the provisions of the Code are default rules that apply only in the absence of a contrary provision in the terms of the trust.[78] Thus, as a general matter, a settlor is free to limit, expand, or override any Code provision. There are exceptions, of course, and all of the exceptions are listed in s. 736.0105(2), F.S. The exclusive list of exceptions found there can be organized into the following broad categories:

- Those relating to the requirements for the creation of a trust including trust formalities[79] and the requirement that the purpose of a trust be lawful, possible to achieve, and not contrary to public policy.[80]

- Those containing public policy restrictions on the designation of a principal place of administration[81] and the effect of penalty,[82] spendthrift,[83] and exculpatory clauses.[84]

- Those covering procedural matters including jurisdiction,[85] venue,[86] and limitations on commencing judicial actions.[87]

- Those dealing with court powers, including the power to adjust a trustee's compensation;[88] to act in the interests of justice;[89] to require, dispense with, modify, or terminate a trustee's bond;[90] and,

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[74] *See* s. 736.0103(2), F.S.
[75] *See* s. 736.0103(20), F.S.
[76] *See* s. 736.0103(19), F.S. The difference between the two concepts can be seen in the context of an oral trust of personal property. Such a trust would have terms but no instrument.
[77] *See* s. 737.0103(9), F.S.
[78] *See* s. 736.0105(1), F.S.
[79] *See* s. 736.0105(2)(a), F.S.
[80] *See* s. 736.0105(2)(c), F.S.
[81] *See* s. 736.0105(2)(p), F.S.
[82] *See* s. 736.0105(2)(u), F.S.
[83] *See* s. 736.0105(2)(e), F.S.
[84] *See* s. 736.0105(2)(k), F.S.
[85] *See* s. 736.0105(2)(o), F.S.
[86] *Id.*
[87] *See* s. 736.0105(2)(m), F.S.
[88] *See* s. 736.0105(2)(g), F.S.
[89] *See* s. 736.0105(2)(n), F.S.
[90] *See* s. 736.0105(2)(f), F.S.

except as otherwise provided elsewhere in the Code, the power to modify or terminate a private or charitable trust.[91]

- Those dealing with the duties of a trustee, including the duty to act in good faith and in accordance with the terms of the trust;[92] the duty to notify, account to[93], and respond to requests for information by qualified beneficiaries;[94] and with respect to a revocable trust, the duty to file a notice of trust at the death of the settlor[95] and to pay the expenses and obligations of the settlor's estate.[96]

- Certain miscellaneous provisions including one giving qualified beneficiaries and the trustee of a dynasty trust the power to amend or terminate the trust[97] and another specifying the rights of third parties who interact with the trust, such as bona fide purchasers, tort or contractual claimants.[98]

Principal Place of Administration

The Code imposes a duty on a trustee to administer the trust at a place that is appropriate to its purposes and administration.[99] Subject to that duty, upon appropriate notice to the qualified beneficiaries, a trustee may move a trust's principal place of administration to another State or jurisdiction.[100]

In the absence of a valid designation in the trust instrument, s. 736.0108, F.S. retains existing Florida statutory law which provides that a trust's principal place of administration is the trustee's usual place of business, if any; otherwise the trustee's residence.[101] In addition, the section validates trust provisions designating a principal place of administration, provided the designated jurisdiction has a sufficient nexus to the trust or its beneficiaries.[102]

Factual Knowledge

Section 736.0104, F.S. clarifies when a person is considered to have knowledge of a fact. That occurs if the person has actual knowledge of the fact, has received a notice or notification of it, or, under all of the facts

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[91] *See* s. 736.0105(2)(d), F.S.
[92] *See* s. 736.0105(2)(b), F.S.
[93] The committee expressed the following comment. If the experience of other jurisdictions is an indication, it is likely that the mandatory provisions dealing with the duty to account and to provide information to qualified beneficiaries will be the subject of keen interest and discussion. This is understandable because these provisions involve a necessary balancing between a settlor's control and privacy interests on the one hand and the competing interest the beneficiaries have in accessing the information necessary protect their interests on the other. More is said about this elsewhere in this Summary. *See Representation; Privacy; and the Right to Information,* infra at p.15. By way of preview, however, the Florida Code balances these interests differently from the Uniform Code in three important respects. First, the duty the UTC imposes on a trustee to notify qualified beneficiaries of the existence of the trust, the identity of the trustee, and their right to reports is mandatory only with respect to qualified beneficiaries who have attained age 25. The FTC makes no distinction based on the age of qualified beneficiaries. Compare UTC s. 105(b)(8) with s. 736.0105(2)(h), F.S. Second, the UTC gives all beneficiaries a right to request reports and information reasonably related to the administration of the trust. Under the FTC, all rights to accountings, reports and information and to a copy of the trust instrument itself are restricted to qualified beneficiaries. Compare UTC s. 813(a) and 105(b)(9) with s. 736.0813, F.S., discussed infra p. 27. Finally, revisions and additions to the representation provisions in Part III of the Code provide a means by which settlors can effectively withhold information from one or more qualified beneficiaries. *See* ss. 736.0302 and 736.0306, F.S., discussed infra at pp. 14 and 15, respectively.
[94] *See* ss. 736.0105(2)(h) – (j), F.S.
[95] *See* s. 736.0105(2)(t), F.S.
[96] *See* s. 736.0105(2)(s), F.S.
[97] *See* s. 736.0105(2)(r), F.S.
[98] *See* s. 736.0105(2)(l), F.S.
[99] Section 736.0108(4), F.S.
[100] *See* s. 736.0108(5), F.S. The contents of the required notice is set out in s. 736.0108(6), F.S.
[101] *See* s. 736.0108(2). Additional guidance dealing with cotrustees and the impact of interstate mergers tracks existing Florida statutory law on these subjects. Compare ss. 736.0108(2) and (3), F.S. with s. 737.101(1)-(3), F.S.
[102] The nexus requirement is mandatory. *See* s. 736.0105(2)(f), F.S. It is satisfied if the designated jurisdiction is the trustee's residence or principal place of business or a jurisdiction where all or part of the administration occurs. Other jurisdictions are judged on a case by case basis. *See* s. 736.0108(1), F.S.

and circumstances known to the person, has reason to know it.[103] With respect to an organization operating through employees, the organization has notice or knowledge of a fact involving a trust only from the earlier of the time the information was received by an employee having responsibility to act on matters involving the trust or the time the information would have been brought to the employee's attention if the organization had exercised reasonable diligence.[104]

Methods and Waiver of Notice

Section 736.0109, F.S. provides that notice of judicial proceedings is to be given as provided in the Florida Rules of Civil Procedure.[105] Other notices and the sending of required documents must be accomplished in a reasonably suitable manner that is likely to result in receipt.[106] Notice and the sending of documents are not required for persons whose identity or location is not reasonably ascertainable by the trustee[107] or who have waived the sending of the notice or document.[108]

Nonjudicial Settlement Agreements

Under the Code, interested persons[109] may enter into a binding nonjudicial settlement agreement[110] with respect to any trust matter, provided:

- The terms and conditions of the agreement could be properly approved by a Court were court approval sought;[111] and
- The agreement does not produce a result that is not authorized under other provisions of the Code.[112]

Qualifications of Foreign Trustee

The Code dispenses with local qualifications for certain foreign trustees who receive distributions from a local estate.[113]

JUDICIAL PROCEEDINGS (PART II)

Part II collects in one place a number of the rules applicable to judicial proceedings involving the validity, administration, and distribution of trusts.[114] Among these are provisions that affirm that, in the absence of a

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[103] Section 736.0104(1), F.S.
[104] Section 736.0104(2), F.S. This may be a change in Florida law as there are some cases that suggest a stricter standard for organizations acting through employees. *See* e.g., *St. Petersburg Coca-Cola Bottling Co. v. Cuccinello*, 44 So. 2d 670 (Fla. 1950); *Harris v. Lewis State Bank*, 436 So. 2d 338 (Fla. 1st DCA 1983).
[105] Section 736.0108(4), F.S.
[106] *See* s. 736.0108(1), particularly the last sentence which contains a list of acceptable methods, including a properly directed facsimile or other electronic message.
[107] Section 736.0108(2), F.S.
[108] Section 736.0108(3), F.S.
[109] In this context, interested persons is defined to be those persons whose interest would be affected by the settlement. Section 736.0111(1), F.S.
[110] Corporate trustees are quick to note the usefulness of nonjudicial settlement agreements in harmonious situations to avoid the expense and delays of formal accountings at the termination of a trust. They can be useful in a variety of other contexts as well. For a nonexclusive list of matters that can be resolved by a nonjudicial settlement agreement, see s. 736.0111(4), F.S. One can only assume that the comfort level banks have with this technique will increase under the Code, both because settlement agreements are now authorized by statute and because the representation provisions in Part III should make it easier to get all interested persons "on board."
[111] Court approval may be requested by any interested person. Section 736.0111(5), F.S.
[112] *See* s. 736.0111(2) and (3), F.S.
[113] Section 737.105, F.S., is essentially identical to s. 736.0112, F.S.

court order, trusts are not subject to continuing judicial supervision;[115] that proceedings involving the validity, administration, or distribution of trusts are commenced by complaint and are governed by the Florida Rules of Civil Procedure;[116] and that the circuit court has original jurisdiction with respect to all matters arising under the Code.[117]

Sticking with the familiar, Part II also incorporates verbatim four provisions found in Chapter 737, F.S. These include:

- Section 736.0204, F.S. dealing with venue for actions and proceedings concerning trusts.[118] The section is identical to s. 737.202, F.S.[119]

- Section 736.0205, F.S. dealing with the dismissal of trust proceedings involving matters relating to foreign trusts. The section is identical to s. 737.203, F.S.

- Section 736.0206, F.S., providing for notice and other rules relating to proceedings for the review of the employment of agents and the compensation of the trustee and trust employees. The section is identical to s. 737.204, F.S.

- Section 736.0207, F.S. preventing actions to contest the validity of a trust while it remains revocable. This aspect of the section is identical to s. 737.2065, F.S. In addition, s. 736.0207, F.S. includes a new exception for court approved actions by the guardian of the property of an incompetent settlor.

Lastly, s. 736.0202, F.S.[120] deals with personal jurisdiction over the trustee, beneficiaries, and recipients of trust distributions. The methods of obtaining jurisdiction detailed in the section are not exclusive.[121] With respect to a trust having its principal place of administration in Florida, s. 736.0202, F.S. provides that:

- A trustee submits to the jurisdiction of Florida courts either by accepting the trusteeship or by moving the principal place of administration to this state;

- The beneficiaries are subject to the jurisdiction of Florida courts with respect to any matter involving the trust; and

- Recipients who accept a distribution from a trust submit personally to the jurisdiction of Florida courts regarding any matter involving the distribution.[122] [123]

REPRESENTATION (PART III)

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[114] For a nonexclusive list of possible judicial proceedings, see s. 736.0201(4), F.S. The power of courts to take actions in judicial proceedings involving trusts may not be changed in a trust instrument. *See* s. 736.0105(2)(n), F.S.
[115] *See* s. 736.0201(3), F.S.
[116] *See* s. 736.0201(1), F.S.
[117] *See* s. 736.0203, F.S. This is a mandatory provision. *See* s. 736.0105(2)(o), F.S.
[118] This is a mandatory provision. *See* s. 736.0105(2)(o), F.S.
[119] Venue lies in any county where it is proper under chapter 47, F.S., where the plaintiff or defendant beneficiary resides or has its principal place of business, or where the trust has its principal place of administration.
[120] Chapter 737, F.S. has no provision corresponding to s. 736.0602, F.S. Jurisdiction under existing law is obtained under the general long arm statutes found in ch. 48, F.S. The Committee believes that the inclusion of a long arm statute tailored specifically to trust matters is a beneficial addition to Florida law.
[121] Section 736.0202(3), F.S.
[122] Section 736.0202, F.S. is a mandatory provision. *See* s. 736.0105(2)(o), F.S.
[123] More is said about this provision for personal jurisdiction in the Constitutional Issues section, infra at p. 67.

Part III of the Code includes, with some important modifications, the representation provisions of the Uniform Code. Of all of the Code, the representation provisions should be among the most useful because they facilitate planning and the efficient administration of trusts.

Background

In the context in which it is used here, "representation" refers to the authority of one person to act on behalf of another.[124] Under the Code, notice, information, accountings and reports sent to a representative have the same effect as those sent to the person being represented. And actions taken by a representative bind the person being represented to the same extent as actions taken by the person being represented.[125]

Types of Representation

The Code recognizes several different types of representation. Two of these – representation by holders of powers of appointment and by persons designated by the settlor in the trust instrument itself – present special considerations and are discussed in greater detail later. The remaining representation types include:

- **Fiduciary**: This category includes those provisions which permit a guardian of the property to represent a ward;[126] an attorney-in-fact to represent a principal;[127] and a trustee or personal representative to represent the beneficiaries of a trust or estate, as the case may be.[128] The Code also provides that a parent may represent an unborn or minor child if no guardian of the property has been appointed.[129]

- **Virtual**: If not otherwise represented, a minor, incapacitated, unborn, unascertainable or unlocatable person may be represented by another person having a substantially identical interest.[130] The classic example of virtual representation involves the representation of minor beneficiaries of a class gift by other adult members of the class.

- **Court appointed**: The court may appoint a representative for a person the court determines is not otherwise adequately represented.[131] A court appointed guardian ad litem would be an example of this category of representation. Uniquely, in making decisions, a court appointed representative may

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[124] The concept of representation is not new to Florida law. Section 731.303, F.S. provides for limited representation in the administration of, or in judicial proceedings involving, decedent's estates and trusts. If the FTC is enacted, a conforming amendment to s. 731.303, F.S., will restrict its application to decedent's estates so all representation regarding trusts will be controlled by the provisions in the FTC. But the Code representation provisions are more extensive. They permit representatives to initiate or consent to actions and to receive accountings and information in both judicial and nonjudicial contests. They apply generically across all provision of the Code. And to a limited extent, they apply to settlors as well as to beneficiaries. *See* e.g., s. 736.0301(3), F.S. providing that notice or consent given to or by a representative of an incapacitated settlor is binding of the settlor's behalf.

[125] *See* s. 736.0301(1) and (2), F.S. Section 301(b) of the Uniform Trust Code provides that the consent of a representative is binding on the person being represented "*unless the person represented objects to the representation before the consent would otherwise have become effective.*" (emphasis added). The comments to the section suggest that, at least with respect to competent adults, the qualification may be constitutionally required. Despite this, section 736.0301 does not include a similar limitation because the Committee believes that the constitutional requirement may not apply with equal force to all types of representation. It may be that representation over the objection of the person being represented violates due process in all cases. It is also possible, however, that representation by the holder of a power of appointment (or by a settlor designated representative) is distinguishable because the underlying rationale for these types of representation is found either in an equivalency with ownership or in the settlor's intent. *See* note 135 infra p. 14. The Committee omitted the explicit limitation because it did not wish to preempt the issue.

[126] *See* ss. 736.0303(1) and (2), F.S.

[127] *See* s. 736.0303(3), F.S.

[128] *See* ss. 736.0303(4) and (5), F.S.

[129] *See* s. 736.0303(6), F.S.

[130] *See* s. 736.0304, F.S.

[131] *See* s. 736.0305(1), F.S.

take into consideration benefits accruing to living members of the family of the represented individual.[132]

Limits on Representation

With two notable exceptions, representation under the Code is available only to the extent there is no conflict of interest between the representative and the person being represented. Representation by holders of powers of appointment and by settlor-designated persons are the exceptions. As detailed more fully below, the former are subject to a fraud or bad faith restriction; the latter are restricted more directly by limitations on who may be designated as a representative.

Special Florida Provisions
Representation by Holders of a Power of Appointment

Section 736.0302, F.S. provides that a holder of a power of appointment may represent and bind the objects and takers in default of the power. As is the case with the representation provision found in the Probate Code,[133] but unlike the corresponding provision in the Uniform Trust Code[134] s. 736.0302, F.S. makes no distinction between general and nongeneral powers.[135] Representation applies to the holders of either.[136]

The Fraud and Bad Faith Limitation

As it turns out, one of the most discussed questions relating to the representation provision dealing with power holders was whether representation should be precluded if the power holder has a conflict of interest with the objects or takers in default. The Uniform Trust Code contains such a restriction. Explicitly and structurally at least, s. 731.303, F.S. of the Probate Code does not. It was the Committee's belief that incorporating a conflict of interest limitation would change existing Florida law.

Discussion on this point centered on the common situation where a life tenant of a trust is given a power to appoint trust property by will. The case for including a conflict of interest limitation can be found in the concern that, without one, as a representative of the objects and takers in default, the power holder could approve acts that improperly benefit his or her life interest.[137] The case against including a conflict

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[132] *See* s. 736.0305(3), F.S.
[133] *See* s. 731.303(1), F.S.
[134] Compare UTC s. 302.
[135] Even so, the rationale supporting this type of representation varies with the type of power. For general powers, the rationale lies in the essential equivalency of these powers to ownership. The Committee believes the same rationale supports representation in the case of broadly drafted nongeneral powers, such as a testamentary power to appoint to anyone in the world except the holder of the power, the estate of the holder or the creditors of either. The restrictions on the objects of this type of power exist for tax purposes only.
The supporting rationale for more restrictive nongeneral powers is different. A commonly encountered example of this type of power would be a trust "to pay the income to spouse for life, then to distribute principal to such of settlor's descendants as spouse appoints by will with gift in default of appointment to the descendants *per stirpes*." In the Committee's view, these powers are used either because existing Florida law permits their use as a means to cut off the flow of information about the trust to the remaindermen during the life tenant's life or because they add flexibility to the trust disposition. In either case, practically speaking, holders of this type of power act as an agent of the creator of the power. If a settlor has sufficient confidence in the holder of a limited nongeneral power to vest him or her with the authority to determine the beneficial ownership of trust property, there is every reason to assume that the settlor would want the power holder to represent the objects and takers in default in other respects. Hence, representation by the holder of a limited special power is a mere manifestation of a principle expressed more formally elsewhere in the Code[135] that a trust settlor should be able to designate persons to serve as representatives of trust beneficiaries.
[136] Nor does s. 736.0302, F.S. make a distinction between presently exercisable (i.e. *inter vivos*) and testamentary powers. Note though, that no question of representation arises when a trust beneficiary has a presently exercisable general power of appointment. It such a case, the trustee's duties would be owed exclusively to the power holder; as long at the power remained exercisable, other trust beneficiaries would have no rights to represent. *See* s. 736.0603, F.S.
[137] The Committee was of the view that this is an unlikely possibility where a corporate trustee is involved. But not all trusts have corporate trustee, and the possibility that the trustee is also the holder of the power, is a particular concern.

limitation is found in the shared view of many on the Committee that the limitation would preclude most representation by holders of powers as there would usually be some conflict between the power holder and the objects and takers in default.

The Committee decided to include a provision precluding representation by power holders in matters involving fraud or bad faith by the trustee instead of one dealing more broadly with conflicts of interest. Ultimately, the Committee hoped that a good faith trustee will resist any attempt by the holder of a nongeneral or testamentary power to enhance his or her life interest.[138]

Powers Held by Trustees

Section 736.0302, F.S. places two other restrictions on the ability of a power holder to represent others under part III of the Code. Both address the same concern – that trustees not be in a position to approve their own actions and accountings. Thus, s. 736.0302, F.S. does not apply to the distribution powers of a trustee.[139] Nor may a beneficiary with a power represent others while the beneficiary is serving as sole trustee.[140]

Designated Representatives

Within limits discussed below, s. 736.0306, F.S. allows a settlor to appoint or designate a person to represent and bind a trust beneficiary or to receive notices, information, reports and accounts on the beneficiary's behalf. This section, which has no counterpart in the Uniform Code, contemplates that the designated representative could be appointed directly by the settlor or by others (such as a committee) pursuant to a process set out in the trust instrument. In either case, a person serving as a designated representative is not a fiduciary. He or she is not liable for acts or omissions made in good faith.

Trustee May Not Serve as Designated Representative

Section 736.0306, F.S. places two important restrictions on the authority of a designated representative to represent and bind a trust beneficiary. The first of these is that a designated representative who is also a trustee may not represent or bind a trust beneficiary while serving in that capacity.[141] This is a mandatory restriction that cannot be waived in the trust instrument.[142]

Certain Beneficiaries Serving as Designated Representatives

The second restriction, which is also mandatory,[143] applies to designated representatives who are also beneficiaries of the trust. Although there is no blanket prohibition on a beneficiary serving as a designated representative, the Code does restrict the situations where this is allowed. A beneficiary may serve as a designated representative only if:

- The beneficiary is designated by the settlor by name (as opposed to by others pursuant to a process detailed in the trust instrument); or

- The designated representative/beneficiary is a spouse, grandparent, or descendant of a grandparent of either the beneficiary being represented or that beneficiary's spouse.[144]

Representation; Privacy; and the Right to Information

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[138] In a conforming amendment, a fraud and bad faith restriction was also added to s. 731.301(1), F.S.
[139] Section 736.0302(2)(b), F.S.
[140] Section 736.0302(2)(c), F.S.
[141] Section 736.0306(2), F.S.
[142] *See* s. 736.0105(2)(h), F.S.
[143] *See* Id.
[144] *See* ss. 736.0306(3)(a) and (b), F.S.

Reference was made previously to the balance the Code attempts to make between a settlor's privacy and control interests on the one hand, and the interests qualified beneficiaries have in accessing trust information on the other. Because, the trustee's duty to notify, account to, and respond to requests for information by qualified beneficiaries is mandatory, a settlor may not directly affect this duty in the trust instrument. Nevertheless, with the judicious use of the representation provisions, particularly the power of appointment and designated representative provisions, it should be possible to prevent one or more qualified beneficiaries from gaining access to information the settlor does not wish them to have.[145]

TRUST CREATION, VALIDITY, MODIFICATION AND TERMINATION (PART IV)

The first several sections of Part IV of the Code gather together what would be considered by most to be the traditional common law of trusts. The balance of Part IV covers the important area of trust modification, termination and reformation. Some of these later provisions are codifications of existing Florida statutes. Others find their source in the Uniform Code.

Trust Creation and Validity

Under the Code, a trust may be created by *inter vivos* or testamentary transfer, by a settlor's self declaration of trust, or by the exercise of a power of appointment.[146] In broad outline and subject to further refinement below, to create a trust a settlor having the capacity to do so[147] must intend to create a trust[148] for a purpose that is lawful, consistent with public policy and possible to achieve.[149] The trust must not be passive, meaning that the trustee must have enforceable duties to perform.[150] A trust or any portion of a trust is void to the extent the trust or trust portion is procured by fraud, duress, mistake, or undue influence.[151]

Ascertainable Beneficiaries

In addition to the above, a private trust must have ascertainable beneficiaries.[152] That said, it is not necessary that the beneficiaries be alive at the creation of a trust. It is sufficient if they can be ascertained at some point in the future within the period of the Rule against Perpetuities.[153] If a class of beneficiaries is ascertainable (such as descendants), the shares of each may be left to the discretion of the trustee.[154]

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[145] Although a settlor may be motivated by a desire to restrict access to information about a trust, the settlor's intent in this regard is merely precatory. That is, a trustee who gives notices, accountings, etc., directly to a person who is represented by another under the Code is not individually liable for doing so. Section 736.0301(5), F.S.
[146] Section 736.0401, F.S.
[147] Section 736.0402(1)(a), F.S.
[148] Section 736.0402(1)(b), F.S.
[149] Section 736.0404, F.S.
[150] Section 736.0402(1)(d), F.S. Accord, *Elvins v. Seestedt*, 141 Fla. 266, 193 So. 54, 126 A.L.R. 1001 (1940); *Watson v. St. Petersburg Bank and Trust Company*, 146 So.2d 383 (Fla. 2d DCA 1962); *Baum v. Corn*, 167 So.2d 740 (Fla. 2d DCA 1964). The requirement that the trustee's duties be enforceable means that the same person may not be the sole trustee and sole beneficiary of the trust. Section 736.0402(1)(e), F.S. Accord, *Wiley v. Hoggson*, 90 Fla. 343, 106 So. 408 (1925).
[151] Section 736.0406, F.S.
[152] Section 736.0402(1)(c), F.S. The reason is obvious enough. It is the beneficiaries who have standing to enforce the trust, and beneficiaries, courts, and trustees alike need to know who they are.
[153] Section 736.0402(2), F.S.
[154] In a departure from orthodox common law, a power of a trustee to select from a class of indefinite beneficiaries (such as friends) is not invalid under the Code. Instead, the trustee is given a reasonable time to make a selection. If the trustee fails to do so, the trustee's power fails and the property passes to those who would have taken it had the power never been conferred. Section 736.0402(3), F.S. Accord, Restatement (Third) of Trusts s. 46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts s. 122 (1959); Restatement (Second) of Property: Donative Transfers s. 12.1 cmt. e (1986). In this regard, the Code overrules *Kunce v. Robinson*, 469 So.2d 874 (Fla. 3rd DCA 1985).

Charitable trusts

A trust may be created for a charitable purpose (e.g., the relief of poverty, the advancement of arts, sciences, education or religion, or the promotion of health, governmental or municipal purposes).[155] The ascertainable beneficiary requirement does not apply to such trusts[156] because the enforcement of charitable trusts is provided by other mechanisms.[157]

Trust for the care of animals

A trust may be created to provide for the care of one or more animals alive during the settlor's lifetime.[158] The trust lasts until the death of the last surviving animal at which time any remaining trust property is distributed as provided in the terms of the trust, or in the absence of such a provision, to the settlor, if living, otherwise as part of the settlor's estate.[159]

The settlor of an animal trust may designate someone to enforce the trust. In the absence of such a designation, the court will appoint a person to enforce the trust.[160] In either case, the presence of a designated enforcer (so to speak) means that an animal trust does not need ascertainable beneficiaries.

Trusts for general or specific noncharitable purpose

In much the same way that the Code validates trusts for the care of animals, it also validates (for 21 years) trusts for a general or specific noncharitable purpose.[161] Like animal trusts, trusts for a noncharitable purpose are enforced by a person designated by the settlor in the terms of the trust, or, in the absence of such a designee, by a person appointed by the court.[162] Hence, this type of trust need not have ascertainable beneficiaries either.[163]

Trust Formalities

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[155] Section 736.0405(1), F.S. Where the intent to create a charitable trust is present but the terms of the trust do not indicate a particular purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. Section 736.0405(3), F.S.

[156] Section 736.0402(1)(c)1, F.S.

[157] Although not stated explicitly, the Code continues the common law rule that charitable trusts are enforced by the state Attorney General. *See* s. 736.0110(3), F.S. under which the Attorney General may assert the right of a qualified beneficiary with respect to charitable trusts. In addition, the rights of a qualified beneficiary are given to charitable organizations expressly designated to receive distributions under the terms of a charitable trust. *See* s. 736.0110(1), F.S. Finally, in a departure from common law, the Code gives settlors standing to enforce the charitable trusts they create. Section 736.0405(3), F.S.

[158] *See* generally, s. 736.0408, F.S. This provision is similar to s. 737.116, F.S.

[159] *See* s. 736.0408(1) and (3), F.S. Except to the extent the court determines that the property in the trust exceeds that necessary to accomplish the purposes of the trust, property in an animal trust may be applied only to its intended use.

[160] An action to request the appointment of someone to enforce an animal trust, or to remove a person serving in that capacity may be brought by anyone having an interest in the welfare of the animal. Section 736.0408(2), F.S.

[161] Section 736.0409(1), F.S. An example of a trust for a general noncharitable purpose would be a trust where the trustee is directed to apply the income annually "to such worthy purposes as the trustee selects." An example of a trust for a specific noncharitable purpose would be one where the trustee is directed to spend trust funds for the saying of masses for the settlor and his deceased spouse. Accord Restatement (Third) of Trusts, s. 47 (2003), cmt. d(1). It is worth noting, though, that this Code provision will not apply to the two most common types of trusts for a specific noncharitable purpose. These, respectively, are trusts for the care of animals, which are covered separately in Code s. 736.0409, F.S. discussed above, and trusts for the care and maintenance of cemetery plots, which, under Florida law are deemed to be charitable. *See* s. 689.13, F.S. The significance of this section is that trusts for the care and maintenance of cemetery plots are not subject to the twenty-one year limitation in Code section 736.0409(1); they may be perpetual.

[162] Section 736.0409(2), F.S. Also like an animal trust, except to the extent the court determines that the value of the property is excessive, trust property must be applied for its intended use and any property not required for that purpose must be distributed as provided in the terms of the trust or in the absence of such terms, to the settlor, if living otherwise to the settlor's estate. Section 736.0409(3), F.S.

[163] Section 736.0402(1)(c)3, F.S.

A testamentary trust is valid only if the will in which it is contained is valid. With two important exceptions discussed next, an *inter vivos* trust is validly created under the Code if its creation complies either with the law of the place where it was executed or the law where the settlor was domiciled at the time of creation.[164] Thus, where either the execution situs or the settlor's domicile is a jurisdiction other than Florida, the Code can validate a trust that does not comply with Florida law. In the common case of a trust executed in Florida by a Florida domiciliary, however, the trust must comply with the requirements for a trust in Florida.[165]

Irrevocable trusts

Neither existing Florida law nor the Code require a writing to create a trust of personal property. Irrevocable oral trusts of personal property are enforceable[166] provided only that their terms can be established by clear and convincing evidence.[167] Trusts containing Florida real property, however, must be evidenced by a signed writing.[168]

Revocable trusts

Nominally, revocable trusts are subject to the same rules. Practically speaking, however, revocable trusts present special considerations. In the first place, most plans involving revocable trusts also involve wills with pourover clauses. Under s. 732.513(1), F.S., a pourover clause is invalid unless the recipient trust is evidenced by a written instrument. More importantly, since 1995, s. 737.111, F.S. has provided that the testamentary aspects of most trusts[169] are void unless the trusts are executed with the formalities required for a will.[170] Similar requirements are imposed by section 736.0403(2)(b) of the Code, but only with respect to revocable trusts[171] created by Florida domiciliaries[172] on or after the effective date of the Code.[173] The practical bottom line then is that, under the Code, if revocable trusts are to serve the function they are intended to serve – to pass property at the death of the settlor to others – they must be executed with the formalities required for a will.

These basics aside, there are aspects to the application of section 736.0403(2)(b), F.S. that may not be apparent from a casual reading. These include the following:

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[164] Section 736.0403(1), F.S.

[165] The formalities discussed in this portion of the analysis do not apply to certain trusts established as part of deferred compensation plans. *See* s. 736.0403(3), F.S.

[166] Section 736.0407, F.S. Accord, *Bay Biscayne Co. v. Baile*, 73 Fla. 1120, 75 So. 860 (1917); *In re Estate of Pearce*, 481 So.2d 69 (Fla. 4th DCA 1986).

[167] Florida cases state the standard of evidentiary proof somewhat differently from s. 736.0407, F.S. *See Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative*, 52 So.2d 670, 674 (Fla. Sup. Ct. 1951) ("clear, positive and almost conclusive"); *Bailey v. Baron*, 269 So.2d 45, 47 (Fla. 3d DCA 1972, rev'd on other grounds 275 So.2d 519 (Fla. Sup. Ct. 1973) ("clear, strong, conclusive and unequivocal"). The Committee believes the standards expressed in these cases is functionally equivalent to the "clear and convincing" standard in s. 736.0407, F.S.

[168] *See* s. 736.0403(2)(a), F.S. providing that trusts containing land must comply with s. 689.05, F.S.

[169] Section 737.111, F.S. applies to trusts created by Florida residents, and perhaps trusts created in Florida by nonresidents. Certain trusts involved with deferred compensation arrangements are explicitly excluded from the requirements of s. 737.111), F.S. *See* s. 737.111(5), F.S. An identical exclusion is included in section 736.0402(3), F.S.

[170] *See* s. 737.111(1), F.S. This section does not apply to trusts created before October 1, 1995. Section 737.111(6), F.S.

[171] A trust is revocable if it is revocable by the settlor without the consent of either the trustee or a person holding an adverse interest. Section 736.0103(15), F.S. The decision to restrict s. 736.0403(2), F.S. to revocable trust follows from the Committee's belief that compliance with testamentary formalities is justifiable as a matter of principle only for that class of trusts that operate as will substitutes. Revocable trusts serve that purpose, irrevocable trusts do not. Stated differently, irrevocable outright transfers need not comply with testamentary formalities and the Committee could find no convincing justification for treating irrevocable transfers in trust any differently.

[172] The change from "resident" in s. 737.111, F.S. to "domiciliary" in s. 736.0403(2), F.S. has no substantive effect as the two terms are defined to be synonymous in s. 731.201(11), F.S.

[173] Section 737.111, F.S. continues to apply to trust created before that date. Section 736.0402(4), F.S.

- The section applies both at the creation of a revocable trust and to any subsequent amendments.[174]

- A failure to comply with the requirements of s. 736.0403(2)(b), F.S. does not result in the initial invalidity of a revocable trust. Rather, only the testamentary aspects of the trust are void. As under existing law, testamentary aspects means "those provisions of the trust that dispose of the trust property on or after the settlor's death other to the settlor's estate."[175]

- The formalities required are those for a will in Florida. Complying with the formalities for a will in some other state is not enough.

- Section 736.0403(2(b), F.S. has no applicability to trusts created by non Florida domiciliaries whether or not the trust was executed in Florida.[176]

- Conversely, s. 736.0403(2)(b), F.S. does not contain an "out" for trusts executed in other states. The section applies to revocable trusts created by Florida domiciliaries regardless of the place of execution and regardless of the location of the property held in the trust.[177]

Trust Modification and Termination

In addition to provisions dealing with the requisites for a trust, Part IV of the Code includes important and useful provisions covering the modification, termination and reformation of trusts. The first three of these provisions discussed below, are rewrites of Florida's existing trust modification statutes. The remaining provisions are borrowed from the Uniform Code.

Incorporation of Existing Florida Statutes

Chapter 737, F.S. includes two important sections dealing with the modification and termination of irrevocable trusts. With some restructuring, these sections have been incorporated into three sections of the Code. Each is discussed individually below. First, however, consideration is given to features the three sections have in common.

Common Features

The three sections under consideration here – ss. 736.1113, 736.1115 and 736.0412, F.S. – are all in addition to and not in derogation of common law rights to modify, amend, terminate trusts.[178] Although they apply in different contexts and with different prerequisites, none is applicable while a trust is revocable and all permit the same kind of modifications. That is, when applicable, each section provides a mechanism through which a trust can be:

- Amended with respect to either administrative or distribution terms;

- Terminated in whole or in part;

- Modified to direct or permit a trustee to do unauthorized or prohibited acts; or

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[174] Unlike s. 737.111, F.S., s. 736.0403(2), F.S. makes no mention of trust amendments. Nevertheless, it applies to trust amendments because trust amendments are included within the definition of trust instrument. *See* s. 736.0103(20), F.S.
[175] *See* s. 736.0403(2), F.S., final sentence.
[176] Compare s. 737.111(2), F.S. which seems to imply that trusts executed by nonresidents are subject to the section if the settlor executes the trust in Florida.
[177] Because of the differences between s. 737.111, F.S. and new section 736.0403(2)(b), F.S., the latter applies only to trusts created on or after the effective date of the Code. Section 736.0403(4), F.S. Section 737.111, F.S. continues to apply to trusts created before that date.
[178] *See* ss. 736.04113(4), 736.04115(5) and 736.0412(6), F.S.

- Modified to preclude a trustee from doing authorized or required acts.[179]

Of course, the three sections have differences as well. By way of preview, areas of difference include:

- The role (if any) a court plays in the modification/termination decision;
- Who may request or effectuate a modification/termination; and
- The respect that is to be given to the settlor's intent.[180]

Judicial Modification Consistent with Settlor's Intent

Section 736.04113, F.S. permits a court to modify an irrevocable trust in any of the ways described above if the trust's purposes have been fulfilled or have become illegal, impossible, wasteful or impractical. It also permits modification when, because of an unanticipated change in circumstances, compliance with the original terms would defeat or substantially impair a material purpose of the trust.[181] Section 736.04113, F.S. is identical in effect to s. 737.4031(1), F.S. The only real difference is that s. 736.04113, F.S. clarifies who may apply for modification under the section. The application may be made by a trustee or any qualified beneficiary.[182]

An important characteristic of s. 736.04113, F.S. is that as long as they remain legal, possible and consistent with public policy (e.g., not wasteful or impractical), the settlor's purposes for the trust are the guiding polestar in a court's decision to permit a modification. In that regard, in exercising its discretion, the court is directed to consider the terms and purposes of the trust, the facts and circumstances surrounding its creation and other extrinsic evidence relevant to the proposed modification.[183] Importantly, modification under s. 736.04113, F.S. is not precluded by the presence of a spendthrift provision.[184]

The court's authority to modify a trust under s. 736.04113, F.S. is included on the list of mandatory provisions.[185] Thus, while a modification that is inconsistent with a material purpose of the settlor should be rejected by a court, a provision in a trust instrument which would seek to prevent the court from exercising its discretion on the matter is ineffective.

Judicial Modification in the Best Interest of the Beneficiaries

Under Code s. 736.04115, F.S., a court may modify an irrevocable trust in any of the ways described previously when compliance with the terms of the trust is not in the best interest of the beneficiaries.[186] As

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[179] *See* ss. 736.04113(2), 736.04115(1), and 736.0412(1), F.S.

[180] The Committee expressed the following comment concerning the settlor's intent. It may come as a surprise to some that two of the Code sections may be used to modify or terminate a trust in a manner that is inconsistent with the intent of the settlor. It is worth emphasizing, however, that this possibility is not new with the Code. It exists under the modification provisions in Chapter 737, F.S. as well. The Code's organization and restructuring of these sections just makes this possibility more apparent. Then too, it is also worth noting that, with some tradeoffs, a settlor can preclude modifications and terminations that are inconsistent with his or her intent in the governing instrument. This ability, which involves an interplay between the modification sections and the Rule against Perpetuities, is detailed more fully later.

[181] *See* s. 736.04113(1), F.S.

[182] Section 736.04113(1), F.S.

[183] Section 736.04113(3)(a), F.S.

[184] Section 736.04113(3)(b), F.S.

[185] *See* s. 736.0105(2)(j), F.S.

[186] The Committee explained the following regarding modification. Except for a clarification of who may apply for a modification under the section – a trustee or any qualified beneficiary – this section is identical in effect to existing s. 737.4031(2), F.S.[186] Under both, it is the best interest of the beneficiaries that is the controlling criteria for modification. Consequently, it is possible that s. 736.04115, F.S. could be used to modify a trust in a manner that is inconsistent with the settlor's intent. Predictably, this possibility may be anathema to some settlors. If so, read on. By default, under Florida's statutory Rule Against Perpetuities, all

with s. 736.04113, F.S. discussed above, modification under s. 736.04115, F.S. is not precluded by the presence of a spendthrift provision[187] and, in exercising its discretion, a court is directed to consider the terms and purposes of the trust, the facts and circumstances surrounding its creation, and extrinsic evidence relevant to the proposed modification.[188]

Nonjudicial Modification of Irrevocable Trusts

Section 736.0412, F.S. provides for the nonjudicial modification of a trust. Under it, a qualifying trust may be modified in any of the ways described previously upon the unanimous agreement of the trustee and all qualified beneficiaries,[189] although neither a spendthrift clause nor a provision in a trust instrument prohibiting amendment or revocation of a trust prevents modifications under the section.[190] The objection of a nonconsenting beneficiary, however, might.

Protection of Nonconsenting Beneficiaries

Because consent to a nonjudicial modification is required only of the trustee and qualified beneficiaries, there is a possibility that a s. 736.0412, F.S. modification could be detrimental to the interests of other beneficiaries. To protect against that, Code s. 736.0410(2), F.S. allows any beneficiary to commence a judicial proceeding to have a court review a proposed nonjudicial modification.

Qualification Criteria

Section 736.0412, F.S. is substantively identical to s. 737.4032, F.S. on which it was based. Under both, a number of factors must be considered in determining whether a trust qualifies for nonjudicial modification.

- First, the trust must have been created after 2000.[191]
- Second, nonjudicial modification is not permitted for any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until such time, if ever, that all charitable interests in the trust have terminated.[192]
- Finally, there can be no nonjudicial modification of any trust while the trust settlor is still alive.[193] This limitation, insures that a settlor's participation in a modification, either directly as a qualified beneficiary or indirectly as a representative of another qualified beneficiary, cannot cause adverse estate tax exposure at a settlor's death under the expansive reading some recent case decisions have given to IRC sections 2036 and 2038.[194]

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trust interests must vest or terminate within 360 years of their creation. For trusts subject to this version of the Rule, section 736.04115 is mandatory. *See* s. 736.0105(2)(j), F.S. But a provision in a trust instrument that expressly prohibits judicial modification under s. 736.04115, F.S. can be effective if the trust is drafted to comply with either the common law Rule Against Perpetuities (lives in being plus 21 years) or with Florida's shorter 90 year statutory substitute. Note, however, that drafting to comply with the common law or shorter statutory Rules is not in and of itself sufficient to preclude modifications under s. 736.04115, F.S. The trust instrument must also expressly prohibit judicial modifications under the section. *See* s. 736.04112(3)(b), F.S. Accord, s.737.4031(2)(c)2, F.S.

[187] Section 736.04115(2)(c), F.S.

[188] Section 736.04115(2)(b), F.S.

[189] Section 736.0412(1), F.S.

[190] Section 736.0412(2), F.S.

[191] Section 736.0412(4)(a), F.S.

[192] Section 736.0412(4)(b), F.S. This restriction is intended to preserved deductibility of charitable trusts for federal tax purposes.

[193] *See* s. 736.0412(1), F.S.

[194] Assuming the above criteria are met, a final consideration involves the applicable Rule Against Perpetuities associated with the trust. Section 736.0412, F.S. involves a tradeoff with the Rule Against Perpetuities similar to that detailed above for s. 736.04113, F.S. That is, nonjudicial modification is not only permissible, its availability is mandatory for trusts having a perpetuities period in excess of the common law and 90-year statutory periods.[194] For other trusts, the availability of nonjudicial

Other Modification and Termination Provisions

The three sections discussed above have their roots in the existing modification provisions of Chapter 737, F.S. In addition, the Code includes two other modification/termination provisions that are derived from the Uniform Code.

Modification or Termination of Uneconomic Trusts

Code s. 736.0414, F.S. provides a mechanism for a trustee or court to modify or terminate an uneconomic trust. The section is not mandatory; modifications and terminations under the section 736.0414 may be precluded by an express provision in the trust instrument.[195] Assuming no such provision:

- A trustee of a trust with property worth less then $50,000 may terminate the trust on its own initiative if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.[196] Before proceeding, notice must be given to the qualified beneficiaries.[197] If one or more of them object, they may commence a judicial proceeding to disapprove the trustee's termination.[198]

- In addition, upon application of a trustee or any qualified beneficiary a court may modify or terminate a trust, or remove or appoint a different trustee, if the court determines that the value of the trust property is insufficient to justify the cost of administration.[199]

In either case, upon termination of a trust, the trustee is directed to distribute the trust property in a manner consistent with the purposes of the trust.[200]

Modification to Achieve Settlor's Tax Objectives

In another section derived from the Uniform Code, s. 736.0416, F.S. provides that upon application by any interested person a court may modify a trust to achieve a settlor's tax objectives. Modifications under the section must be consistent with the settlor's probable intent.[201]

Trust Reformation

The Code contains two sections permitting the reformation of a trust to better effectuate a settlor's intent. The first of these is a codification of the common law *cy pres* doctrine. The second permits reformations to cure mistakes. This latter, in particular, is an expansion of existing law.

Cy Pres

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modification is within the control of the governing instrument. By default, trusts which are drafted to comply with the common law or 90 year statutory periods are automatically exempt from modification under s. 736.0412, F.S. The governing instrument, may however, provide to the contrary. *See* s. 736.0412(4)(b), F.S.

[195] Although the existence of a spendthrift clause is not itself sufficient to preclude applicability of the section. Section 736.0414(4), F.S.

[196] Section 736.0414(1), F.S.

[197] *Id.*

[198] *See* s. 736.0414(3), F.S.

[199] Section 736.0414(2), F.S.

[200] A trustee may enter into agreements and take other necessary or appropriate actions to protect the interests of the beneficiaries and to effectuate the intent and purposes of the trust. Section 736.0414(3), F.S.

[201] Code s. 736.0416, F.S. provides an important state law authority for this type of modification. It does not, and can not, however, insure that the modification will be recognized for tax purposes. In general, tax recognition requires either that the modification occur before the event giving rise to the tax or that the modification be authorized by the Internal Revenue Code or Treasury Regulations promulgated thereunder. *See* Rev. Rul. 73-142, 1973-1 C.B. 405.

Section 736.0413, F.S. codifies the common law *cy pres* doctrine. Under the section, a court may modify or terminate a charitable trust in a manner consistent with a settlor's charitable purposes if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful. Reformation under s. 736.0413, F.S. is discretionary with a court. In that regard, the section differs from the corresponding Uniform Code provision. Under Uniform Code s. 413, it is presumed that the settlor had a general charitable intent in creating the trust which precludes a court from reverting the trust property back to the settlor or the settlor's successors in interest.[202] This limitation is not present in s. 736.0413, F.S.

Reformation to Correct Mistakes

Under s. 736.0415, F.S., upon application of the trustee or any interested person, a court may reform the terms of a trust to conform to the settlor's intentions if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake. Reformation under the section is available for both mistakes of law and of fact, whether or not the terms of the trust are ambiguous.[203]

Trust Division and Combination

The final section of Part IV of the Code -- s. 736.0417, F.S. -- gives trustees the power to sever or combine trusts. The section is derived from Uniform Code s. 417. It replaces provisions in Chapter 737, F.S. which also permit trust combinations and severances.[204] The Committee preferred the Uniform Code provision over existing law because the existing statutes are unnecessarily restrictive. For example, severances under existing statutes must result in trusts with identical terms and with an aggregate of interests that are reasonably equivalent to those that existed prior to the severance. Similar restrictions apply to combinations.[205]

By contrast, under s. 736.0417, F.S. a trustee may combine trusts even though their terms are not identical. And a single trust can be severed even though the resulting trusts are dissimilar. Three cautions, are in order, however.

- First, the authority of the trustee is circumscribed by a requirement that the severance or combination not impair any beneficiary's rights.

- Second, notice must be given to qualified beneficiaries and any beneficiary may commence a proceeding to disapprove a proposed severance or combination.[206]

- Lastly, the types of actions permitted under s. 736.0417, F.S. may exceed what are permissible from a tax standpoint. Trustees should exercise caution as tax law requirements for trust combinations and severances vary with the context.

CREDITORS CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS (PART V)

Part V of the Code contains the several provisions that bear on the rights of creditors vis-à-vis a beneficiary's interest in a trust. Areas covered include the ability to garnish present or future distributions; the validity,

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[202] This aspect of the Uniform Code is discussed further in the comments to UTC s. 413.
[203] Existing Florida case law supports reformation to cure scrivener's errors. *See Robinson v. Robinson*, 720 So. 2d 540 (Fla. 4th DCA 1998). Section 736.0415, F.S. is broader, however, as it allows reformation for mistakes both in the expression and in the inducement.
[204] *See* s.737.403, F.S.
[205] *See* s. 737.403(b), F.S.
[206] Section 736.0410(2), F.S.

requisites, effect, and limits of spendthrift provisions; the impact on creditor's rights of discretionary distribution standards; the treatment of self-settled trusts; and the duty of trustees of revocable trusts to pay the expenses and obligations of a settlor's estate.

Third Party Trusts

The term "third party trusts" is used in this Summary as a convenience to distinguish between those trusts that a settlor creates for others and those where the settlor has either a power of revocation or an interest as beneficiary. The latter are referred to as self-settled trusts.

No Spendthrift Provision

With respect to third party trusts, s. 736.0501, F.S. provides the basic statement of creditor remedy. Under the section, as long as the trust does not contain a valid spendthrift provision, a court may "authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means."[207] Importantly, the rights given to creditors under the section are limited to those cases where a beneficiary has a right to distributions. If distributions are discretionary, a beneficiary has no "attachable" trust interest. Thus, s. 736.0504(1), F.S. provides that a creditor of a beneficiary may not compel a distribution that is subject to a trustee's discretion whether or not the discretion is subject to a standard and whether or not the trustee has abused the discretion.[208] In addition, s. 736.0504(2), F.S. insures that the same rules apply even if the beneficiary is the trustee, provided the trustee's discretion to distribute for its own benefit is limited by an ascertainable standard.[209]

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[207] Although Chapter 737, F.S. contains nothing similar, s. 736.0501, F.S. is consistent with existing Florida case law which permits garnishment of "disbursements that are due to be made or actually made from the trust." *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985). It does not matter that the distribution is to be made to or for the benefit of the beneficiary. *See Bradshaw v. Am. Advent Christian Home and Orphanage*, 145 Fla. 270, 199 So. 329 (1941) ("Where trust income is to be applied for the use and benefit of the *cestui que* trust, a court of equity may direct application of the income to payment of his debts.")

[208] Existing Florida case law does not permit the garnishment of interests in wholly discretionary trust interests. *See Bacardi v. White*, supra note 207. Whether the same rule applies to trusts where the discretion is subject to a standard, particularly where the standard has been abused, is not clear.

[209] On the question of when a trustee's powers may be subject to an ascertainable standard even though such a standard is not provided in the trust instrument, *see* ss. 736.0814(2) and (3), F.S. under which a power of a trustee other than a settlor or a spouse of a settlor to distribute to itself is automatically restricted by an ascertainable standard.
Section 736.0504(2), F.S. is derived from UTC section 504(e). The purpose of the provision is explained in the following comment to the UTC section:

> The UTC, as previously drafted, did not specifically address the issue of whether a creditor of a beneficiary may reach the beneficial interest of a beneficiary who is also a trustee. However, Restatement (Third) of Trusts s.60, comment g, which was approved by the American law Institute in 1999, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee's creditors. Because the UTC is supplemented by the common law (see UTC Section 106), this Restatement rule might also apply in states enacting the UTC. The drafting committee has concluded that adoption of the Restatement rule would unduly disrupt standard estate planning and should be limited. Consequently, Section 504 is amended to provide that the provisions of this section, which generally prohibit a creditor of a beneficiary from reaching a beneficiary's discretionary interest, apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee is protected from creditor claims to the extent the beneficiary-trustee's discretion is protected by an ascertainable standard as defined in the relevant Internal Revenue Code sections. The result is that the beneficiary's trustee's interest is protected to the extent it is also exempt from federal estate tax. The amendment thereby achieves its main purpose, which is to protect the trustee-beneficiary of a bypass trust from creditor claims.

The Committee notes that there is no Florida case law in support of the position taken by the Restatement (Third) of Trusts above with respect to powers subject to ascertainable standards. In *Croom v. Ocala Plumbing & Electric Co.*, 62 Fla. 460 (1911), the supreme court did subject property to the reach of trust beneficiaries' creditors because the trust instrument gave the beneficiaries an unrestricted right to demand distribution of the trust. The court said:

Section 736.0504, F.S. applies only with respect to the rights of creditors to compel distributions from discretionary trusts. It does not limit the right of a beneficiary to sue for an abuse of discretion or a failure to comply with a distribution standard.[210]

Spendthrift Trusts

Code s. 736.0502, F.S. gives statutory recognition to spendthrift provisions.[211] Assuming a trust has a valid spendthrift provision:

- A beneficiary may not transfer his beneficial interest in the trust; and
- With some exceptions discussed next, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before it is received by the beneficiary.[212]

Spendthrift provisions are also recognized in existing Florida case law, although there is an important difference in the treatment of them under the Code. The difference concerns the required scope of the restraint on alienability. Under Florida case law, it appears possible for a spendthrift provision to allow limited transfers among family members.[213] That is not allowable under the Code. Under s. 736.0502(1), F.S., a spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest. Because this limitation is mandatory and is a change in existing law, the requirement does not apply to any trust in existence on the effective date of the Code.[214]

Exception Creditors

When it comes to the effectiveness of spendthrift provisions, not all creditors are created equal. For public policy reasons, some creditors may proceed against a beneficiary's interest in a trust even though the trust includes a spendthrift clause. Thus, s. 736.0503(2), F.S. provides that a spendthrift clause is unenforceable against:

- A claim by a beneficiary's child, spouse, or former spouse for support or maintenance;
- A judgment creditor (such as an attorney) who has provided services for the protection of a beneficiary's interest in the trust; or
- A claim by a state or the United States, but only to the extent a separate statute so provides.

> Even if a deed creating a spendthrift trust, if properly construed, is valid and effectual to exempt the property from the debts of the beneficiaries, yet where the deed provides that the trustees shall convey all or any part of the property to the *cestui que* trust or to their assigns as they may direct on the joint request in writing, this virtually gives them absolute dominion so as to vest in them or their assigns absolute title, and such deed does not exempt the property from their debts under the general rule that when one has an interest in property which he may alien or assign, that interest, whether legal or equitable, is liable for the payment of his debts.

The powers in *Croom*, however, were unrestricted. The rationale of the case would not appear to apply to powers subject to an ascertainable standard. Hence, the Committee believes that section 736.0504(2) is consistent with existing law.

[210] Section 736.0504(3), F.S.

[211] The Code clarifies that no special language is necessary to create a spendthrift trust. Thus, a trust term to the effect that beneficial interests are subject to a spendthrift trust or words of similar import is sufficient to do the trick. *See* s. 736.0502(2), F.S.

[212] Section 736.0502(3).

[213] Although neither court discussed the point, the spendthrift clauses upheld in *Bacardi v. White*, 463 So. 2d 218 (Fla. 1885) and *Mason v. Mason*, 789 So. 2d 895 (Fla. 3d DCA 2001) both permitted limited transfers to family members.

[214] Section 736.0502(1), F.S.

Remedies Available to Exception Creditors

The fact that spendthrift clauses are unenforceable against exception creditors means only that these creditors have remedies against a beneficiary's interest similar to those of creditors of beneficiaries with interests in a trust that does not include a spendthrift provision. That is, exception creditors may attach present or future distributions to or for the benefit of the beneficiary;[215] they cannot compel distributions from or otherwise reach beneficial interests in discretionary trusts.[216]

Key Change from Existing Law

The concept of exception creditors has been recognized in Florida's case law since the 1985 decision in *Bacardi v. White*[217] in which the Supreme Court permitted a former spouse to recover alimony and attorney's fees from her former husband's spendthrift trust. In dicta, the court indicated that the result would be the same for a claim by a child for child support. A key difference between the *Bacardi* holding and the Code treatment of these exception creditors, however, is that the court in *Bacardi* held that the spouse's remedy is a last resort remedy which is available only upon a showing that traditional remedies are not effective.[218] The Code's provisions dealing with exception creditors are not so limited. Hence the Code changes existing law in this area by eliminating the need to show that traditional remedies are ineffective.

Mandatory Distributions

Although a spendthrift provision prevents a beneficiary's creditor from attaching or garnishing the beneficiary's interest in a trust, it does not protect trust income or principal after it has been distributed to the beneficiary. For that reason, a sympathetic trustee might be tempted to delay required distributions to spendthrift beneficiaries to frustrate or delay the beneficiaries' creditors' efforts to reach the distributions. Code s. 736.0506, F.S. is intended to prevent this. Under the section, whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution that the trustee does not make within a reasonable time.[219] For this purpose, a mandatory distribution is a distribution of income or principal that the trustee is required to make under the terms of the trust, including a distribution on termination of the trust. The term does not encompass discretionary distributions of any sort.[220]

Self-settled Trusts

As mentioned previously, this Summary uses the term "self-settled trust" as a convenience. A trust is a self-settled trust if it is revocable by the settlor or if the settlor is a mandatory or permissible distributee of trust property.

Creditor Remedies

Traditionally, self-settled trusts have been treated harshly when it comes to creditors' rights. This follows from a widely accepted public policy maxim that you should not be permitted to put property in a trust for your own benefit and escape your creditors. This policy maxim informs the Code's treatment of self-settled trusts. Under Code s. 736.0505(1), F.S., whether or not a trust includes a spendthrift provision:

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[215] *See* s. 736.0503(3), F.S. This subsection also preserves the existing procedures available under the Uniform Interstate Family Support Act. *See* Chapter 88, F.S.
[216] *See* s. 736.0504(1), F.S., discussed supra, p. 24, which applies whether or not a trust contains a spendthrift provision.
[217] 463 So. 2d 218 (Fla. 1985).
[218] Accord, *Mason v. Mason*, 789 So. 2d 895 (Fla. 3d DCA 2001).
[219] Section 736.0506(2), F.S.
[220] It is immaterial for this purpose that the discretion is subject to a standard or that it is coupled with language of direction. Section 736.0506(1), F.S.

- While a trust is revocable, the trust property is subject to the claims of the settlor's creditors;[221] and

- In the case of an irrevocable trust, a settlor's creditor or assignee may reach the maximum that can be distributed to or for the benefit of the settlor.[222] [223]

Withdrawal Powers

While the remedies given in the Code to creditors of settlors of self-settled trusts are not new, there is one aspect of s. 736.0505, F.S. that may be. Under s. 736.0505(2)(a), F.S., during the period it may be exercised, a holder of a withdrawal power over trust property is treated the same as a settlor of a revocable trust with respect to the property subject to the power.[224] Hence, the power holder's creditors may reach the property subject to the power.

As the term "power of withdrawal" does not include powers held by a trustee which are limited by an ascertainable standard or powers which require the consent of the trustee or an adverse person,[225] the rule in section 736.0505(2)(a), F.S. appears consistent with the Supreme Court's decision in *Croom v. Ocala Plumbing & Electric Co.*[226] which subjected trust property to the reach of creditors when the trust beneficiaries had an unrestricted right to access trust property. Under s. 736.0505(2)(b), F.S., however, upon a lapse, release, or waiver of a withdrawal power, the power holder retains the status of trust settlor with respect to the value of the property subject to the lapse, etc.[227] Accordingly, the power holder's creditors can reach the maximum amount of that property that could thereafter be distributed to the power holder. As there is no similar principal in existing Florida case law, the Committee views s. 736.0505(2)(b), F.S. to be a change in existing law.[228]

Trustee's Duty to Pay Expenses and Obligations of Settlor's Estate

Chapter 737, F.S. includes provisions which establish a workable and important mechanism by which the assets of a deceased settlor's revocable trust must be applied in payment of the expenses of administration and the obligations of a settlor's estate. The Code incorporates these provisions without change. Thus, in a mandatory provision, s. 736.05053, F.S. obligates a trustee of a trust described in s.733.707(3), F.S.[229] to pay

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[221] Section 736.0505(1)(a), F.S. Accord UTC s. 505(a)(1); Restatement (Third) of Trusts s. 25 comment e (Tentative Draft No. 1, approved 1996). But see Restatement (Second) of Trusts s. 330 comment o (1959) indicating that the rule with respect to revocable trusts at common law is different.

[222] Section 736.0505(1)(b), F.S. Accord UTC s. 505(a)(2); Restatement (Third) of Trusts s. 58(2) and comment e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts s. 156 (1959).

[223] Neither of these rules is surprising. As both are consistent with accepted general principles of law, the Committee believed that s. 736.0505(1), F.S. does not change existing Florida law. Of course, not all states follow these rules. Recent, legislation in some states gives greater creditor protection to irrevocable self-settled trusts.

[224] Section 736.0505(2)(a), F.S.

[225] *See* s. 736.0103(12), F.S.

[226] 62 Fla. 460 (1911). *Croom* is discussed further at note 209.

[227] *See* s. 736.0505(2)(b), F.S.

[228] The Code contains an important qualification to the rule discussed above dealing with the effect of lapses, releases and waivers. The rule applies if and only to the extent the value affected by the lapse, release or waiver exceeds the greater of the gift tax annual exclusion (currently $11,000) or the safe harbor for lapses under the federal gift and estate tax laws (currently the greater of $5,000 or 5 percent of the trust). *See* ss. 736.0505(b)(1) and (2), F.S. For powers drafted not to exceed these limits, the property subject to the power will be subject to the power holder's creditors before the lapse, release, etc., but not thereafter. Initially, the Committee favored a rule that would have excepted lapsing powers altogether (even while they were exercisable) provided the powers lapsed within the restrictions of the gift tax annual exclusion or transfer tax safe harbors. Such an exception, however, would invite abuse as unrestricted and unlimited withdrawal powers could be brought within the scope of the exception simply by providing that they are to lapse at some nominal rate (such as $100 per year). Ultimately, the Committee accepted the treatment described in the text which is also the treatment given to withdrawal powers under the Uniform Code. *See* UTC s. 505(b).

[229] Sections 736.05053 and 736.05055, F.S. refer to trusts described in s. 733.707(3), F.S. rather than to revocable trusts because s. 733.707(3), F.S. is a broader concept. In addition, the section contains safeguards to prevent adverse tax consequences.

to a deceased settlor's personal representative amounts the personal representative certifies in writing to be required to pay administration expenses and the obligations of the settlor's estate. The section is identical to s. 737.3054, F.S. In another mandatory provision, Code s. 736.05055, F.S. carries forward the requirements found in s. 737.308, F.S., including the requirement imposed on a trustee of a trust described in s. 733.707(3) , F.S. to file a notice of trust with the court of the county of the settlor's domicile and the court having jurisdiction of the settlor's estate.

Revocable Trusts (Part VI)

Part VI of the Code gathers in one place most of the provisions relating to revocable trusts, which the Code defines to be a trust that may be revoked by the settlor without the consent of either a trustee or a person having an adverse interest.[230] In an initial mandatory provision, s. 736.0601, F.S. clarifies that the capacity required to create a revocable trust is the same as that needed to execute a will.[231] Other sections specify the rules to be used to determine if and how a trust may be revoked or amended, the effect revocability has on the duties and liabilities of a trustee and the limitations period for contesting revocable trusts after the death of the settlor.[232]

Consequences of Revocability

Revocability is important under the Code in two respects. The first, discussed previously, is the impact revocability has on the ability of a settlor's creditors to reach trust assets in satisfaction of their claims and the liability the trust has for contribution for costs and claims at a settlor's death. The second area where revocability plays an important role concerns the duties of the trustee. While a trust is revocable, the trustee's duties are owed exclusively to the trust settlor.[233] As a consequence:

- No other person is entitled to notices, information, accountings, or reports;[234] and
- A trustee may follow a direction of the settlor that is contrary to the trust instrument.[235]

The situations where a trustee's duties are restricted by section 736.0603 are not limited to traditional revocable trusts. Under s. 736.0603(2), F.S., during the period the power may be exercised, a holder of a power of withdrawal is given the rights of a settlor of a revocable trust with respect to the property subject to the power.[236] Hence, if upon attaining a specified age, a beneficiary is given a continuing right to withdraw all trust property, the trustee has no duty to send notices, information, accountings, or reports to any other beneficiary.[237]

Trusts are Revocable by Default

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[230] Section 736.0103(15), F.S.
[231] As a section dealing with the requirements for creating a trust, s. 736.0601, F.S. is made mandatory by s. 736.0105(2)(a), F.S.
[232] As for the capacity to execute a revocable trust, all of the Committee agreed that it should be the same as that required to execute a will. But some on the Committee preferred that the standard for both be raised to that required to make an irrevocable inter vivos gift.
[233] Section 736.0603(1), F.S.
[234] The corresponding provision of the Uniform Code ceases to apply if a settlor loses capacity. *See* UTC s. 603(a). This restriction is not present in s. 736.0603(1), F.S.
[235] *See* s. 736.0808(1), F.S. discussed infra at p. 27.
[236] Accord UTC s. 603(b).
[237] Section 736.0603(2), F.S. is not restricted to withdrawal powers that extend to the entire trust. It applies in the case of powers to withdraw only a portion of a trust, including lapsing powers so commonly included for tax purposes. With respect to these powers, however, the impact of s. 736.0602(2), F.S. should be minor, first because its applicability would be limited to the portion of the trust that is subject to the withdrawal power, and second because the section ceases to apply once the power lapses.

In an important change from prior law, the Code provides that trusts are revocable by default. That is, unless the trust instrument states that the trust is irrevocable, the trust may be amended or revoked by the settlor.[238]

This change is prospective only. It conforms Florida law to that of California, Texas and a growing number of other states, including those that have adopted the Uniform Code. The new rule reflects the view that most well drafted trust instruments explicitly say whether they are revocable. When a trust instrument does not clarify this, the implication is that the instrument was not drafted by an experienced attorney in which case the trust was probably intended to be revocable.[239]

Revocation Methodology

In addition to stating that it is revocable, a well drafted revocable trust instrument will specify the method that is to be used to accomplish a revocation or amendment. Under the Code:

- If the instrument does this, the provision in the instrument is exclusive in the sense that the trust can be revoked or amended only by substantially complying with the method stated in the instrument.[240]

- If the instrument does not specify a method, any clear and convincing manifestation of the settlor's intent to revoke is sufficient,[241] including a provision in the settlor's later will or codicil expressly revoking the trust or specifically devising property that would otherwise pass according to the trust terms.[242]

Both principles, however, are subject to the possible overriding application of s. 736.0403(2)(b), F.S. as well as to certain other restrictions when someone is acting on behalf of the settlor or when a trust has more than one settlor.

Interrelationship with s. 736.0403(2)(b), F.S.

Recall that under s. 736.0403(2)(b), F.S., the testamentary aspects of a revocable trust executed by a Florida domiciliary are void unless the trust instrument is executed in the manner required for wills. Under the Code, the term trust instrument includes trust amendments.[243] Hence, notwithstanding the principles set out above, *amendments* to the testamentary provisions of a revocable trust must comply with s. 736.0403(2)(b), F.S.

The question of whether trust *revocations* must also comply with s. 736.0403(2)(b), F.S. is less clear. The better position is that they do not, as the effect of a revocation is to return the property to the settlor free of trust.[244] It is an unnecessary stretch to say that such a result is a trust "amendment" to which s. 736.0403(2)(b), F.S. would apply. Nevertheless, there is sufficient uncertainty on the issue that compliance with s. 736.0403(2)(b), F.S. for all amendments and revocations would appear prudent.

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[238] Section 736.0602(1), F.S. Under the Code, if a trust is revocable, it may also be amended. *See* generally the comments to UTC s. 601 citing Restatement (Third) of Trusts s. 63 cmt. g (Tentative Draft No. 3, approved 2001); Restatement (Second of Trusts s. 331 cmt. g & h (1959) to the same effect. *See* also s. 736.0602(1), F.S.

[239] *See* generally the comments to UTC s. 602(a). Moreover, if the assumptions underlying the revocable by default rule are wrong in a particular case, it is easier to make a revocable trust irrevocable than it would be to reform an irrevocable trust into a revocable one.

[240] Section 736.0602(3)(a), F.S. The "substantial compliance" test in this section may be more lenient that existing Florida law which appears to require strict compliance. *See Euart v. Yoakley*, 456 So.2d 1327 (Fla. 4th DCA 1984).

[241] Section 736.0602(3)(b)2, F.S. Accord *Macfarlane v. First National Bank of Miami*, 203 So. 257 (Fla. 3d DCA 1967).

[242] Section 736.0602(3)(b)1, F.S.

[243] Section 736.0103(20), F.S.

[244] Under this view, if no methodology is expressed in the trust instrument, a trust could be revoked by physical act or perhaps even by an oral statement. For a suggestion that both approached might be available under the identical provision of the Uniform Code, see the comments to UTC s. 602.

Revocations on Behalf of a Settlor

In most cases, a settlor's power of revocation or amendment will be exercised personally. The Code does, however, confirm separate Florida statutes under which others have a limited authority to act on a settlor's behalf. Thus, a settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by:

- An attorney in fact, but only as authorized by s. 709.08, F.S.;[245] or
- A guardian of the property, but only as authorized in s. 744.441, F.S.[246]

Trusts with more than one Settlor

As defined in the Code, "settlor" includes anyone who transfers property to a new or existing trust.[247] Under this definition, a trust can have more than one settlor. In such cases, s. 736.0602(2), F.S. specifies default rules for how the trust may be revoked or amended. As a general principle, each settlor may unilaterally revoke or amend his or her trust portion. But an exception applies if a trust consists of community property. To that extent, either spouse may revoke the trust, but amendments require the joinder of both. In all cases, if a trust is revoked or amended by fewer than all settlors, the trustee must promptly notify the other settlors of that fact.[248]

Protection of Trustees

If a trust is revoked, the Code directs the trustee to deliver the trust property as the settlor directs.[249] Of course, nothing insures that directions from the settlor will be forthcoming and, particularly where no method is specified in the trust instrument, it is possible that a trust could be amended or revoked without the trustee's knowledge. In such cases, the Code holds the unknowing trustee harmless for distributions made and other actions taken on the assumption that the trust has not been amended or revoked.[250]

Trust Contests

Provisions relevant to trust contests appear in several places in the Code. Reference has already been made to the fact that a trust or part of a trust is void to the extent its creation is procured by fraud, duress, mistake, or undue influence.[251] Reference has also been made to the general rule prohibiting actions to contest the validity of trusts while they are revocable and the exception to the prohibition that applies to court sanctioned contests by the guardian of the property of an incompetent settlor.[252] Part VI's contribution to this area is s. 736.0604, F.S. This section sets out the period of limitations for contesting a trust that was revocable at the settlor's death. On a person by person basis, a trustee can have the advantage of a short six month limitations period by sending the person a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name and address, and the time allowed for commencing a

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[245] Section 736.0602(5), F.S.
[246] Section 736.0602(6), F.S.
[247] Section 736.0103(16), F.S.
[248] *See* s. 736.0602(2), F.S. The restrictions placed on trusts holding community property are intended to facilitate the ability to transfer community property to a trust without destroying its community property characteristics. *See* comments to UTC s. 602.
[249] Section 736.0602(4), F.S.
[250] Section 736.0602(7), F.S.
[251] *See* s. 736.0406, F.S.
[252] *See* s. 736.0207, F.S.

proceeding. As is true across the entire Code, the representation provisions of Part III are available to a trustee who wishes to comply with the requirements of s. 736.0604, F.S.[253]

Office of Trustee (Part VII)

Part VII of the Code contains the various rules relating to the office of trustee. This includes provisions detailing when and how a designated trustee accepts or declines the office; how trustees may resign or be removed; the powers and duties of a trustee who has resigned or been removed; and when vacancies in the office of trustee must be filled and how successor trustees are appointed. Also covered are the duties and powers of cotrustees, compensation of trustees, and trustees' right to reimbursement for expenses incurred in the administration of the trust.

Accepting or Declining the Office

A person designated in a trust instrument to serve as trustee may decline to do so. Prior to acceptance, a trustee who knows of his designation of trustee is deemed to decline the trusteeship if the person does not accept the designation within a reasonable time.[254] A person accepts the trusteeship by substantially complying with the method provided in the terms of the trust or by otherwise indicating acceptance, such as by accepting delivery of the trust property or by exercising powers or performing duties as trustee.[255]

Actions not Constituting Acceptance

In some cases, it is desirable for a person designated as trustee to be able to act on behalf of a trust, or in his or her own interest, without the actions being treated as an acceptance of the trusteeship. To facilitate this, the Code provides that a designated trustee may, without accepting the trusteeship:

- Act to preserve trust property (provided the person sends a notice of the person's decision to decline the trusteeship to at least one qualified beneficiary within a reasonable time of taking the action); or
- Inspect or investigate trust property for any purpose including to determine potential liability under environmental or other law.[256]

Trustee's Bond

A trustee need not give bond unless required by the terms of the trust or the court finds that a bond is needed to protect the interests of the beneficiaries.[257] In the former case, the court may dispense with a bond required in an instrument. And in all cases, it may specify the amount of the bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond or surety at any time.[258]

Resignations and Removals
Resignations

[253] This important new provision attempts to strike a balance between the need for a reasonable period to bring an action contesting the validity of a revocable trust and the sometimes competing interest the trust beneficiaries have in an expeditious resolution of their rights and a distribution of their shares.
[254] Section 736.0701(2), F.S.
[255] Section 736.0701(1)(a) and (b), F.S.
[256] Section 736.0701(3)(a) and (b), F.S.
[257] Section 736.0702(1), F.S.
[258] Section 736.0702(2), F.S. The Committee notes that the power a court has to modify or terminate a bond under this subsection includes the power to modify any required surety.

A trustee may resign with court approval.[259] In addition, the Code provides a mechanism for trustees to resign without court approval. A trustee may resign by giving at least 30 days notice to the settlor (if living), the cotrustees (if any) and all qualified beneficiaries.[260] In either case, a trustee's resignation does not discharge any liability of the resigning trustee or any sureties on the trustee's bond.[261]

The ability of a trustee to resign without court intervention was new. There was no counterpart under prior law.[262] Subsequently, new s. 737.309, F.S. was enacted to permit this. Note that under the Code, however, the trustee's right to resign is a mandatory provision. It may not be denied or curtailed in the trust instrument.[263]

Removals

Court removal of a trustee may be sought by the settlor, a cotrustee, or any beneficiary. The Code also recognizes the ability of a court to remove a trustee on its own initiative.[264] Statutory grounds for removal include a serious breach of trust, lack of cooperation among cotrustees, and unfitness, unwillingness or persistent failure to effectively administer the trust.[265] In lieu of (or in addition to) removing a trustee, the court may grant appropriate relief for any breaches of trust that have occurred.[266]

The Code's provision giving a settlor the right to seek removal of a trustee is probably an expansion of existing law.[267] So to is the "unfitness" criteria at least if and to the extent it permits removal in anticipation of an actual breach.[268]

The Code also permits removal of a trustee at the request of all of the qualified beneficiaries or upon a showing of a substantial change in circumstances. Removal on these grounds does not require a showing of malfeasance. It requires only that:

- The removal best serve the interests of all beneficiaries;
- It not be inconsistent with a material purpose of the trust; and
- A suitable cotrustee or successor trustee be available.[269]

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[259] Section 736.0705(1)(b), F.S. The court may impose conditions and enter orders reasonable necessary to protect trust property. Section 736.0705(2), F.S.
[260] Section 736.0505(1)(a), F.S.
[261] Section 736.0705(3), F.S.
[262] Prior Florida law followed the general rule that a trustee who has accepted a trusteeship cannot resign except in accordance with the terms of the trust, upon consent of all beneficiaries, or with approval of a court of competent jurisdiction. *See* e.g., *Stearns v. Fraleigh*, 39 Fla. 603, 23 So. 18 (1897); *Strong v. Willis*, 3 Fla. 1244 (1850). *See* also J. Grimsley, Florida Law of Trusts, s. 4-3; Restatement (Second) of Trusts s. 106(b) (Ali 1957).
[263] *See* s. 736.0105(2)(o), F.S.
[264] Section 736.0706(1), F.S.
[265] Section 736.0706(2)(a) – (c), F.S.
[266] *See* s. 736.0706(3), F.S. On the remedies generally available for a breach of trust, see s. 736.1001(2), F.S. discussed infra at p. 27.
[267] *See Sanders v. Citizens Nat. Bank of Leesburg*, 585 So. 2d 1064 (Fla. 5th DCA 1991) holding that the settlor of an irrevocable trust who has retained no beneficial interest in the trust corpus cannot maintain an action to enforce the trust.
[268] Under existing law, the general rule is that removal of a trustee must be predicated on a "clear showing of abuse or wrongdoing in the actual administration of the trust" or upon a showing of disharmony and hostility between trustees. Removal may not be predicated solely on hostility between beneficiaries and a trustee or upon a potential for mismanagement or conflict of interest. *See Parr v. Cushing*, 507 So.2d 1227, 1228 (Fla. 5th DCA 1987); *Robinson v. Tootalian*, 691 So. 2d 52 (Fla. 4th DCA 1997); *State of Delaware ex rel. Gebelein v. Belin*, 456 So. 2d 1237 (Fla. 1st DCA 1984), *rev. den.* 464 So.2d 556; *Rosen v. Rosen*, 167 So. 2d 70 (Fla. 3d DCA 1964).
[269] Section 736.0706(2)(d), F.S. The necessity of getting the joinder of all qualified beneficiaries may be facilitated by the representation provisions of Part III of the Code. Moreover, it may be possible to use ss. 736.04113 or 736.04115, F.S. to remove a trustee without meeting the requirements of section 736.0706(2)(d), F.S.

Delivery of Property by Former Trustee

Subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes, a removed or resigning trustee must, within a reasonable time, deliver any trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitle to it.[270] Pending that, unless a cotrustee remains in office or the court orders otherwise, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect trust property.[271]

Vacancies and Appointment of Successor Trustees

The court has plenary authority to appoint an additional trustee or special fiduciary whenever the court considers it necessary for the administration of the trust.[272] In addition, the court has residual authority to appoint a successor trustee if an otherwise unfilled vacancy in the trusteeship occurs.[273]
A vacancy in a trusteeship can occur for a number of reasons including the inability to identify a designated trustee, the fact that a designated trustee declines the office, is adjudicated to be incapacitated, resigns, is disqualified, is removed or dies.[274] In each instance, unless the terms of the trust provide otherwise, a vacancy need not be filled unless there is no remaining trustee to serve.[275]
Where a vacancy in a trusteeship is required to be filled, it must be filled first by a person designated pursuant to the terms of the trust, then by a person appointed by unanimous agreement of the qualified beneficiaries (or in the case of charitable trusts, the charitable organizations expressly designated to receive distributions under the terms of the trust), and lastly, if necessary, by a person appointed by the court.[276]

Cotrustees
Duty to Participate

With some exceptions noted below, the Code imposes upon cotrustees a duty to participate in the administration of the trust.[277] In doing so, it is normally to be expected that the cotrustees would act by unanimous consent. However, if the cotrustees are not able to reach a unanimous decision, they may act by majority agreement.[278]

Failure to Participate

A cotrustee's participation is excused if the cotrustee is unavailable because of absence, illness, disqualification or other temporary incapacity,[279] in which cases the remaining trustee or a majority of the remaining trustees may act for the trust if prompt action is necessary to achieve the purposes of the trust or to

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[270] Section 736.0707(2), F.S. The provisions of this subsection are explicitly stated to be in addition to and not in derogation of the rights of a removed or resigning trustee under common law. The intent of this statement is to insure that the subsection is not read as overruling the holding in *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Assoc. Inc. Et. al.*, 832 So. 2d 948 (Fla. 2d DCA 2002).
[271] Section 736.0706(3), F.S.
[272] Section 736.0704(5), F.S.
[273] *See* ss. 736.0704(3)(c) and (4)(c), F.S.
[274] These reasons are detailed in s. 736.0704(1), F.S.
[275] Section 736.0704(2), F.S. If a vacancy in a cotrusteeship occurs, the remaining trustees (or a majority of the remaining trustees) may act for the trust. Section 736.0703(2), F.S. *Accord* s. 737.404(2), F.S.
[276] Section 736.0704(3) and (4), F.S. The ability of qualified beneficiaries (or named charities) to designate a successor trustee is an expansion of existing Florida law. *See Van Roy v. Hunter*, 96 Fla. 194, 117 So. 887 (1928) (a vacancy in a trusteeship would be filled by a court if the instrument did not provide for a successor or a method of selecting a successor).
[277] Section 736.0703(3), F.S.
[278] Section 736.0703(1), F.S.
[279] Section 736.0703(3), F.S.

avoid injury to the trust property.[280] In addition, a cotrustee's participation in the administration of the trust is not required if the trustee has properly delegated performance of a function to another trustee.[281]

Delegation among Cotrustees

Delegation is permitted under the Code only of those functions the settlor did not reasonably expect the trustees to perform jointly.[282] In the absence of an express delegation authority in the trust instrument, this would normally be limited to ministerial duties incidental to the execution of the trust, although even in the absence of a provision in the governing instrument, the investment decisions may be delegated to a qualified trustee under other provisions of the Florida statutes.[283]

Liability of Nonjoining or Dissenting Trustees

In general, a trustee who does not join in an action by another trustee is not liable for the action.[284] However, this rule is subject to the overriding duty of each trustee to exercise reasonable care to prevent a cotrustee from committing a breach of trust and to compel a cotrustee to redress a breach that does occur.[285]

Because the Code permits a majority of trustees to act for the trust, it is possible that one or more trustees could be outvoted as to some particular course of action. A dissenting trustee who joins in an action at the direction of a majority of trustees is not liable for actions taken by the majority provided notice of the dissent is given to any cotrustee at or before the time of the action.[286]

Compensation and Reimbursement of Trustees

A trustee is entitled to reasonable compensation,[287] including reasonable additional compensation for other services the trustee renders in connection with the administration of the trust.[288] If the trustee's compensation is specified in the terms of the trust, the trustee is entitled to be compensated as specified, subject to the court's authority to allow more or less compensation if the trustee's duties are substantially different from those originally contemplated or the specified compensation is unreasonably low or high.[289]

A trustee is also entitled to be reimbursed out of the trust property, with appropriate interest, for reasonable expenses properly incurred in the administration of the trust. A trustee has a lien against trust property to secure reimbursement for advances (plus interest) made by the trustee for the protection of the trust.[290]

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[280] Section 736.0703(4), F.S.
[281] Section 736.0703(3), F.S.
[282] Section 736.0703(5), F.S. Irrevocable delegations are not permitted under this subsection. A trustee may revoke a delegation previously made. Compare UTC s. 703(e).
[283] On this, see s. 518.112, F.S.
[284] Section 736.0703(6), F.S.
[285] Section 736.0703(7)(a) and (b), F.S. The corresponding provision in the Uniform Code refers to "serious" breaches of trust. *See* UTC s. 703. The Committee removed "serious" because it did not feel the word clarified the meaning of the section. Mere technical breaches would not appear to be a problem under the subsection as they would not normally result in damages to the trust or its beneficiaries. The "seriousness" of other breaches will be reflected in the standard of reasonable care required by the subsection.
[286] Section 736.0703(8), F.S. Unlike the similar provision in existing law, s. 736.0703(8) does not require the notice of the dissent to be in writing. Compare s. 737.404, F.S.
[287] Section 736.0708(1), F.S. On the factors to be taken into account in determining a reasonable compensation, see *West Coast Hospital Association v. Florida Nat'l Bank of Jacksonville*, 100 So. 2d 807 (1958) citing with favor Bogert, Trusts and Trustees, s 976.
[288] Section 736.0708(3), F.S. There is not existing statute covering the compensation of multiple trustees and the Code does not address this issue either. Compare s. 733.716(5), F.S. dealing with the compensation of multiple personal representatives.
[289] Section 736.0708(2), F.S. The authority of the Court to adjust a trustee's compensation in this manner under existing law is unsettled.
[290] Section 736.0709(1) and (2), F.S. This section accords with existing law on the subject. *See* s. 737.402(2)(s), F.S. *See* also, *First Union Nat'l Bank v. Jones*, 768 So. 2d 1213 (Fla. 4th DCA 2000).

Duties and Powers of Trustee (Part VIII)

As its title suggests, Part VIII of the Code covers the duties and powers of a trustee. Coverage in this section of the analysis begins with duties, moves on to powers, and ends with a few miscellaneous matters.

Duties of a Trustee

In a series of separate sections, the Code codifies all of the fundamental common law duties of a trustee as well as several other more specifically targeted duties relating to the collection, management, and distribution of trust property. Except as otherwise noted, all of the Code's provisions dealing with the duties of a trustee are consistent with existing Florida decisional and statutory law. In addition, except as otherwise noted, these provisions are default rules which apply only in the absence of a contrary provision in the trust instrument.

Compendium of Statutory Duties

A comprehensive list of the statutory duties of a trustee is presented here. Included on the list are the duty of loyalty, the duty to redress breaches, and the duty to inform and account each of which is sufficiently nuanced to merit additional discussion. That discussion appears after the list.

Duty to Administer in Good Faith

A trustee has a duty to administer the trust in good faith and in accordance with its terms and the interests of the beneficiaries.[291] This is a mandatory duty which may not be relaxed or curtailed in the trust instrument.[292]

Duty of Loyalty

As between the trustee and the beneficiaries, a trustee has a duty to administer the trust solely in the interests of the beneficiaries. This duty is explored in greater detail in the next section of the analysis.

Duty of Impartiality

When a trust has more than one beneficiary, a trustee must administer the trust impartially giving due regard to the respective interests of the beneficiaries.[293]

Duty to Administer Prudently

A trustee must administer the trust as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust and by exercising reasonable care, skill, and caution.[294]

Duty to Incur only Reasonable Expenses

A trustee must incur only expenses that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.[295]

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[291] Section 736.0801, F.S. This section is identical to UTC s. 801. The requirement of good faith imposed by the section is consistent with existing Florida case law. *See Mesler v. Holly*, 318 So. 2d 530 (Fla. 2nd DCA 1975); *Hoppe v. Hoppe*, 370 So. 2d 374 (Fla. 4th DCA 1978).
[292] Section 736.0105(2)(b), F.S.
[293] Section 736.0803, F.S.
[294] Section 736.0804, F.S. This is a more generalized statement of the duty relating to trust investments that appears in Florida's Prudent Investor Act. *See* s. 518.11(a), F.S.

Duty to use Special Skills

A trustee with special skills or expertise has a duty to use those special skills.[296]

Duty to Control and Protect Trust Property

A trustee must take reasonable steps to take control of and protect trust property. This includes the taking of reasonable steps to compel a former trustee or other person to deliver trust property to the trustee.[297]

Duty to Keep Accurate Records

A trustee must keep clear, distinct, and accurate records.[298]

Duty not to Commingle and to Earmark

A trustee must keep trust property separate from the trustee's own property and must, to the extent feasible, cause the interest of the trust to appear in any records maintained by third parties.[299] An exception permits a trustee to invest two or more separate trusts as a common fund if the trustee maintains records clearly indicating the respective interests.[300]

Duty to Ascertain Marketable Title

A trustee must obtain title insurance or proof of marketable title when it is required for a specific sale or conveyance, but need not do so prior to that time.[301]

Duty to Enforce and Defend Claims

A trustee must take reasonable steps to enforce claims of and to defend claims against the trust.[302]

Duty to Redress Breaches of Former Trustees

In general, a trustee must take reasonable steps to redress a breach of trust known to the trustee to have been committed by a former trustee.[303] However, this duty is subject to important exceptions which are elaborated more fully below.

Duty to Inform and Account

A trustee must keep qualified beneficiaries reasonably informed of the trust and its administration.[304] This mandatory duty is also discussed more fully below.

Duty to Administer Pending Outcome of Contest or other Proceeding

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[295] Section 736.0805, F.S.
[296] This duty also extends to a trustee who is named trustee on the basis of the trustee's representation that the trustee possesses special skills or expertise. S. 736.0806, F.S. This duty also appears in the Florida Prudent Investor Act. *See* s. 518.11(1)(a), F.S.
[297] *See* ss. 736.0809 and 736.0812, F.S.
[298] Section 736.0810(1), F.S.
[299] Section 736.0810(2) and (3), F.S.
[300] Section 736.0810(4), F.S.
[301] Section 736.08105, F.S.
[302] Section 736.0811, F.S.
[303] *See* s. 736.0812, F.S.
[304] *See* s. 732.813, F.S.

In general, while a proceeding to determine the validity or the beneficiaries of all or a part of a trust is pending, a trustee has a duty to administer the trust as if no proceeding had been commenced. An exception applies to actions and distributions in contravention of the rights of persons who may be affected by the outcome of the proceeding. A trustee may not take such actions or make such distributions except upon court direction after notice and good cause shown.[305]

Duty to Expeditiously Distribute Trust Property on Termination

Upon termination of a trust, subject to the right to retain a reasonable reserve for the payment of debts, expenses, and taxes, a trustee has a duty to expeditiously distribute trust property to the persons entitled.[306]

More on the Duty of Loyalty

Under the Code, as between the trustee and the beneficiaries, a trustee has a duty to administer the trust solely in the interests of the beneficiaries.[307] Among other things, this means that in the absence of a contrary provision in the trust instrument, a court order, or a specific statutory exception:

- A trustee may not engage in any sale, encumbrance or transaction for its own personal account or that involves a conflict between the trustee's personal and fiduciary interests;[308]
- An investment by a trustee in an investment owned or controlled by the trustee or affiliate is not presumed to be a conflict;[309]
- A trustee may not usurp an opportunity properly belonging to the trust;[310] and
- In voting shares of stock or in exercising powers of control over interests in other enterprises, the trustee must act in the best interest of the beneficiaries.[311] Where the trust is the sole owner of a corporation or other enterprise, this includes the duty to elect or appoint directors and managers who will manage the entity in the best interest of the beneficiaries.[312]

A trustee who is faced with a transaction that might involve a breach of the duty of loyalty may petition the court for appointment of a special fiduciary to act with respect to the transaction.[313]

The Voidable *Per Se* Rule

With some exceptions discussed later, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is

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[305] *See* s. 736.08165, F.S. This section is identical to s. 737.208, F.S.
[306] Section 736.0817, F.S. The final sentence of the section stating that "the provisions of the section are in addition to and are not in derogation of the rights of a trustee under the common law with respect to final distribution of a trust" are intended to insure that this section does not override the holdings of cases such as *First Union Nat'l Bank v. Jones*, 768 So. 2d 1213 (Fla. 4th DCA 2000) and *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Ass'n, Inc.*, 832 So. 2d 948 (Fla. 2d DCA 2002).
[307] *See* generally, s. 736.0802, F.S.
[308] Section 736.0802(2) , F.S.
[309] Section 736.0802(5)(a), F.S.
[310] *See* s. 736.0802(4), F.S.
[311] Section 736.0802(6), F.S.
[312] Id. Accord UTC s. 802(g). The comments to the UTC section contain the following statement with respect to this duty: "Thus, for example, a trustee whose duty of impartiality would require the trust to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trust must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust-law duty of impartiality."
[313] Section 736.0802(9), F.S.

otherwise affected by a conflict between the trustee's personal and fiduciary interests is voidable by an affected beneficiary.[314]

The fact that an offending transaction is voidable rather than void is a change in Florida law.[315] The change is significant in the following respects:

- The right of an affected beneficiary to void a transaction is subject to the rights of persons dealing with or assisting the trustee in good faith.[316]

- A beneficiary's action can be precluded by an effective consent, ratification, or release[317] or by a failure to commence an action within the applicable limitations period.[318]

The Presumptively Voidable Rule

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business[319] or personal ties[320] to the trustee. Such transactions are only presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.[321] Accordingly, the transactions are not voidable *per se*; they are voidable only if the presumption is not rebutted.[322]

Affiliated Services

A trustee is permitted to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company. Such a transaction is not presumed to be affected by a conflict between personal and fiduciary interests so long as the investment complies with chapters 518[323] and 660[324], and the trustee complies with the disclosure requirements.[325] The requirements of disclosure are that all qualified beneficiaries are: noticed regarding the investment; provided the identity of the investments; and the nature of the relationship of the trustee to the affiliate.[326]

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[314] Section 736.0802(2), F.S. This is a per se rule. Hence, good faith and reasonableness are not defenses. Neither is the presence of consideration, a lack of harm, or the presence of a profit or benefit to the trust, although each of these factors may impact on a beneficiary's decision whether to act on the breach.
[315] *Compare Barnhart v. Hovde*, 490 So. 2d 1271 (Fla. 3d DCA 1986) (Where trustee failed to get court approval in advance of a transaction involving a conflict of interest, the transaction was void).
[316] *See* s. 736.0802(2), F.S., introductory clause. On the protection of persons dealing with a trustee, see s. 736.1016, discussed infra at p. 27.
[317] Section 736.0802(2)(d). On the effectiveness of consents, ratifications and releases, see s. 736.1012, F.S. *See* also the representation provisions of Part III of the Code.
[318] Section 736.0802(2)(c), F.S. On the statute of limitations on proceedings against trustees, see s. 736.1005,F.S., discussed infra at p. 27.
[319] This includes an officer, director, employee, agent, or attorney of the trustee or a corporation or other person or enterprise in which the trustee (or a person owning a significant interest in the trust) has an interest that might affect the trustee's best judgment. Section 736.0802(c) and (d), F.S.
[320] This includes the trustee's spouse and the trustee's descendants, siblings, parents or the spouse of any of them. Section 736.0802(3)(a) and (b), F.S.
[321] Section 736.0802(3), F.S.
[322] According to the comments to UTC section 802 from which s. 736.0802, F.S. is partially derived, factors relevant to this determination include the fairness of any consideration involved and whether the other terms of the transaction are similar to those that would be found in a transaction involving an independent party.
[323] *See* in particular s. 518.11, F.S., Florida's Prudent Investor rule, which provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes of the trust. In seeking to satisfy this standard, the trustee must exercise reasonable care and caution.
[324] Chapter 660, F.S. governs trust business and in part precludes self dealing, s. 660.40, F.S.
[325] Section 736.0802(5)(a), F.S.
[326] The requirements of s. 736.0802(5), F.S. do not apply to qualified investment instruments or to a trust for which a right of revocation exists, s. 736.0802(5)(e)(1), F.S. However, the requirements of s. 736.0802(5), F.S. do apply to irrevocable trusts

Exceptions

In the interests of a fair, effective and efficient trust administration, the Code includes several exceptions to the basic duty of loyalty. Notwithstanding the potential presence of a conflict between the personal and fiduciary interests of a trustee, the trustee's duty of loyalty does not preclude any of the following:

- Payment of reasonable compensation to the trustee or an agreement between a trustee and beneficiary relating to the appointment or compensation of the trustee;[327]
- Transactions between the trust and another trust, a decedent's estate, or a guardian of the property of which the trustee is a fiduciary or in which a beneficiary has an interest;[328]
- A deposit of trust money in a regulated financial-service institution operated by the trustee;[329]
- An advance by the trustee of money for the protection of the trust;[330] or
- The employment of persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee or are associated with the trustee, to advise or assist the trustee in the performance of its administrative duties[331] or the employment of agents to perform any act of administration, whether or not discretionary.[332]

Duty to Redress Breaches of Former Trustees

As mentioned previously, as a general rule a trustee must take reasonable steps to redress a breach of trust known to the trustee to have been committed by a former trustee.[333] This duty is qualified, however, by s. 736.08125, F.S. which details several instances where a successor trustee has no personal liability for actions[334] of a prior trustee.[335]

Under Code s. 736.08125, F.S., there is no personal liability, nor is there any *duty* to institute proceedings against a prior trustee:[336]

- When the successor trustee succeeds a settlor serving as trustee of a revocable trust;
- As to any beneficiary who has waived a required accounting, but only as to the periods included in the waiver;
- As to any beneficiary who has effectively released the successor trustee of its duty to institute a proceeding or file a claim; or

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created on or after July 1, 2007, the assets of which are valued in excess of five million dollars on the date the trust was created, s. 736.0802(5)(e)(2), F.S.

[327] Section 736.0802(7)(a) and (b), F.S.

[328] Section 736.0802(7)(c), F.S.

[329] Section 736.0802(7)(d), F.S.

[330] Section 736.0802(7)(e), F.S.

[331] Section 736.0802(8), F.S. The trustee may act without independent investigation on their recommendations.

[332] *Id.*

[333] Section 736.0812, F.S.

[334] The term actions includes a failure to act. Section 736.0103(1), F.S.

[335] Section 736.08125, F.S. is substantively similar to s. 737.306(3) - (6), F.S. As under existing law, the section speaks only to the personal liability of successor trustees. Nothing in the section affects the liability of a prior trustee or the right of a successor trustee or any beneficiary to proceed against the prior trustee. Section 736.08125(7), F.S.

[336] Or the estate of a prior trustee.

- As to any person who is not a qualified beneficiary.[337]

In addition, there is no personal liability with respect to a qualified beneficiary:

- For any action or claim that the qualified beneficiary is barred from bring against the prior trustee;[338]
- If the qualified beneficiary fails to act within 6 months after the date the successor trustee accepts the trusteeship and delivers a written notice to the beneficiary;[339] or
- If a super majority of the eligible beneficiaries have released the successor trustee.[340]

Duty to Inform and Account

Under s. 736.0813, F.S., a trustee must keep the qualified beneficiaries of an irrevocable[341] trust reasonably informed of the trust and its administration.[342] The extent of this duty, which is limited to the qualified beneficiaries, is described in detail in the five paragraphs of s. 736.0813(1), F.S., each of which is included on the list of mandatory provisions.[343] According to these paragraphs, a trustee's duty to inform and account includes, but is not limited to, a duty with respect to the qualified beneficiaries to:

- Notify them of the trustee's acceptance of the trust and the full name and address of the trustee within 60 days after the trustee's acceptance;[344]
- Notify them of the existence of the trust, the identity of the settlor, the right to request a copy of the trust instrument, and the right to accountings within 60 days of when the trustee acquires knowledge of the creation of an irrevocable trust or that a formerly revocable trust has become irrevocable;[345]
- Upon reasonable request, furnish them with a complete copy of the trust instrument;[346]
- Once a trust becomes irrevocable, furnish a trust accounting to them annually as well as on termination of the trust or on a change of trustee;[347] and
- Upon reasonable request, provide them with relevant information about the trust's assets and liabilities and the particulars of the trust administration.[348]

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[337] Section 736.08125(1) – (4), F.S.
[338] Section 736.08125(5)(c), F.S.
[339] In addition informing the qualified beneficiary of the trustee's acceptance of the trusteeship in accordance with section 736.0813(1)(a), F.S. (see infra p. 27), the written notice must advise the beneficiary that the right to proceed against the successor trust will be barred unless the beneficiary delivers a written request to the trustee within 6 months after the date of the trustee's acceptance. Section 736.08125(5)(b), F.S.
[340] Section 736.08125(5)(a), F.S. For purpose of this final exception, eligible beneficiaries is defined to be a subset of the qualified beneficiaries. The intermediate qualified beneficiaries described in s. 736.0103(14)(b), F.S. are excluded from the subset unless, at the time the determination is being made, there are no qualified beneficiaries described in section 736.0103(14)(c), F.S. *See* s. 736.08125(6)(a), F.S. A super majority of eligible beneficiaries means at least two-thirds in interest of the eligible beneficiaries if their interests are reasonably ascertainable; otherwise, it means at least two-thirds in number of the eligible beneficiaries. Section 736.08125(6)(b), F.S.
[341] While a trust is revocable, a trustee's duty to inform and account is owed only to the settlor. Section 736.0603(1), F.S.; 736.0813(4), F.S.
[342] The representation provisions of Part III of the Code apply with respect to the rights of a qualified beneficiary under s. 736.0813, F.S.. Section 736.0813(3), F.S.
[343] *See* s. 736.0105(2)(q) – (s), F.S. Section 736.0813, F.S. applies only with respect to accountings rendered for periods beginning on or after January 1, 2008.
[344] Section 736.0813(1)(a), F.S.
[345] Section 736.0813(1)(b), F.S.
[346] Section 736.0813(1)(c), F.S.
[347] Section 736.0813(1)(d), F.S.

Trustee Powers

The powers of a trustee are detailed in several sections of the Code. These provisions apply only in the absence of a contrary limitation or restriction in the trust instrument.

General Powers

In addition to powers granted in the trust instrument and those provided in other sections of the Code, s. 736.0815, F.S. states generally that a trustee's powers include any powers that are appropriate to achieve the proper investment, management and distribution of the trust property as well as all powers that an unmarried competent owner has over individually owned property. These powers may be exercised without authorization of the court.

Specific Powers

In a more informative provision, s. 736.0816, F.S. contains a detailed listing of powers that a trustee automatically has in the absence, of course, of a contrary provision in the trust instrument. While space does not permit an exhaustive listing of these powers, it is worth noting that this section serves the same function as s. 737.402, F.S. Although the wording and ordering of the powers included in the two provisions differs, it is the Committee's view that all powers included in s. 737.402, F.S. are also covered by section 736.0816. In addition, under s. 736.0816, F.S., a trustee has authority to:

- Exercise federal, state and local tax elections;[349]
- Select payment options, exercise rights, and take other appropriate actions with respect to retirement plans, annuities and insurance contracts payable to the trust;[350]
- Make loans, including to a beneficiary, with terms and conditions that are fair and reasonable under the circumstances;[351] and
- On termination of a trust, exercise powers appropriate to the winding up of the trust and the distribution of the trust property, subject to a right to retain a reasonable reserve for the payment of debts, expenses, and taxes.[352]

Environmental Powers

Code s. 736.08163, F.S. incorporates almost verbatim[353] the provisions of current s. 737.4025, F.S. dealing with a trustee's rights and powers (and the concomitant protection from personal liability) when a trust includes or might include environmentally contaminated property.

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[348] A little more about these duties. The initial two duties above do not apply to irrevocable trusts created (or revocable ones that became irrevocable) before the effective date of the Code. In addition, the first provision does not apply to a trustee who accepts a trust (whether revocable or irrevocable) before that date. *See* the language following s. 736.0813(1)(e), F.S. The contents of the required accounting are detailed in s. 736.08135, F.S. This section is effective for all trust accountings rendered for any accounting period beginning on or after January 1, 2003. Section 736.08135(3), F.S. This section is identical with s. 737.3035, F.S. with the addition of a requirement that a trustee's final accounting include a plan of distribution for any undistributed assets shown on the accounting. Section 736.08135(2)(f), F.S. And a qualified beneficiary may waive (or withdraw a prior waiver of) the right to one or more accountings, including a final accounting. Section 736.0813(2), F.S., and a withdrawal of a prior waiver is effective only for accounting for future periods.

[349] Section 736.0816(17), F.S.

[350] Section 736.0816(18), F.S.

[351] Section 736.0816(19), F.S. The trustee has a lien on future distributions for repayment of any loans.

[352] Section 736.0816(25), F.S.

Power to Delegate to Agents

Under s. 736.0807, F.S., a trustee may delegate duties and powers that a prudent trustee of comparable skill could properly delegate under the circumstances. The trustee must exercise reasonable care, skill and caution in selecting the agent, in defining the scope and terms of the delegation, and in supervising the agent.[354] In accepting a delegation, an agent submits to the jurisdiction of Florida courts[355] and thereafter owes a duty to exercise reasonable care to comply with the terms of the delegation.[356] A trustee who properly delegates duties and powers under the structures of s. 736.0807, F.S. is not liable for the acts of the agent.[357]

Powers to Direct

For various reasons, it is sometimes desirable that someone have the power to direct the trustee's actions and decisions with respect to the trust. Code s. 736.0808, F.S. deals with this topic. As there is no statutory equivalent under existing law, this section provides useful clarification.

By Settlor of Revocable Trust

While a trust is revocable, the settlor has the power to direct the trustee whether or not it is explicitly stated in the terms of the trust. Thus, with two important caveats, the trustee of a revocable trust may follow a direction of the settlor even when the direction is contrary to the terms of the trust.[358]
The two caveats relate to the formalities required for a settlor's direction to be effective. To the extent the direction relates to an act that is either expressly prohibited or is not authorized in the terms of the trust, as opposed to one relating to an exercise of discretion the trustee already possesses, the direction is, in effect, a trust amendment.[359] As such, the direction must be manifested in a manner that substantially complies with any provisions in the trust instrument pertaining to trust amendments.[360] Moreover, if the direction relates to a "testamentary aspect" of the trust, the direction must comply with the requirements of s. 736.0403(2)(b), F.S.[361] That is, it must be made in a written instrument executed with testamentary formalities.[362]

Other Directions

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[353] Apart from a simplification of the section title, the only difference between the two sections is that the definition of "environmental law" was removed from section 736.08163 in favor of the more generally applicable definition found in s. 736.0103(5), F.S.
[354] *See* s. 736.0807(1), F.S.
[355] Section 736.0807(4), F.S.
[356] Section 736.0807(2), F.S.
[357] Current law permits delegations of: investment functions (including special provisions relating to life insurance trusts) under s. 518.112, F.S., and somewhat more indirectly, functions relating to trust administration under the general authority to employ agents under s. 737.402(2)(y), F.S. The former remain available under the Code. The provisions of s. 737.402(2)(y), F.S. are replaced with the Code's more comprehensive s. 736.0807, F.S. under which any duty or power may be delegated provided the delegation would be proper for a trustee of comparable skill. Apart from its increased scope, Code s. 736.0807, F.S. makes one other important change. Section 737.402(2)(y), F.S. states that trustees may act without independent investigation of an agent's recommendations. A similar statement is found in Code s. 736.0816(20), F.S. The apparent conflict between this provision and the duties imposed in s. 736.0807(1)(c), F.S. is a matter of uncertainty. Section 736.0807, however, contemplates a continuing duty to review and monitor an agent's actions and performance. *See* s. 736.0807(1)(c), F.S.
[358] Section 736.0808(1), F.S.
[359] On the equivalency of a settlor's direction to a trust amendment, see the comments to UTC s. 808.
[360] Section 736.0701(1)(a), F.S., discussed supra p. 27.
[361] Section 736.0403(2)(b), F.S. is discussed supra p. 27.
[362] As a matter of best practice, because of the concerns discussed in the preceding paragraph, whenever possible, trustees of revocable trusts should insist that settlor's directions be made in a written instrument executed with testamentary formalities and that they substantially comply in other respects with the terms of the trust.

With respect to a power to direct given to others (or to settlors of irrevocable trusts), the power must be expressly granted in the terms of the trust. It may be given to a beneficiary or to some other person in which case the other person is presumptively a fiduciary. As such, the person:

- Is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries; and
- Is liable for any loss resulting from a breach of that duty.[363]

A power given to someone other than the settlor of a revocable trust may include the power to direct modification or termination of the trust,[364] or the power to direct the actions of the trustee in which latter case the trustee may act in accordance with a direction unless the direction is either manifestly contrary to the terms of the trust or the trustee knows that the direction would constitute a serious breach of the power holder's fiduciary duty described above.[365]

Tax Savings

The Code contains two provisions targeted generally at the protection of trusts from inadvertent and adverse tax consequences. Both have an antecedent in Chapter 737, F.S.

Duty to Distribute Income of Marital Trust

Absent a contrary provision in the trust instrument, Code s. 736.08147, F.S. directs that income from a trust which gives the settlor's spouse a right to income must be distributed no less frequently than annually. This provision is intended to insure the qualification of marital trusts for the gift and estate tax marital deductions. It is identical in effect to current s. 737.3053, F.S., although a slight change in wording was made to restrict application of the section to the lifetime of the surviving spouse.

Limitations on a Trustee's Power to Distribute to Itself

Code ss. 736.0814(2)-(5), F.S. are intended to protect trustees who are also beneficiaries of the trust from having adverse estate tax consequences because of their distribution and administration powers with respect to the trust. The section is based on and serves an identical purpose to current s. 737.402(4) , F.S. Under s. 736.0814(2), F.S., in the absence of an express provision in the terms of a trust indicating that one or more of the following rules are not to apply, a trustee may not directly or indirectly:[366]

- Make distributions of income or principal to or for its own benefit other than distributions subject to an ascertainable standard;[367]
- Make distributions of income or principal to satisfy the trustee's support obligations;[368] or
- Make discretionary allocations of receipts or expenses to directly enlarge or shift beneficial interests in the trust.[369]

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[363] Section 736.0808(4), F.S.
[364] A power to direct trust modification or termination may also be given to a trustee. *See* s. 736.0808(3), F.S.
[365] Section 736.0808(2), F.S.
[366] *E.g.*, through an exercise of a power to remove or to replace a trustee in a manner that causes some other person to do an act the trustee is prohibited under the section from doing directly. *See* s. 736.0814(2)(d), F.S. *See* also the statement in s. 736.0814(5), F.S. that a person who has the right to remove or to replace a trustee does not, by virtue of that authority, possess the powers of the trustee who may be removed or replaced. The effectiveness of this statement for tax purposes is unclear.
[367] Section 736.0814(2)(a), F.S.
[368] Section 736.0814(2)(c), F.S.
[369] Section 736.0814(2)(b), F.S.

Alternative Exercise

A power whose exercise is limited or prohibited under the above rules may be exercised by any remaining trustees, or in the absence of a remaining trustee, by a person appointed by the Court on application of any qualified beneficiary.[370]

Exceptions

Notwithstanding the prohibitions listed above, exceptions are provided for:

- Trustees (whether the settlor or other person) of revocable or amendable trusts;[371]
- A power held by the trust settlor;[372] and
- Trusts where application of the restrictions could jeopardize an intended tax benefit, such as a marital deduction trust where the settlor's spouse serves as trustee;[373] or a trust qualifying for the annual exclusion under s. 2503(c) of the Internal Revenue Code.[374]

Trust Investments (Part IX)

As was mentioned previously, Part IX of the Code consists of a single section that incorporates the provisions of Chapter 518, F.S; Florida's Prudent Investor rule. This rule provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.[375] In seeking to satisfy this standard, the trustee must exercise reasonable care and caution.[376]

Liability of Trustees and Rights of Persons Dealing with Trustee (Part X)

Part X is one of the longer parts of the Code. In the order discussed below, it deals with the remedies and damages for breach of trust; liability of trustees to nonbeneficiaries, the entitlement, assessment and recovery of costs and fees; limitations on actions against a trustee; and the protection of persons dealing with the trustee including those relying on a certification of trust furnished by the trustee.

Liability of Trustees for Breach of Trust

A trustee is not an insurer. Thus, absent a breach of trust, a trustee is not liable for a loss or depreciation in trust value or for not making a profit.[377] On the other hand, except as discussed below, a trustee *is* liable for a breach of trust, a concept that includes among others, a violation (intentional or not) of any of the duties discussed previously that the trustee owes to a beneficiary.[378]

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[370] Section 736.0814(4), F.S.
[371] Section 736.0814(3)(c), F.S.
[372] Section 736.0814(3)(a), F.S.
[373] Section 736.0814(3)(b), F.S.
[374] Section 736.0814(3)(d), F.S.
[375] Section 518.11(1)(a), F.S.
[376] *Id.*
[377] Section 736.1003, F.S. Accord *Boalt v. Hanson*, 412 So. 2d 880 (Fla. 3d DCA 1982); *Wohl v. Lewy*, 505 So. 2d 525 (Fla. 3d DCA 1987).
[378] *See* s. 736.1002(1), F.S.

Protection of Trustees from Liability
When Trustee Acts in Reasonable Reliance on Trust Instrument

Although a breach of trust has occurred, new Code s. 736.1006, F.S. insulates a trustee from liability if the breach resulted from the trustee's reasonable reliance on the terms of the trust as expressed in the trust instrument.[379]

For Losses Resulting from Certain Unknown External Events

In some cases, the terms of a trust or the duties and powers of a trustee may depend on the status of certain external events such as the marriage, divorce, educational status or death of beneficiaries or other persons. At common law, a trustee is strictly liable for misdelivery regardless of the trustee's level of care. Code s. 736.1007, F.S., which is based on Uniform Code s. 1007, changes this rule. It protects; a trustee who has exercised reasonable care to ascertain the happening of the event from liability for losses resulting from the trustee's lack of knowledge of the event. The comments to the Uniform Code section clarify that the events listed in the section are not exclusive.

Effect of Beneficiary's Consent, Release, or Ratification

Code s. 736.1012, F.S. deals with the impact of a beneficiary's consent, release or ratification of a trustee's actions. As a general principle, a trustee is not liable to a beneficiary who has consented to the conduct that constitutes a breach or who has released the trustee from liability or ratified the offending transaction. This principle does not apply, however, to consents, releases or ratifications that were:

- Induced by the trustee's improper conduct; or
- Made by a beneficiary who did not know of its rights and the material facts relating to the breach.

Effect of Term Exculpating Trustee from Liability

Code s. 736.1008, F.S. restricts the enforceability of a term in a trust that attempts to relieve a trustee of liability for a breach of trust. The restrictions are mandatory; they may not be relaxed in the trust instrument.[380]

Under the section, an exculpatory term may not relieve a trustee of liability for breaches committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.[381] In addition, an exculpatory term is unenforceable if it was inserted as a result of an abuse of a fiduciary or confidential relationship between the trustee and settlor.[382] This latter restriction applies to terms that were drafted or caused to be drafted by the trustee unless the trustee proves that the term is fair and its existence and contents were adequately communicated *directly* to the settlor.[383] [384]

Remedies and Damages for Breach of Trust

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[379] This provision is derived from Uniform Code s. 1006. It is intended to protect trustees from liability arising from subsequent inconsistent reformations of a trust instrument to remedy a mistake of fact or law or from the fact that the terms of a trust may not always be manifested comprehensively in the trust instrument.
[380] Section 736.0105(2)(u), F.S.
[381] Section 736.1011(1)(a), F.S.
[382] Section 736.1011(1)(b), F.S.
[383] Section 736.1011(2), F.S.
[384] Section 736.1011, F.S. is derived from Uniform Code s. 1008. The Committee added the requirement that a term drafted by or at the direction of the trustee be *directly* communicated to the settlor to indicate the Committee's disapproval of a statement in the comments to UTC s. 1008 that disclosure to the settlor's attorney would suffice for this purpose.

Section 736.1001(2), F.S. contains a nonexclusive list of actions a court may take with respect to a breach of trust.[385] According to the section, a court may:

- Suspend or remove the trustee;
- Enjoin, void, or compel actions by the trustee including the performance of the trustee's duties and the issuance of accountings;
- Reduce or deny the trustee's compensation;
- Compel the trustee to pay money or to restore trust property; and
- Impose a lien or a constructive trust on trust property and recover wrongfully disposed of trust property or its proceeds.

Damages

In those cases where the court finds that it is appropriate for a trustee to respond in damages for a breach of trust, s. 736.1002, F.S. states that the trustee's liability is the greater of any profit the trustee made from the breach and the amount required to restore the trust to what it would have been but for the breach, including lost income, capital gain, or appreciation that would have resulted from a property administration.[386]

Contribution

Depending on the circumstances, more than one person can be liable for a single breach of trust. This can occur, for example, when there are cotrustees or when a sole trustee acts improperly with the knowing participation of an agent. In both cases, the Code provides new and important clarification on the rights of one liable person to contribution from others.[387] The rules discussed below apply both to cases filed after the effective date of the Code and to causes of action for breach of trust pending on that date.[388]

Section 736.1002(2), F.S. sets out the basic principle that, if more than one person is liable to the beneficiaries for a breach of trust, each liable person is entitled to pro rata contribution from the others. There are exceptions. No contribution is available for breaches committed in bad faith or to the extent a liable person benefits from the breach.[389]

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[385] In the absence of extenuating circumstances such as bad faith, gross negligence or recurring breaches, the Committee believed that a court's focus in fashioning a remedy for a breach of trust normally should be the redress of the damage caused by the breach and not the punishment of the trustee. Accordingly, s. 736.1001(3), F.S. suggests that the appropriate remedy for a breach involving a failure to distribute trust property is an order requiring the trustee to make distributions in an amount necessary to restore the trust beneficiaries to their appropriate position. Where the breach involves an improper distribution, the trust may be made whole by compelling the recipient of the distribution to return the distribution. In this regard, Code s. 736.1018, F.S. provides that persons receiving improper distributions must return the assets or funds together with any income or interest, or, if the person does not have the property, its value on the date of disposition together with any income or gain received by the person. Section 736.1018, F.S. is identical to s. 737.209, F.S. When this remedy is unavailable or insufficient, s. 736.1001(3), F.S. suggests that that the appropriate remedy for a breach that has resulted in an improper distribution is an order directing the trustee to withhold future distributions. Note however, that the remedies suggested in s. 736.1001(3), F.S. are aspirational. Courts are not bound by them. In appropriate situations, courts may adopt a remedy from the more comprehensive list found in s. 736.1001(2), F.S. or may order any other relief they find appropriate.

[386] *See* s. 736.1002(1), F.S.

[387] Much of s. 736.1002, F.S. is based on s. 768.31(4), F.S. dealing with contribution among joint tortfeasors. By its terms, that section does not apply to breaches of trust or other fiduciary obligations. Section 768.31(2)(g), F.S.

[388] Section 736.1002(7), F.S.

[389] Section 736.1002 (2), F.S.

Section 736.1002(3), F.S. specifies how the pro rata contribution is to be determined. In addition to stating that general principles of equity apply,[390] s. 736.1002(3), F.S. clarifies that pro rata in this context means in proportion to the relative degrees of fault.[391] Importantly, this determination anticipates more than a mere counting of the number of liable persons. Some evaluation of their relative fault is required. In making this evaluation, a court may treat the collective liability of a group as a single share.[392]

Finally, in sequential order, subsections (4) through (6) of s. 736.1002, F.S.,

- Set out detailed rules specifying how the right to contribution can be enforced;
- Provide that an unsatisfied judgment against one liable person does not discharge the liability of others and that satisfaction of the judgment does not impair any right to contribution under the section; and
- Make a court's judgment determining the liability of the persons to the beneficiary binding among the persons for purpose of determining their right to contribution.

Costs and Fees

The Code contains several sections covering the burden of fees and costs. With the usual caveat relating to minor revisions and restructuring, these provisions track corresponding provisions in Chapter 737, F.S. The provisions of the Code dealing with fees and costs include:

- **Section 736.1004, F.S.:** This section is derived from a combination of s. 737.188, F.S. and s. 737.4033, F.S. It applies to costs (including attorney's and guardian ad litem's fees) incurred in actions for breach of a fiduciary duty or challenging an exercise or nonexercise of a trustee's power and in proceedings to modify a trust under ss. 736.04133 - 736.0412, F.S.[393] The section directs the court to award taxable costs and fees as in chancery actions[394] and authorizes the court to direct payment from the party's interest, from other property, or from both. Section 736.1004, F.S. makes no change in Florida law.
- **Section 736.1005, F.S.:** This section is substantively identical to that portion of s. 737.2035, F.S. relating to attorney's fees. Under it, an attorney who has rendered services to a trust may apply to the court for an award of reasonable compensation for those services. The section is directed primarily at the compensation of attorneys of beneficiaries and others who render services that benefit the trust. The section authorizes the court to direct from which part of the trust the fees are to be paid. The section also continues the requirement of written notice to nonadverse trustees and the authority of the court to adjust the attorney's compensation for services rendered prior to the notice.
- **Section 736.1006, F.S.:** This section is substantively identical to that portion of s. 737.2035, F.S. that relates to costs other than attorney's fees. Section 736.1006, F.S. provides that a court may award costs as in chancery proceedings in all trust proceedings. The court may also direct the part of the trust from which the costs are to be paid.
- **Section 736.1007, F.S.:** This section is substantively identical to s. 737.2041, F.S. It contains rules relating to the compensation of attorneys for ordinary and extraordinary services rendered in

[390] Section 736.1002 (3)(c), F.S.
[391] Section 736.1002 (a), F.S.
[392] Section 736.1002 (3)(b), F.S.
[393] Judicial proceedings arising with respect to s. 736.0412, F.S. actually arise under s. 736.0410(2), F.S.
[394] This means that costs may be awarded to the prevailing party, unless equity and fairness dictate otherwise. *See In re Estate of Simon*, 549 So. 2d 210 (Fla. 3d DCA 1989).

conjunction with the administration of a revocable trust after the settlor's death; the impact of a fee agreement between the attorney and the trustee or settlor; and the authority of the court to determine reasonable compensation and to award costs and fees in proceedings involved in determining that compensation.

Liability of Trustees to Third Parties

Codes ss. 736.1013 and 736.1015, F.S. address a trustee's liability to third parties. The latter is a new provision addressing a trustee's liability as a general partner of a partnership entered into or acquired by a trust. The former deals with liability for contracts entered into and torts committed by a trustee during the administration of the trust. Except as noted in the comment below, s. 736.1013, F.S. is substantively identical to current ss. 737.306(1) and (2), F.S.

General Rules for Contracts and Torts

With respect to contracts, a trustee is not personally liable on contracts entered into as a fiduciary in the course of administration of a trust unless the contract so provides or the trustee failed to reveal its fiduciary capacity.[395] [396]

With respect to torts, a trustee is personally liable for torts committed in the course of administration of a trust or for obligations arising from the ownership or control of trust property only if the trustee is personally at fault.[397]

Whether or not a trustee is personally liable under the above rules, a claim based on a contract or tort may be asserted against the trustee in the trustee's representative capacity.[398] As is true under existing law, subsequent (or earlier) issues of liability between the trust estate and trustee individually may be determined in a proceeding for accounting, surcharge, indemnification or other appropriate proceeding.[399]

Trustee's Liability as General Partner

Code s. 736.1015, F.S. is new to Florida law.[400] It provides trustees with protection against personal liability for contracts and torts entered into by a partnership when the trustee holds an interest as general partner. In this context:

- A trustee is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the partnership interest as long as the trustee was not personally at fault;[401] and.

- Absent a contrary provision in the contract, a trustee has no personal liability on contracts entered into by the partnership if the trustee's fiduciary capacity was disclosed either in the contract or in a previously filed statement pursuant to the Uniform Partnership (or Limited Partnership) Acts.[402]

Limitations on Actions Against Trustees

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[395] Section 736.1013(1), F.S.
[396] Unlike existing law, the Code contains no exception for contracts for attorney's fees.
[397] Section 736.1013(2), F.S. *Accord* s. 737.306(1)(b), F.S.
[398] Section 736.1013(3), F.S. *Accord* s. 737.306(1)(c), F.S.
[399] Section 736.1013(4), F.S. *Accord* s. 737.306(2), F.S.
[400] The section is derived from UTC. Section 736.1015, F.S. protects only trustees; it does not protect settlors. To the contrary, the section specifically provides that when a trustee of a revocable trust holds a general partnership interest, the settlor is personally liable for contracts and other partnership obligations as if the settlor were a general partner. Section 736.1015 (3), F.S.
[401] Section 736.1015(2), F.S.
[402] Section 736.1015(1), F.S.

Code s. 736.1008, F.S. specifies limitations periods for claims by a beneficiary against a trustee for breach of trust.[403] The section is a reorganized and slightly expanded version of s. 737.307, F.S. under which the applicable limitations period for a particular action can depend on a variety of factors including whether the trustee has filed an interim or final accounting and, if so, whether the matter is disclosed on the accounting.

Matters Adequately Disclosed on a Trust Accounting

With respect to matters adequately disclosed on a trust accounting, the applicable limitations period depends on whether the trustee has sent the beneficiary a limitation notice that relates to that accounting.

When Trustee has Issued a Written Limitation Notice

The shortest limitations period provided in s. 736.1008, F.S. is six months. This period applies to actions on matters the trustee has adequately disclosed on a trust accounting or other trust disclosure document when the trustee has provided the beneficiary with a related limitation notice.[404] A limitation notice is a written statement informing the beneficiary that an action against the trustee for actions based on any matter adequately disclosed in the accounting may be barred unless the action is commenced within six months of receipt of the accounting or limitation notice, whichever is later.[405]

More comprehensive definitions of "trust disclosure document" and "limitation notice," as well the detailed rules controlling when a limitation notice is related to a particular disclosure document are specified in ss. 736.1008(4)(a) and (4)(c), F.S.. In all respects, however, these provisions are identical to the corresponding provisions in s. 737.307, F.S.

When There is no Limitation Notice

A significantly longer limitations period applies to claims involving matters adequately disclosed on a trust accounting when no related limitation notice is sent to the beneficiary. Here, s. 736.1008(1)(a), F.S. provides that the claims are barred as provided in Chapter 95, F.S. Normally, this will result in a four year limitations with the period beginning on the date of receipt of the adequate disclosure.[406] An exception applies to matters involving actual or constructive fraud by the trustee. In those cases, the discovery rule of s. 95.031(2)(a), F.S. applies. Subject to an overall requirement that the action be commenced within twelve years, the discovery rule provides that the limitations period does not begin until the later of the time the facts giving rise to the action are discovered or the time the facts should have been discovered by an exercise of due diligence.[407]

Matters NOT adequately disclosed on a trust accounting
When Trustee has Issued Final Accounting and Given Written Notice to Beneficiary

The provisions of Chapter 95, F.S. discussed above also apply to claims involving matters that have not been adequately disclosed on a trust accounting or other trust disclosure document, but only if:

- The trustee has issued its final accounting for the trust; and
- The trustee has given written notice to the beneficiary of the availability of trust records for examination and that claims based on matters not adequately disclosed in that accounting may be

[403] For the limitations period applicable to actions contesting the validity of a revocable trust after the settlor's death, see s. 736.0604, F.S. discussed supra at p. 27.
[404] *See* s. 736.1008(2), F.S.
[405] *See* s. 736.1008(4)(c), F.S.
[406] *See* s. 95.11(3), F.S. *See* also s. 736.1008(1)(a), F.S.
[407] Here again, Code s. 736.1008, F.S. is identical to s. 737.307, F.S.

barred unless the action is commenced within the applicable limitations period provided in Chapter 95, F.S.[408]

In this context, in the absence of fraud which would bring the discovery rule into play, the normal limitations period will be four years with the period beginning on the date of receipt of the final trust accounting and required written notice.[409]

When Trustee has NOT Issued Final Accounting or has NOT Given Written Notice to Beneficiary

A careful reading of the portions of s. 736.1008, F.S. discussed so far will reveal that they do not cover the entire universe of factual situations. Specifically, no limitations rules have yet been discussed for matters that have not been disclosed on a trust accounting where either the trustee has not issued a final accounting or, having done so, the trustee has not given the required notice described above.

As to both situations, s. 736.1008(3), F.S. provides that the applicable limitations period is determined under Chapter 95, F.S. That is, the normal limitations period will the four year period described in s. 95.11(3), F.S. In what may be an important change in existing law, however, the section provides that the cause of action does not accrue (and correspondingly, the limitations period does not commence) until the trust beneficiary has actual knowledge of the trustee's repudiation of the trust or adverse possession of trust assets.[410]

Protection of Persons other than Beneficiaries Dealing with the Trustee

The Code contains two sections of interest to persons other than beneficiaries who deal with trustees. Code s. 736.1016, F.S., which is based on Uniform Code s. 1012, provides protection against liability for persons who deal with a trustee in good faith. The section is similar to, but slightly more expansive than, current s. 737.405, F.S. Code s. 736.1017, F.S. which is derived from Uniform Code s. 1013 and for which there is no counterpart in Chapter 737, F.S. provides protection for persons who rely on a certificate of trust furnished by the trustee.

Persons Dealing with Trustee in Good Faith

Section 736.1016, F.S. provides protection to persons (other than beneficiaries) who assist or deal for value with a trustee in good faith and without knowledge that:

- The trustee is exceeding its powers or
- The trustee is actually a former trustee whose trusteeship has terminated.

In addition, the section:

- Relieves a person acting in good faith (other than a beneficiary) from any duty to inquire into the extent of the trustee's powers or the propriety of their exercise; and
- Relieves *any* person acting in good faith from any duty to ensure the proper application of any assets the person delivers to a trustee.

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[408] *See* s. 736.1008(1)(b), F.S.
[409] Section 736.1008(1)(b), F.S.
[410] The situations described here are unaddressed in s. 737.307, F.S. As a consequence, they would be subject to the general provisions of Chapter 95, F.S. under which, in the absence of fraud, the four year period would begin at the occurrence of the last element constituting the cause of action. Section 95.031(2)(a), F.S. Under this test, unless a failure to account is itself a constructive fraud, a breaching trustee who failed to account could be protected by a silent running of the limitations period behind an unsuspecting beneficiary's back. The Committee believed this to be an inappropriate result because it undermines the incentive trustees should have to fully and adequately account.

Section 736.1016, F.S. is included on the list of mandatory provisions; the protections it provides may not be altered in a trust instrument.[411] The section is similar to current s. 737.405, F.S. Two noteworthy areas of difference include:

- Section 737.405, F.S. does not include a provision protecting persons who in good faith deal with or assist a former trustee whose trusteeship has terminated; and
- By its terms, Code s. 736.1016, F.S. is subservient to other laws (such as the Uniform Commercial Code) relating to commercial transactions and the transfer of securities by fiduciaries.

Persons Acting in Reliance on a Certification of Trust

Except when it is required by law or a judicial proceeding concerning the trust, instead of furnishing a complete copy of a trust instrument to a person (other than a beneficiary) who requests it, Code s. 736.1017, F.S. provides that the trustee may furnish a certification of trust.[412] The section sets out certain required information that must be included in the certification[413] among which is a statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations in the certificate to be incorrect.[414]

A person to whom a certificate of trust is furnished may:

- Require copies of excerpts from the trust instrument that designate and empower the trust to act in a particular pending transaction.[415]
- Assume without inquiry the existence of any facts contained in the certification;
- Act without liability to any person in good faith reliance on the certification; and
- Enforce against trust property a transaction entered into in good faith reliance on the certification as if the representations contained therein were correct.[416] [417]

Rules of Construction (Part XI)

Part XI contains a series of default rules of construction. As an initial matter, it is worth repeating the admonitions found in the initial section of the Part that, except for the provisions included on the mandatory list in s. 736.0105(2), F.S. (of which there is only one — s. 736.1108 dealing with penalty clauses for contesting trusts), the intent of the settlor as expressed in the terms of the trust controls the legal effect of the

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[411] *See* s. 736.0105(2)(v), F.S.
[412] Section 736.1017(1) and (8), F.S..
[413] *See* s. 736.1017 (1), F.S. for a list of the required contents. A certification of trust need not include the dispositive terms of the trust. Section 736.1017 (4), F.S.
[414] Section 736.1017 (3), F.S.
[415] Section 736.1017 (5), F.S.
[416] *See* s. 736. 1017(6) and (7), F.S.
[417] The right of a certification recipient to act in good faith reliance on the certification applies only when the recipient does not have knowledge that the representations contained in the certification are incorrect. Without more, knowledge of a trust's terms may not be inferred solely because the recipient is in possession of a copy of the trust instrument. *See* s. 736.1017(6), F.S., final sentence.

trust dispositions. In ascertaining that intent, however, in the absence of a contrary indication in the terms of a trust, the rules of construction set out in Part XI of the Code apply.[418]

All of the statutory rules of construction found in Part XI have a counterpart in existing Chapter 737, F.S. One of these – s. 736.1106, F.S. dealing with antilapse and the descendibility of beneficial interests in trust – changes existing law. The others are substantively identical to their Chapter 737, F.S. cousins. New s. 736.1106, F.S. is discussed last.

Carryover Provisions from Existing Law
Construction of Generic Terms

Code s. 736.1102, F.S. is identical to s. 737.623, F.S. It provides that in construing a trust, adopted persons and persons born out of wedlock are included in class gift terminology and other terms of relationship in accordance with the rules for determining relationships for purposes of intestate succession.

Multi-Generational Class Gifts

Code s. 736.1103, F.S. provides that gifts to multi-generational classes (such as descendants, heirs, etc.) are *per stirpes*. This provision is identical in intent to s. 737.624, F.S., although the wording of the section was revised to eliminate a potential conflict between this section and new s. 736.1106, F.S. discussed below.

Unlawful and Intentional Killings

Code s. 736.1104, F.S. is identical to s. 737.625, F.S. Under both, a beneficiary who unlawfully and intentionally kills or participates in procuring the death of the settlor or another person on whose death such beneficiary's interest depends is precluded from taking that interest. Instead, the interest devolves as if the slayer predeceased the victim. This rule is triggered by a civil evidentiary standard (the greater weight of the evidence) although a final judgment of murder in any degree is conclusive.

Effect of Dissolution of Marriage on Revocable Trust

Absent a contrary provision in the trust instrument or in a judgment for dissolution of marriage or divorce, s. 736.1105, F.S. provides that provisions in a revocable trust in favor of a spouse become void upon a subsequent divorce, annulment or dissolution of the marriage. The trust is administered and construed as if the spouse were dead. Apart from a title change, this section is identical to s. 737.106, F.S.

Change in Securities; Accessions; Nonademption

Code s. 736.1107, F.S. addresses some commonly occurring constructional issues that arise when a trust beneficiary is entitled to a distribution of specific securities (as opposed to their equivalent value).[419] The section gives the beneficiary:

- A right to whatever securities remain in the trust at the time the distribution is to occur;
- A right to additional securities of the same issuer held by the trust as a result of a traditional stock split or stock dividend; and
- A right to securities of another issuer held by the trust as a result of merger, consolidation, reorganization, or other similar action initiated by the issuer.

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[418] *See* s. 736.1016, F.S..
[419] Section 736.1107, F.S. is the trust law counterpart to s. 732.605, F.S. in the Probate Code and is identical in all respect to current s. 737.622, F.S.

Trust Contest Penalty Clauses

Code s. 736.1108, F.S. is a mandatory provision the initial subsection of which is identical to s. 737.207, F.S. The subsection provides that trust *in terrorem* clauses[420] are unenforceable. The second subsection of s. 736.1108, F.S. is new. It is an effective date provision that incorporates the effective date of the legislation originally creating current s. 737.207, F.S. Trusts created before October 1, 1993 are not subject to either provision.[421]

Antilapse and the Descendibility of Beneficial Interests in Trusts

Code s. 736.1106, F.S. is new.[422] Like current s. 737.6035, F.S. which it will replace, s. 736.1106, F.S. is concerned with antilapse and the descendibility of beneficial interests in trusts. The new section is applicable to all trusts except those which are irrevocable on the effective date of the Code.[423]

Historical Background

Prior to 2003, Florida's only section dealing with antilapse was s. 732.603(1), F.S. of the Probate Code. This section applied only when certain related devisees under a will predeceased the testator. Because the term "devisee" is defined in the Probate Code to exclude the beneficiaries of trusts,[424] the prevailing wisdom at the time was that the section did not apply to beneficial interests in testamentary trusts. The impact of the limitation can be illustrated in a brief example.

> **Example 3 — Lapse of Interest in Testamentary Trust.** D executes a will that devises $100,000 outright to his child C and the residue of his estate in trust "income to Wife for life; remainder in corpus C." D's child, C, predeceases D survived by a daughter GC. Subsequently, D dies, survived by Wife and by GC.

As it existed in 2001, s. 732.603(1), F.S. would preserve the outright devise to C for the benefit of GC. But the gift of the remainder interest to C in the trust would lapse. That particular oddity was remedied in 2001 when s. 732.603(1), F.S. was amended to apply both to certain related predeceasing devisees and to "a beneficiary of a trust created by a will." In addition, the section was extended to apply when C survived D but not life tenant W.[425] Then, in 2003, s. 737.6035, F.S. was created to apply similar rules in the case of interests created in living trusts.[426]

Concerns Regarding Current Statutes

The changes made to s. 732.603, F.S. in 2001 and the creation of s. 737.6035, F.S. in 2003 have led to several concerns expressed by commentators:

- The failure to address how these sections apply to powers of appointment, if at all;

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[420] *I.e.,* a provisions purporting to penalize any interested person for contesting the trust instrument or instituting other proceedings relating to the trust estate or trust assets. *See* s. 736.1108(1), F.S.
[421] For this purpose, a revocable trust is treated as if it was created when the right of revocation terminates. Section 736.1108(2), F.S.
[422] Section 736.1106, F.S. is the trust law equivalent of s. 732.603, F.S. (the Probate Code antilapse statute). As is explained more fully below, adoption of s. 736.1106, F.S. requires that conforming amendments be made to s. 732.603, F.S. as well. As these two provisions are related, discussion of the conforming changes that are being made to s. 732.603, F.S. appear below instead of later in the Summary where other conforming changes are considered.
[423] Section 736.1106(5), F.S.
[424] *See* s. 731.201(9), F.S.
[425] The 2001 changes became effective January 1, 2002.
[426] Section 737.6035, F.S. became effective on June 12, 2003.

- The inadvertent and inappropriate application of s. 737.6035, F.S. to some present interests in trust; and

- The failure of s. 732.603, F.S. to address the situation of a related beneficiary dying without surviving descendants after the testator but before the expiration of the life tenant's interest.

- The failure of s. 737.6035, F.S. to clarify how beneficial interests in *inter vivos* trusts are to be handled when they are not saved for some other beneficiary under the section.[427]

Of necessity, the formulation of the new Florida Trust Code required a reexamination of s. 737.6035, F.S. In turn, a Committee decision to remedy the problems it found in that section required changes in s. 732.603, F.S. as well. Together, these two provisions constitute a new coordinated and more comprehensive default regime covering antilapse and descendibility issues in both testamentary and nontestamentary contexts. Discussion begins with the changes made to s. 732.603, F.S.[428]

Revisions to s. 732.603, F.S.

As detailed above, under existing law, lapse and descendibility rules for testamentary trusts appear in s. 732.603, F.S. of the Probate Code while the companion rules for living trusts appear in s. 737.6035, F.S. The division of labor under the new regime is different. Because Code s. 736.1106, F.S. applies to both testamentary and to living trusts, s. 732.603, F.S. is restored to its pre-2002 state. That is, the new version applies only to outright testamentary dispositions.[429] In addition, new s. 732.603, F.S. is revised as follows.

- In addition to devises, it now covers interests created by the exercise of testamentary powers of appointment; and

- It incorporates existing Florida case law on the impact of survivorship language in a devise or appointment.

Powers of Appointment

Current s. 732.603, F.S. is not clear on whether and how it applies to outright interests created by the exercise of testamentary powers of appointment. In contrast, new s. 732.603, F.S. explicitly applies to these interests.[430]

> **Example 4 — Outright Exercise of Testamentary Power**. At his death, D is the life beneficiary of a trust created by his uncle F. Under the terms of the trust, D has a testamentary power to appoint property among D's descendants. D's will purports to appoint $100,000 to his child C. But C predeceased D, survived by GC who survived D.

In the absence of a contrary intent, new s. 732.603, F.S. provides that GC becomes entitled to the $100,000 D tried to appoint to C. Note, however, the following additional observations about this example:

- It is immaterial to the result whether F created D's power in an *inter vivos* or a testamentary instrument.

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[427] For more on these and other problems with s. 732.603, F.S. and s. 737.6035, F.S., see David Powell, *Lapse, Antilapse, an Descendible Beneficial Interests in Trusts, in* ADMINISTRATION OF TRUSTS IN FLORIDA ch 7 (4th Ed. The Florida Bar 2005).
[428] In the interest of clarity, the analysis uses the adjective "new" when referencing the newly formulated version of section 732.603.
[429] New s. 732.603(4), F.S.
[430] *See* new s. 732.603(2), F.S.

- Application of new s. 732.603, F.S. assumes that there is no contrary intent indicated in either D's will or in the instrument in which F created D's power.

- GC takes in C's place under new s. 732.603, F.S. only if the relationship test specified in the section is met with respect to F and C. Thus, if F is unrelated to C, the section does not apply whether or not C is related to D.

- In general, it is immaterial to the application of new s. 732.603, F.S. whether D's power is a general one or a special one. With the latter, however, there exists the possibility that the person in whose favor the section operates is outside the class of permissible objects of the power.[431] The section explicitly permits this unless the language creating the power expressly excludes the substitution of descendants for an object of the power.[432]

Words of Survivorship and other Indications of Contrary Intent

Like its predecessor, new s. 732.603, F.S. yields to an indication of a contrary intent. This would include a direction in the testator's will that lapsed gifts are to be added to the residue or that they are to pass instead to an alternate beneficiary. In this regard, the new section also codifies existing Florida case law which holds that mere words of survivorship associated with a testamentary disposition are a sufficient indication of contrary intent.[433] Thus the section would not apply in either Example 3 or Example 4 if D's devise (or appointment) had been "to C *if he survives me*." Likewise, the section would not apply to Example 4 if in creating D's power, F had provided that he could appoint "among his *surviving* descendants."[434]

Beneficial Interests in Trust
General Effect of s. 736.1106, F.S.

With some exceptions discussed below, Code s. 736.1106, F.S. applies when a beneficiary of a future interest in either a testamentary or an *inter vivos* trust dies before the point at which the beneficiary's interest becomes possessory.[435] In such situations, s. 736.1106, F.S. does two things:

- First, it provides that the deceased beneficiary's future interest in the trust is contingent on the beneficiary surviving the point at which the interest takes in possession.

- Second, unless a contrary intent appears in the trust instrument, s. 736.1106, F.S. creates a *per stirptual* alternate gift in such of the deceased beneficiary's descendants as are living at that time.[436]

The effect of the section may be illustrated with the following example.

> **Example 5 — Beneficial Future Interest in Trust**. D dies with a will in which he devises property to a testamentary trust to pay "income to W for life; remainder in corpus to C." C dies after D survived by W and by two children GC-1 and GC-2. Some time later, W dies survived by C's two kids.

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[431] To illustrate, if D's power in the above example had been to appoint among his children instead of his descendants, the operation of new s. 732.603, F.S. will be to preserve the gift for a person (GC) who is not an object of D's power.
[432] *See* new s. 732.603(2), F.S., final sentence.
[433] *See Williams v. Williams,* 152 Fla. 255, 9 So. 2d 798 (Fla. 1942) (dealing with former s. 731.20, F.S.); *In re Estate of Wagner,* 423 So. 2d 400 (Fla. 2d DCA 1982).
[434] *See* new s. 732.603(3)(a), F.S.
[435] The section refers to this as the "distribution date." *See* s. 736.1106(1)(b), F.S.
[436] Section 736.1106(2), F.S.

On the facts of this example, and again assuming no contrary intent appears in the trust instrument, s. 736.1106, F.S. creates a *per stirptual* alternate gift of C's interest in favor of GC-1 and GC-2.[437]

Situations where s. 736.1106, F.S. Applies

Section 736.1106, F.S. applies to a broad array of situations where the beneficiary of a future interest[438] in a trust dies before the time the interest becomes possessory. The only two exceptions are situations where a contrary intent appears in the instrument and where the beneficial interest involved is one created in a trust that became irrevocable before the effective date of the Code. Thus, in the illustrative context of Example 5, the section would apply:

- Whether the trust in which C held his interest was created by standard transfer or by an exercise of a power of appointment, and in the latter case, whether the power was general or special.
- Whether the transfer (or appointment) by which the trust was created was an *inter vivos* or testamentary one.
- With respect to an *inter vivos* trust, whether the trust is revocable or irrevocable.
- With respect to a testamentary trust, whether C survived the testator or not.
- Whether, the predeceasing beneficiary is an individual or a member of a class.[439]
- Whether or not the trust settlor and predeceasing beneficiary are related. That is, unlike s. 732.603, F.S. of the Probate Code, there is no relationship test under s. 736.1106, F.S.

The absence of a relationship test in s. 736.1106, F.S. rests on a subtle but important distinction between the underlying rationales for that section compared with the Probate Code antilapse provision. The latter is first, foremost, and exclusively a rule based on presumed intent. The relationship test assumes that that intent differs depending on whether the beneficiary of a testamentary gift is a relative or not. The rationale behind s. 736.1106, F.S. is different. It is found in large part on matters of economy and administrative convenience. To illustrate, consider the impact of s. 736.1106, F.S. to Example 5. Because of the section, C's interest in the example is not descendible. That is, it does not pass at C's death to his successors by will or inheritance. For that reason:

- It is not subject to estate taxation at C's death;
- It may not it be reached by C's creditors (including the elective share right of C's surviving spouse); and
- It will not be necessary to reopen administration of C's estate at W's subsequent death in order to determine who is entitled to C's interest.

To the above may be added the secondary advantage that in many cases, application of s. 736.1106, F.S. *will* accord with D's probable intent. But the advantages listed above exist regardless of any relationship between

[437] Astute readers will readily see that the effect of s. 736.1106, F.S. is to turn C's vested interest into a contingent one with alternate gift in his descendants. Note that the alternate gift is in the descendants of D who survive W. If GC-1 predeceased W survived by a child GGC, the remainder will pass half to GGC and half to GC-2 at W's death. It is immaterial whether GGC was born before or after C's death. The result of the situation described in the comment is the same whether GC-1 predeceased W in fact or in law. *See* s. 736.1106(1)(e), F.S.
[438] Section 736.1106, F.S. applies only to future interests. *See* s. 736.1106(1)(a), F.S.
[439] *See* s. 736.1106(1)(a) and (c), F.S.

D and C. If D's contrary intent in a particular case outweighs the listed advantages, D is free to negate application of s. 736.1106, F.S. in the trust instrument. Unless he does so, however, the better default rule is for the section to apply regardless of any relationship test.

Language Indicating a Contrary Intent

It was mentioned previously, that application of s. 736.1106, F.S. means two things. The first is that vested remainders are now contingent on the taker surviving to the time of possession. The second is that an alternate gift arises in the descendants of a beneficiary who fails to meet the survivorship contingency. As a default rule of construction, both of these principles will yield to a contrary intent in the trust instrument. As a practical matter, however, an instrument would rarely negate application of the first principle because to do so is to invite the problems the section was designed to avoid. It is for this reason that vested remainder interests are seldom found in well drafted trust instruments.
The second principle is certain to be less universally acceptable. It is to be expected that many settlors would prefer a different taker for the alternate gift. If so, application of the second principle can be avoided by:

- Expressing a different alternate taker in the instrument;
- Stating the intent that the designated beneficiary's descendants not share in the gift; or
- Attaching words of survivorship to the remainder beneficiary' interest.[440]

By contrast, the mere presence of a residuary clause in a settlor's will is not a sufficient indication of a contrary intent to the application of the second principle and this is true even if the will specifically provides that lapsed or failed gifts are to pass under the residuary clause.[441]

Disposition of Remainder Interests when there is no Alternate Taker

In some cases, there will be no eligible alternate taker for the contingent interest arising from an application of the first principle of s. 736.1106, F.S. This can occur if the predeceasing beneficiary left no descendants. It can also occur when the instrument contains language negating the application of the second principle but not language identifying an alternative taker for the interest. In either case, disposition of the interest will depend on whether the interest was created by traditional transfer or by the exercise of a power of appointment.

Interests Created by Traditional Transfer

If the interest was created in a nonresiduary devise in the *transferor's* will, the interest will pass as part of the transferor's residuary estate.[442] Otherwise it passes to the *transferor's* heirs with the heirs being determined as if the transferor had died intestate at the time the interest takes in possession.[443]

> **Example 6 — Residuary devise to testamentary trust – no alternate taker.** D dies with a will in which he devises the residue of his estate to a testamentary trust to pay "income to W for life; remainder in corpus to his child C." D's only other relatives are a brother B and a sister S. C dies after D. He is survived by W, B, and

[440] On the effectiveness of using words of survivorship for this purpose, *see* s. 736.1106(3)(a), F.S.
[441] *See* s. 736.1106(3)(b), F.S.
[442] Section 736.1106(4)(b), F.S.
[443] Section 736.1106(4)(c), F.S.

S, but not by any descendants. Thereafter, W dies survived by B and S. At W's death, the property passes to D's surviving heirs, B and S.[444]

Interests Created by Appointment

In general, the rules discussed above for interests created by traditional transfers also apply to interests created by the exercise of a power of appointment. In the case of powers, however, the basic rules are subject to two special wrinkles:

- First, prior to application of the above rules, preference is given to the power donor's gift-in-default clause, if any.[445]

- Second, in the application of the above rules, the *transferor* of an interest created by the exercise of a general power is specified to be the donee of the power while the *transferor* for interests created by the exercise of a special power is specified to be the donor of the power.[446]

Charitable Trusts (Part XII)

Part XII of the Code incorporates most of the sections currently found in Part V of chapter 737, F.S. dealing with charitable trusts. Two current sections (s. 737.510, F.S. and s. 737.512, F.S.) were omitted, the latter because it is obsolete and the former because charitable organizations expressly designated in a trust instrument are given the rights of a qualified beneficiary under Code s. 736.0110(1), F.S. Accordingly, the duties imposed on trustees in s. 737.510, F.S. are unnecessary under the Code.

The remaining sections, and the changes, if any, made to them are listed below.

- **Section 736.1201, F.S.**: This section is derived from s. 737.501, F.S. The order of the definitions for "charitable organization" and "Internal Revenue Code" were switched and changes were made to the definitions of Internal Revenue Code and State attorney. The definition of the former was updated to the 1986 Code and the definition of the latter was tied to the state attorney for the judicial circuit of the principal place of administration of the trust under s. 736.0108, F.S.

- **Section 736.1202, F.S.**: This section is identical to s. 737.502, F.S.

- **Section 736.1203, F.S.**: This section is derived from s. 737.503, F.S. A cross reference to s. 737.505, F.S. was updated to Code s. 736.1203, F.S.

- **Section 736.1204, F.S.**: Section 736.1204, F.S. is derived from s. 737.504, F.S. Gender specific references were replaced with gender neutral ones, cross references to s. 737.505, F.S. were updated to Code s. 736.1205, F.S., and some section references were clarified as referring to the Internal Revenue Code.

- **Section 736.1205, F.S.**: This section is derived from s 737.505, F.S. Cross references to s. 737.504, F.S. were updated to Code s. 736.1204, F.S.

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[444] Some additional observations about the above example: if D's brother B had died before W, the property would pass exclusively to sister S because the class of D's heirs is determined as if D had died intestate at W's death when the remainder interest takes in present possession; the result in the Example (original or as modified above) is the same if D had created the trust by *inter vivos* transfer instead of by will; in the case of an *inter vivos* trust, the result is also the same whether the trust is revocable or irrevocable and whether D predeceases W or not, and since there is no relationship test under s. 736.1106, F.S., all of the above remains true even if D and C are unrelated to each other.
[445] *See* s. 736.1106(4)(a), F.S.
[446] *See* s. 736.1106(4), F.S., final paragraph.

- **Section 736.1206, F.S.**: This section is derived form s. 737.506, F.S. References to s. 737.504(2), F.S. were updated to Code s. 736.1204(2), F.S.

- **Section 736.1207, F.S.**: This section is identical to s. 737.507, F.S.

- **Section 736.1208, F.S.**: This section is identical to s. 737.508, F.S.

- **Section 736.1209, F.S.**: This section is derived from s. 737.509, F.S. A reference to s. 737.510, F.S. was deleted and references to s. 737.508(5), F.S. were updated to Code s. 736.1208(5), F.S.

- **Section 736.1210, F.S.**: This section is identical to s. 737.511, F.S.

Miscellaneous (Part XIII)

Part XIII of the Code contains miscellaneous sections. One deals with electronic records and signatures, two with investments by fiduciaries, another with severability, and two with effective date issues.

Electronic Records and Signatures

Section 736.1301, F.S. is a prophylactic provision with no real current effect. It provides that any provisions of the Code relating to the legal effect, validity, or enforceability of electronic records or signatures supersede those found in the Electronic Signatures in Global National Commerce Act. This section appears in all recent Uniform Acts. As the Florida Code contains no such provisions relating to the legal effect, validity, or enforceability of electronic records or signatures, the main impact of the section is that it will insure the primacy of any provisions that may be added in the future.

Investment of Fiduciary Funds Permitted

Section 518.117, F.S. is created to permit a fiduciary that is authorized to engage in trust business to invest fiduciary funds in accordance with s. 660.417, F.S.

Severability

Section 736.1302, F.S. is a standard severability clause that is intended to insure that the invalidity of one or more provisions of the Code will not affect the validity of other provisions.

Investment of Fiduciary Funds

Section 660.417, F.S. is amended to permit affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company and receiving additional compensation for that investment. If a trustee engages in such activity the basis for the calculation of the compensation must be disclosed.

Effective date

The final miscellaneous provisions are found in s. 736.1303, F.S. Section 736.1303, F.S. specifies that the Code takes effect on July 1, 2007, and specifies rules relating to the application of the Code to existing trusts and legal proceedings. These include the following:

- The Code does not affect any act done prior to its effective date.[447]

- The Code does not affect the running of any limitations period that began before the effective date of the Code, even if the statute specifying the period is repealed or superseded by the Code.[448]

- The Code applies to all judicial proceedings concerning trusts commenced on or after its effective date.[449]

- The Code also applies to judicial proceedings commenced before that date unless the court finds its application would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of the parties.[450]

- Finally, except as otherwise provided in a particular section of the Code, the Code applies to all trusts whether created before, on, or after its effective date.[451]

The significance of the final point above is worth emphasizing. Except as might be provided above or in a particular section, the Code applies retroactively to all trusts, whenever created. Although this has the advantage of avoiding the maintenance of two systems of trust law for extended periods of time, in some instances retroactive application can be constitutionally impermissible (e.g., where it impairs vested rights) or unfair. For this reason, a number of Code sections include effective date sections that limit the default retroactivity rule of s. 736.1303, F.S. This table lists most of these:

Specific Effective Dates of Code Provisions to Limit Retroactivity

Section	Title or topic	Effective date:
736.0403	Trusts created in other jurisdictions; formalities required for revocable trusts	Trusts created after the effective date of the Code.
736.04115	Judicial modification of irrevocable trust when modification is in best interest of beneficiaries	Inapplicable to trusts created before January 1, 2001. Revocable trusts are deemed created at the time they become irrevocable.
736.0412	Nonjudicial modification of irrevocable trust	Inapplicable to trusts created before January 1, 2001. Revocable trusts are deemed created at the time they become irrevocable.
736.0813	Duty to inform and account	In general, applies only to trust accountings rendered for accounting periods beginning on or after January 1, 2008. Paragraphs (1)(a) and (b) do not apply to trustees who accept a trusteeship before the effective date of the Code or to trusts that are irrevocable before that date.
736.08135	Trust accountings	Applies only to trust accountings rendered for accounting periods beginning on or after January 1, 2003.

[447] Section 736.1303(1)(e), F.S.
[448] Section 736.1303(2), F.S.
[449] Section 736.1303(1)(b), F.S.
[450] Section 736.1303(1)(d), F.S.
[451] Section 736.1303(1)(a), F.S.

Specific Effective Dates of Code Provisions to Limit Retroactivity		
Section	**Title or topic**	**Effective date:**
736.08163	Powers of trustees relating to environmental or human health laws or to trust property contaminated with hazardous or toxic substances; liability	Does not apply to trusts created before July 1, 1995, unless the trust is amended to incorporate the provisions of the section.
736.1008	Limitations on proceedings against trustees	Applies to trust accountings for accounting periods beginning on or after January 1, 2008, and to written reports, other than trust accountings, received by a beneficiary on or after January 1, 2008.
736.1108	Penalty clause for contest	Applies to trusts created on or after October 1, 1993. Revocable trusts are treated as created when the right of revocation terminates.

Conforming Changes

In addition to the Code itself, the bill includes a number of conforming and other changes to various sections of the Probate Code and other portions of the Florida statutes. Many of these are just updates to statutory cross references and will not be discussed here. Those with substantive impact are list below.

- **Section 518.117, F.S.:** *New.* This section authorizes investment of fiduciary funds pursuant to s. 660. 417, F.S.

- **Section 660.25, F.S.:** *Revised.* This section provides a definition for "investment instrument."

- **Section 660.417, F.S.:** *Revised.* This section authorizes trustees to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company.

- **Section 689.075(4), F.S.:** *Revised.* The second sentence of this subsection was deleted as obsolete.
- **Section 689.175, F.S.:** *New.* This section abolishes the Doctrine of Worthier title as both a rule of law and a rule of construction. The purposes originally served by that doctrine are no longer relevant and its application can create adverse tax consequences and can impair the validity of special needs trusts.

- **Section 731.103, F.S.:** *Revised.* The section is made applicable to new Chapter 736; the provision specifying the applicability of the rules of evidence in civil actions is moved to new s. 731.1035, F.S. (below); subsection (4) permitting proof of death by direct or circumstantial evidence before expiration of 5-year time period is added to conform this section to s. 737.626(4), F.S.

- **Section 731.1035, F.S.:** *New.* This new section is separated out from s. 731.103, F.S. (see above). It specifies that the rules of evidence in civil action apply to proceedings under Probate Code.

- **Section 731.201(2) and (9), F.S.:** *Revised.* In both of these subsections, a reference to beneficiaries described in s. 737.303(4)(b), F.S. is changed to qualified beneficiary as defined in the new Code.

- **Section 731.201(27), F.S.:** *New.* This section adds a new definition of "power of appointment."

- **Section 731.303, F.S.:** *Revised.* This section is amended to limit it to proceedings involving estates and not those involving trusts. In addition, the portions of the section dealing with representation by holders of powers of appointment are subjected to the same restrictions that appear in Code s. 736.0302, F.S. That is, representation does not apply to matters involving a trustee's fraud or bad faith, a power of a trustee to distribute property or to a power held by a person who is the sole trustee.

- **Section 732.513, F.S.:** *Revised.* Subsection (c) of the section is deleted to remove the implication that a pour over to a revocable trust that is not executed in the manner required for wills is effective.

- **Section 732.603, F.S.:** *Rewritten.* The revisions to this section have been discussed in detail previously.[452]

- **Section 732.604, F.S.:** *Clarified.* Subsection (2) of this section is revised to clarify the meaning it was intended to have all along.

- **Section 732.611, F.S.:** *Clarified.* The wording of this section was changed to better reflect its intended purpose.

- **Section 732.212, F.S.:** *Revised.* A reference in this section to beneficiaries described in s. 737.303(4)(b), F.S. is changed to qualified beneficiary as defined in the new Code.

- **Section 738.104, F.S.:** *Revised.* This section is amended in several places to change references to the previously defined term "beneficiaries" to a newly defined term "eligible beneficiaries." Under the new version, it is the eligible beneficiaries of a trust who have standing to object to the use of a trustee's power to adjust with respect to trusts in existence on January 1, 2003. The new term excludes from the class of beneficiaries with standing the middle tier qualified beneficiaries described in Code s. 736.0103(14)(b), F.S. unless there is no third tier qualified beneficiary described in s. 736.0103(14)(c), F.S. The practical effect of the revisions are two fold. First, for most trusts the term eligible beneficiaries will have a meaning very similar to the term "beneficiaries" under the current version of the section. For those trusts where the term differs, the revisions are intended to insure that there will always be two categories of qualified beneficiaries with standing to object to an exercise of the trustee's adjustment power.

- **Section 744.331(6)(b) and (f), F.S.:** *Revised.* These are companion revisions to the change made in Code s. 736.0207, F.S. permitting court approved contests of a revocable trust by a settlor's guardian prior to the settlor's death. Paragraph (b) requires that a court determine whether a sufficient alternative to guardianship exists for a person the court finds to be incapable of exercising delegable rights. If so, the court is precluded from appointing a guardian. If not, the court is required to appoint a guardian for the incapacitated person. Paragraph (f) provides that an incapacitated person's trust, trust amendment, or durable power of attorney is not to be considered a sufficient alternative to guardianship if an interested person files a verified statement that he or she has a reasonable factual basis for believing in good faith that the trust, trust amendment or durable power is invalid.

- **Section 744.441(11), F.S.:** *Revised.* The new language added to this subsection is also a related to new Code s. 736.0207, F.S. Subsection (11) directs that before authorizing a guardian to bring an action under s. 736.0207, F.S., the court must find that the action appears to be in the ward's best interest during the ward's probable lifetime.

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[452] *See* "Revisions to s. 732.603, F.S.", supra p. 27.

- **Section 744.462, F.S.:** *New*. This new section provides for the reporting of a court's finding as to the validity of a ward's trust, trust amendment, and power of attorney and for the continued review by the court of the sufficiency of guardianship alternatives, the continued need for a guardian, and the extent of the need for delegation of the ward's rights.

C. SECTION DIRECTORY:

Section 1. Creating Part I of chapter 736, F.S., consisting of sections 736.0101, 736.0102, 736.0103, 736.0104, 736.0105, 736.0106, 736.0107, 736.0108, 736.0109, 736.0110, 736.0111, and 736.0112. This section provides a short title, scope, and definitions for the Florida Trust Code (FTC).

Section 2. Creating Part II of chapter 736, F.S., consisting of sections 736.0201, 736.0202, 736.0203, 736.0204, 736.0205, 736.0206, and 736.0207. This section provides for the role of courts in trust proceedings, including, but not limited to, jurisdiction, venue, and trust contests.

Section 3. Creating Part III of chapter 736, F.S., consisting of sections 736.0301, 736.0302, 736.0303, 736.0304, 736.0305, and 736.0306. This section outlines the effect of representation throughout the trust process.

Section 4. Creating Part IV of chapter 736, F.S., consisting of sections 736.0401, 736.0402, 736.0403, 736.0404, 736.0405, 736.0406, 736.0407, 736.0408, 736.0409, 736.0410, 736.04113, 736.04115, 736.0412, 736.0413, 736.0414, 736.0415, 736.0416, and 736.0417. This section encompasses the methods and requirements for the creation of a trust, trust validity, trust modification, and trust termination.

Section 5. Creating Part V of chapter 736, F.S., consisting of sections 736.0501, 736.0502, 736.0503, 736.0504, 736.0505, 736.05053, 736.05055, 736.0506, and 736.0507. This section details creditors' claims, and what effect, if any, spendthrift provision may have upon the trust. Furthermore, this section outlines responsibilities of a trustee, and claims against a settlor.

Section 6. Creating Part VI of chapter 736, F.S., consisting of sections 736.0601, 736.0602, 736.0603, and 736.0404. This section gathers in one place most of the provisions relating to revocable trusts. Section 736.601 clarifies that the capacity required to create a revocable trust is the same as that needed to execute a will. Other sections specify the rules to be used to determine if and how a trust may be revoked or amended, the effect revocability has on the duties and liabilities of a trustee and the limitations period for contesting revocable trusts after the death of the settlor.

Section 7. Creating Part VII of chapter 736, F.S., consisting of sections 736.0701, 736.0702, 736.0703, 736.0704, 736.0705, 736.0706, 736.0707, 736.0708, and 736.0709. Part VII of the Code contains the various rules relating to the office of trustee. This includes provisions detailing when and how a designated trustee accepts or declines the office; how trustees may resign or be removed; the powers and duties of a trustee who has resigned or been removed; and when vacancies in the office of trustee must be filled and how successor trustees are appointed. Also covered are the duties and powers of cotrustees, compensation of trustees, and trustees' right to reimbursement for expenses incurred in the administration of the trust.

Section 8. Creating Part VIII of chapter 736, F.S., consisting of sections 736.0801, 736.0802, 736.0803, 736.0804, 736.0805, 736.0806, 736.0807, 736.0808, 736.0809, 736.0810, 736.08105, 736.0811, 736.0812, 736.08125, 736.0813, 736.08135, 736.0814, 736.08147, 736.0815, 736.0816, 736.08163, 736.08165, and 736.0817. This section covers the duties of a trustee, the powers of a trustee, and a few miscellaneous matters.

Section 9. Creating Part IX of chapter 736, F.S., consisting of section 736.0901 which directs that a trustee shall invest trust property in accordance with chapter 518, F.S.

Section 10. Creating Part X of chapter 736, F.S., consisting of sections 736.1001, 736.1002, 736.1003, 736.1004, 736.1005, 736.1006, 736.1007, 736.1008, 736.1009, 736.1010, 736.1011, 736.1012, 736.1013, 736.1014, 736.1015, 736.1016, 736.1017, and 736.1018. This section deals with the remedies and damages for breach of trust; liability of trustees to nonbeneficiaries, the entitlement, assessment and recovery of costs and fees; limitations on actions against a trustee; and the protection of persons dealing with the trustee including those relying on a certification of trust furnished by the trustee.

Section 11. Creating Part XI of chapter 736, F.S., consisting of sections 736.1101, 736.1102, 736.1103, 736.1104, 736.1105, 736.1106, 736.1107, and 736.1108. This section contains a series of default rules of construction.

Section 12. Creating Part XII of chapter 736, F.S., consisting of sections 736.1201, 736.1202, 736.1203, 736.1204, 736.1205, 736.1206, 736.1207, 736.1208, 736.1209, and 736.1210. This section incorporates most of the sections currently found in Part V of Chapter 737, F.S. dealing with charitable trusts.

Section 13. Creating Part XIII of chapter 736, F.S., consisting of sections 736.1301, 736.1302, and 736.1303. This section addresses four miscellaneous sections. One deals with electronic records and signatures, another with severability, and two with effective date issues.

Section 14. This section amends paragraph (a) of subsection (5) of s. 497.458, F.S., relating to the disposition of proceeds received on contracts.

Section 15. This section creates s. 518.117, F.S., relating to what investments of fiduciary funds are permissible.

Section 16. This section amends subsection (2) of s. 607.0802, F.S., relating to qualifications of directors.

Section 17. This section amends subsection (2) of s. 617.0802, F.S., relating to qualifications of directors.

Section 18. This section amends subsections (6) and (7) of s. 660.25, F.S., defining "investment instrument," and correcting references from Chapter 737, F.S. to s. 736.

Section 19. This section amends s. 660.417, F.S., to permit a trustee to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company

Section 20. This section amends paragraphs (a), (d), and (e) of subsection (1) and subsections (2), (3), (9), and (10) of s. 660.46, F.S., relating to the substitution of fiduciaries.

Section 21. This section amends s. 660.418, F.S., to correctly reference s. 736 and not Chapter 737, F.S.

Section 22. This section amends subsection (5) of s. 689.071, F.S., to correctly reference s. 736 and not Chapter 737, F.S.

Section 23. This section amends subsections (1) and (4) of s. 689.075, F.S., relating to *inter vivos* trusts; powers retained by settlor.

Section 24. This section creates s. 689.175, F.S., abolishing the Worthier title doctrine.

Section 25. This section amends subsection (8) of s. 709.08, F.S., to correctly reference s. 736 and not Chapter 737, F.S.

Section 26. This section amends paragraph (c) of subsection (2) of s. 721.08, F.S., to correctly reference sections of s. 736 and not Chapter 737, F.S.

Section 27. This section amends paragraph (e) of subsection (1) of s. 721.53, F.S., to correctly reference sections of s. 736 and not Chapter 737, F.S.

Section 28. This section amends s. 731.103, F.S., regarding evidence as to death or status.

Section 29. This section creates s. 731.1035, F.S., providing in proceedings under the code, the rules of evidence in civil actions are applicable unless specifically changed by the code.

Section 30. This section amends s. 731.201, F.S., regarding general definitions.

Section 31. This section amends paragraph (a) of subsection (1) and subsection (5) of s. 731.303, F.S., regarding representation.

Section 32. This section amends subsection (5) of s. 732.2075, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 33. This section amends subsection (2) of s. 732.513, F.S., relating to devises to trustee.

Section 34. This section amends s. 732.603, F.S., substantially rewording s. 732.603, F.S., relating to antilapse; deceased devisee; class gifts.

Section 35. This section amends s. 732.604, F.S., concerning a failure of testamentary provision.

Section 36. This section amends s. 732.611, F.S., regarding devises to multigenerational classes to be *per stirpes*.

Section 37. This section amends subsection (1) of s. 733.212, F.S., regarding a notice of administration.

Section 38. This section amends subsection (1) of s. 733.602, F.S., to correctly reference a Chapter 736 and not Chapter 737, F.S.

Section 39. This section amends subsection (4) of s. 733.805, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 40. This section amends paragraph (j) of subsection (1) of s. 733.817, F.S., correcting a reference to s. 731.201, F.S.

Section 41. This section amends paragraphs (a) and (f) of subsection (8) and paragraphs (a) and (d) of subsection (9) of s. 738.104, F.S., regarding a trustee's power to adjust.

Section 42. This section amends subsection (4) of s. 738.1041, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 43. This section amends subsection (5) of s. 738.202, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 44. This section amends paragraph (a) of subsection (12) of s. 739.102, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 45. This section amends paragraphs (b) and (f) of subsection (6) of s. 744.331, F.S., relating to orders determining incapacity.

Section 46. This section amends paragraph (a) of subsection (6) of s. 744.361, F.S., correcting a reference to Chapter 518, F.S.

Section 47. This section amends subsections (11) and (18) of s. 744.441, F.S., relating to powers of a guardian upon court approval.

Section 48. This section creates s. 744.462, F.S., concerning determinations regarding alternatives to guardianship.

Section 49. This section repeals ss. 737.101, 737.105, 737.106, 737.111, 737.115, 737.116, 737.201, 737.202, 737.203, 737.2035, 737.204, 737.2041, 737.205, 737.206, 737.2065, 737.207, 737.208, 737.209, 737.301, 737.302, 737.303, 737.3035, 737.304, 737.305, 737.3053, 737.3054, 737.3055, 737.306, 737.3061, 737.307, 737.308, 737.309, 737.401, 737.402, 737.4025, 737.403, 737.4031, 737.4032, 737.4033, 737.404, 737.405, 737.406, 737.501, 737.502, 737.503, 737.504, 737.505, 737.506, 737.507, 737.508, 737.509, 737.510, 737.511, 737.512, 737.6035, 737.621, 737.622, 737.623, 737.624, 737.625, 737.626, and 737.627, F.S.

Section 50. This section provides and effective date of July 1, 2007.

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:

By providing settlors and trustees with the ability to take advantage of more flexible trust provisions, this bill may perhaps result in more equitable trust distributions and better tax outcomes for trust beneficiaries.

Traditionally, self-settled trusts have been treated harshly when it comes to creditors' rights. Under Code s. 736.0505(1), F.S., whether or not a trust includes a spendthrift provision: while a trust is revocable, the trust

property is subject to the claims of the settlor's creditors, and in the case of an irrevocable trust, a settlor's creditor or assignee may reach the maximum that can be distributed to or for the benefit of the settlor. Therefore, this bill provides creditors with greater protection.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Personal Jurisdiction:

Section 736.0202, F.S. pertains to personal jurisdiction by Florida courts over the trustee, beneficiaries, and recipients of trust distributions. Specifically, s. 736.0202(2), F.S. provides:

> With respect to their interest in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the distribution.

The Committee's Scrivener's Summary provides that "F.S. chapter 737 has no provision corresponding to section 736.0602[453]. Jurisdiction under existing law is obtained under the general long arm statutes found in F.S. chapter 48. The Committee believes that the inclusion of a long arm statute tailored specifically to trust matters is a beneficial addition to Florida law."[454]

Even assuming, for the sake of argument, that the provisions of the Florida Long Arm Statute have been satisfied,[455] federal due process requirements cannot be minimized. The U.S. Supreme Court has "noted

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[453] The report points to s. 736.602, F.S., however s. 736.0602, F.S. pertains to revocation or amendment of revocable trusts, therefore it would seem that the reference to s. 736.602, F.S. is merely a scrivener's error and it will be considered as such.
[454] Committee's Scrivener's Summary, page 12.
[455] Section 48.193, F.S. provides:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
(b) Committing a tortious act within this state.
(c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.
(d) Contracting to insure any person, property, or risk located within this state at the time of contracting.
(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.
(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
1. The defendant was engaged in solicitation or service activities within this state; or

several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents. A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."[456]

Nevertheless, the U.S. Supreme Court maintains that the "constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum."[457] The Court will look to the individuals "conduct and connection with the forum State" to determine if that person "should reasonably anticipate being haled into court there."[458] In seeking to make this determination, the court will attempt to determine if an individual has purposefully availed himself or herself of the "privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[459]

"This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State."[460]

Furthermore, in determining whether due process requirements are met, the Florida Supreme Court has set forth a "twofold constitutional inquiry: (1) whether the acts or the nonresident defendant give rise to sufficient 'minimum contacts' with the forum such that (2) maintaining a suit there 'does not offend traditional notions of fair play and substantial justice.'"[461] Factors to consider in whether minimum contacts have been established include "whether sufficient minimum contacts exist including the foreseeability that the defendant's conduct will result in suit in the forum state and the defendant's purposeful availment of the forum's privileges and protections."[462] In other words, even though an individual may appear to fall within the reach of the long arm statute, personal jurisdiction over that nonresident may run afoul of the due process requirements of the U.S. Constitution unless minimum contacts with Florida can be established.

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2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.
(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.
(h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.
(2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.
(3) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.
(4) If a defendant in his or her pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff may by amendment assert against the defendant.
(5) Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereinafter provided by law.

[456] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)(citations omitted).
[457] *Rudzewicz*, 471 U.S. 474-75 (citations omitted).
[458] *Id.*
[459] *Id.*
[460] *Rudzewicz*, 471 U.S. at 475-76. (emphasis in original)(citations omitted).
[461] *Georgia Insurers Insolvency Pool v. Brewer*, 602 So. 2d 1264, 1268 (Fla. 1992)(citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).
[462] *Id.* (citing *Rudzewicz*, 471 U.S. 462 (1985).

Section 736.0202, F.S., which authorizes personal jurisdiction over an out of state resident solely upon the receipt of a distribution from a trust located in Florida, may perhaps be challenged by a nonresident whose only contact with Florida was cashing a check received in the mail.

Formalities for Creation of a Trust:

Section 736.0403(2)(b) provides: "The testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will in this state. For the purpose of this subsection, the term 'testamentary aspects' means those provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to the settlor's estate."

The Committee's Scrivener's Report provides the following analysis of this section:[463]

> A failure to comply with the requirements of section 736.0403(2)(b) does not result in the initial invalidity of a revocable trust. Rather, only the testamentary aspects of the trust are void. As under existing law, testamentary aspects means "those provisions of the trust that dispose of the trust property on or after the settlor's death other to the settlor's estate."
>
> The formalities required are those for a will in Florida. Complying with the formalities for a will in some other state is not enough.
>
> Section 736.0403(2(b) has no applicability to trusts created by non Florida domiciliaries whether or not the trust was executed in Florida.
>
> Conversely, section 736.0403(2)(b) does not contain an "out" for trusts executed in other states. The section applies to revocable trusts created by Florida domiciliaries regardless of the place of execution and regardless of the location of the property held in the trust.

Section 736.0403(2)(b), F.S. may invalidate testamentary aspects of a trust created by a Florida domiciliary in another state regardless of whether the corpus of the trust is outside of Florida. By way of example the above language would seem to preclude a Floridian from executing a trust in New York with testamentary aspects which seeks to solely dispose of property located in New York unless New York has identical to formalities to Florida required for the execution of a will. Such a result may create a potential conflict of laws problem.

B. RULEMAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Florida Bankers Association supports the bill and advises[464] that it contains provisions that

> would allow professional trustees more investment options for their customers by removing strict prohibitions on sophisticated investment products offered by or through the trustee or an affiliate. Professional trustees already enjoy this freedom on mutual funds, common trust funds and money market funds. This legislation would

[463] Committee Report, pages 19-20.
[464] Correspondence from C. Scott Jenkins, Vice President of Governmental Affairs, dated February 8, 2006, on file with the Committee on Elder & Long-Term Care.

expand the authority to investments that are customarily seen only in large trusts.... We believe that the bill may also reduce customer fees.... Currently, Delaware, Ohio and Illinois have such provisions in their laws... The [CS] would help keep Florida competitive in the trust industry.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 11, 2005, the Civil Justice Committee adopted an amendment removing everything after the enacting clause. The amendment modified the bill in the following manner:

- Changed the presumption on an unproductive trust to that of current law ($50,000);
- Removed the definition of "person" from the bill;
- Modified the governing law provisions of s. 736.0107, F.S. to provide that in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust is created controls. Moreover, a designation in the terms of the trust is not controlling as to any matter for which the designation would be contrary to a strong public policy of Florida;
- Removed "the interest of the beneficiaries" from consideration of a trustees' duty where to administer the trust;
- Authorized a trustee to invest in investment instruments that are controlled by the trustee or its affiliate or from which the trustee or affiliate receives compensation, provides for notice of this to beneficiaries, and establishes a method by which a beneficiary may file an objection with the trustee;
- Created s. 518.117, F.S., authorizing a fiduciary to invest fiduciary funds pursuant to s. 660.417, F.S.; so long as the investment complies with among other things Florida's Prudent Investor Rule. This rule provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.[465] In seeking to satisfy this standard, the trustee must exercise reasonable care and caution;
- Amended s. 660.417, F.S., regarding investments by fiduciaries, to add that a bank or trust company is not precluded from investing in investment instruments offered by that bank or trust company; and

The bill was then reported favorably with a Committee Substitute.

This analysis is drawn to the Committee Substitute.

[465] Section 518.11(1)(a), F.S.

CHAMBER ACTION

1 The Civil Justice Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to the Florida Trust Code; creating parts
7 I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII
8 of chapter 736, F.S.; providing a short title; providing
9 general provisions and definitions; providing for judicial
10 proceedings; providing for representations; providing for
11 creation, validity, modification, and termination of
12 trusts; providing for creditors' claims; providing for
13 spendthrift, discretionary, and revocable trusts;
14 providing for the office of trustee; providing for powers
15 and duties of the trustee; providing for trust
16 investments; providing for liability of trustee and rights
17 of persons dealing with trustee; providing for rules of
18 construction; providing for charitable trusts; providing
19 miscellaneous provisions; creating s. 518.117, F.S.;
20 authorizing investment of certain fiduciary funds by
21 certain fiduciaries; amending s. 660.25, F.S.; providing a
22 definition of the term "investment instrument"; amending
23 s. 660.417, F.S.; revising provisions relating to

24 investment of fiduciary funds in investment instruments by
25 certain banks or trust companies; creating s. 689.175,
26 F.S.; abolishing the worthier title doctrine; providing
27 construction of certain instrument language; amending s.
28 731.103, F.S.; correcting a cross-reference; providing
29 construction relating to establishment of death by certain
30 evidence under certain circumstances; creating s.
31 731.1035, F.S.; providing for application of rules of
32 evidence in civil actions to certain proceedings; amending
33 s. 731.201, F.S.; revising definitions; conforming terms
34 and correcting cross-references; amending s. 731.303,
35 F.S.; specifying nonapplication of certain orders relating
36 to powers of revocation and powers of appointment;
37 revising provisions relating to representation by a holder
38 of a power of appointment; amending s. 732.513, F.S.;
39 deleting a ground protecting a devise's validity; amending
40 s. 732.603, F.S.; revising provisions relating to
41 antilapse, deceased devisees, and class gifts; amending s.
42 744.331, F.S.; revising provisions relating to orders
43 determining incapacity; amending s. 744.441, F.S.;
44 revising authority of certain guardians to prosecute or
45 defend claims or proceedings for certain purposes;
46 specifying duties of a court; creating s. 744.462, F.S.;
47 providing requirements for judicial determinations
48 relating to alternatives to guardianship; providing duties
49 of a court; amending ss. 497.458, 607.0802, 617.0802,
50 660.46, 660.418, 689.071, 689.075, 709.08, 721.08, 721.53,
51 732.2075, 732.604, 732.611, 733.212, 733.602, 733.805,

52 733.817, 738.104, 738.1041, 738.202, 739.102, and 744.361,
53 F.S., to conform terms and correct cross-references;
54 repealing ss. 737.101, 737.105, 737.106, 737.111, 737.115,
55 and 737.116, constituting part I of ch. 737, F.S.,
56 relating to trust registration; repealing ss. 737.201,
57 737.202, 737.203, 737.2035, 737.204, 737.2041, 737.205,
58 737.206, 737.2065, 737.207, 737.208, and 737.209,
59 constituting part II of ch. 737, F.S., relating to
60 jurisdiction of courts; repealing ss. 737.301, 737.302,
61 737.303, 737.3035, 737.304, 737.305, 737.3053, 737.3054,
62 737.3055, 737.306, 737.3061, 737.307, 737.308, and
63 737.309, constituting part III of ch. 737, F.S., relating
64 to duties and liabilities of trustees; repealing ss.
65 737.401, 737.402, 737.4025, 737.403, 737.4031, 737.4032,
66 737.4033, 737.404, 737.405, and 737.406, constituting part
67 IV of ch. 737, F.S., relating to powers of trustees;
68 repealing ss. 737.501, 737.502, 737.503, 737.504, 737.505,
69 737.506, 737.507, 737.508, 737.509, 737.510, 737.511, and
70 737.512, constituting part V of ch. 737, F.S., relating to
71 charitable trusts; repealing ss. 737.6035, 737.621,
72 737.622, 737.623, 737.624, 737.625, 737.626, and 737.627,
73 consisting of part VI of ch. 737, F.S., relating to rules
74 of construction of trust administration; providing an
75 effective date.
76
77 Be It Enacted by the Legislature of the State of Florida:
78

79 Section 1. Part I of chapter 736, Florida Statutes,
80 consisting of sections 736.0101, 736.0102, 736.0103, 736.0104,
81 736.0105, 736.0106, 736.0107, 736.0108, 736.0109, 736.0110,
82 736.0111, and 736.0112, is created to read:
83
84 PART I
85 GENERAL PROVISIONS AND DEFINITIONS
86
87 736.0101 Short title.--This chapter may be cited as the
88 "Florida Trust Code" and for purposes of this chapter is
89 referred to as the "code."
90 736.0102 Scope.--This code applies to express trusts,
91 charitable or noncharitable, and trusts created pursuant to a
92 law, judgment, or decree that requires the trust to be
93 administered in the manner of an express trust. This code does
94 not apply to constructive or resulting trusts; conservatorships;
95 custodial arrangements pursuant to the Florida Uniform Transfers
96 to Minors Act; business trusts providing for certificates to be
97 issued to beneficiaries; common trust funds; land trusts under
98 s. 689.05; trusts created by the form of the account or by the
99 deposit agreement at a financial institution; voting trusts;
100 security arrangements; liquidation trusts; trusts for the
101 primary purpose of paying debts, dividends, interest, salaries,
102 wages, profits, pensions, or employee benefits of any kind; and
103 any arrangement under which a person is nominee or escrowee for
104 another.
105 736.0103 Definitions.--Unless the context otherwise
106 requires, in this code:

107 (1) "Action," with respect to an act of a trustee,
108 includes a failure to act.
109 (2) "Affiliate" means any person or entity that directly
110 or indirectly through one or more intermediaries owns or
111 controls, is owned or controlled by, or is under common control
112 or ownership with, the fiduciary. An affiliate may include, but
113 is not limited to, an investment adviser, administrator, broker,
114 custodian, transfer agent, placement agent, servicing agent,
115 registrar, custodian, underwriter, sponsor, distributor, or
116 manager.
117 (3) "Ascertainable standard" means a standard relating to
118 an individual's health, education, support, or maintenance
119 within the meaning of s. 2041(b)(1)(A) or s. 2514(c)(1) of the
120 Internal Revenue Code of 1986, as amended.
121 (4) "Beneficiary" means a person who:
122 (a) Has a present or future beneficial interest in a
123 trust, vested or contingent; or
124 (b) Holds a power of appointment over trust property in a
125 capacity other than that of trustee.
126 (5) "Charitable trust" means a trust, or portion of a
127 trust, created for a charitable purpose as described in s.
128 736.0405(1).
129 (6) "Environmental law" means a federal, state, or local
130 law, rule, regulation, or ordinance that relates to protection
131 of the environment or human health.
132 (7) "General power of appointment" means a power of
133 appointment exercisable in favor of the holder of the power, the

134 power holder's creditors, the power holder's estate, or the
135 creditors of the power holder's estate.
136 (8) "Guardian of the person" means a person appointed by
137 the court to make decisions regarding the support, care,
138 education, health, and welfare of a minor or an incapacitated
139 adult. The term does not include a guardian ad litem.
140 (9) "Guardian of the property" means a person appointed by
141 the court to administer the estate of a minor or incapacitated
142 adult.
143 (10) "Interests of the beneficiaries" means the beneficial
144 interests provided in the terms of the trust.
145 (11) "Jurisdiction" with respect to a geographic area,
146 includes a state or country.
147 (12) "Power of withdrawal" means a presently exercisable
148 general power of appointment other than a power:
149 (a) Exercisable by a trustee and limited by an
150 ascertainable standard; or
151 (b) Exercisable by another person only upon consent of the
152 trustee or a person holding an adverse interest.
153 (13) "Property" means anything that may be the subject of
154 ownership, real or personal, legal or equitable, or any interest
155 therein.
156 (14) "Qualified beneficiary" means a living beneficiary
157 who, on the date the beneficiary's qualification is determined:
158 (a) Is a distributee or permissible distributee of trust
159 income or principal;
160 (b) Would be a distributee or permissible distributee of
161 trust income or principal if the interests of the distributees

162 described in paragraph (a) terminated on that date without
163 causing the trust to terminate; or
164 (c) Would be a distributee or permissible distributee of
165 trust income or principal if the trust terminated in accordance
166 with its terms on that date.
167 (15) "Revocable," as applied to a trust, means revocable
168 by the settlor without the consent of the trustee or a person
169 holding an adverse interest.
170 (16) "Settlor" means a person, including a testator, who
171 creates or contributes property to a trust. If more than one
172 person creates or contributes property to a trust, each person
173 is a settlor of the portion of the trust property attributable
174 to that person's contribution except to the extent another
175 person has the power to revoke or withdraw that portion.
176 (17) "Spendthrift provision" means a term of a trust that
177 restrains both voluntary and involuntary transfer of a
178 beneficiary's interest.
179 (18) "State" means any state of the United States and
180 includes the District of Columbia, the Commonwealth of Puerto
181 Rico, and any territory or possession subject to the legislative
182 authority of the United States.
183 (19) "Terms of a trust" means the manifestation of the
184 settlor's intent regarding a trust's provisions as expressed in
185 the trust instrument or as may be established by other evidence
186 that would be admissible in a judicial proceeding.
187 (20) "Trust instrument" means an instrument executed by a
188 settlor that contains terms of the trust, including any
189 amendments to the trust.

190 (21) "Trustee" means the original trustee and includes any
191 additional trustee, any successor trustee, and any cotrustee.
192 736.0104 Knowledge.--
193 (1) Subject to subsection (2), a person has knowledge of a
194 fact if the person:
195 (a) Has actual knowledge of the fact;
196 (b) Has received a notice or notification of the fact; or
197 (c) Has reason to know the fact from all the other facts
198 and circumstances known to the person at the time in question.
199 (2) An organization that conducts activities through
200 employees has notice or knowledge of a fact involving a trust
201 only from the time the information was received by an employee
202 having responsibility to act on matters involving the trust, or
203 would have been brought to the employee's attention if the
204 organization had exercised reasonable diligence. An organization
205 exercises reasonable diligence if the organization maintains
206 reasonable routines for communicating significant information to
207 the employee having responsibility to act on matters involving
208 the trust and there is reasonable compliance with the routines.
209 Reasonable diligence does not require an employee of the
210 organization to communicate information unless the communication
211 is part of the individual's regular duties or the individual
212 knows a matter involving the trust would be materially affected
213 by the information.
214 736.0105 Default and mandatory rules.--
215 (1) Except as otherwise provided in the terms of the
216 trust, this code governs the duties and powers of a trustee,

217 relations among trustees, and the rights and interests of a
218 beneficiary.
219 (2) The terms of a trust prevail over any provision of
220 this code except:
221 (a) The requirements for creating a trust.
222 (b) The duty of the trustee to act in good faith and in
223 accordance with the terms and purposes of the trust and the
224 interests of the beneficiaries.
225 (c) The requirement that a trust and its terms be for the
226 benefit of the trust's beneficiaries, and that the trust have a
227 purpose that is lawful, not contrary to public policy, and
228 possible to achieve.
229 (d) The periods of limitation for commencing a judicial
230 proceeding.
231 (e) The power of the court to take such action and
232 exercise such jurisdiction as may be necessary in the interests
233 of justice.
234 (f) The requirements under s. 736.0108(1) for the
235 designation of a principal place of administration of the trust.
236 (g) The jurisdiction and venue provisions in ss. 736.0202,
237 736.0203, and 736.0204.
238 (h) The restrictions on the designation of representative
239 under s. 736.0306.
240 (i) The formalities required under s. 736.0403(2) for the
241 execution of a trust.
242 (j) The power of the court to modify or terminate a trust
243 under ss. 736.0410-736.04115, except as provided in s.
244 736.04115(3)(b), and under ss. 736.0413, 736.0415, and 736.0416.

245 (k) The ability to modify a trust under s. 736.0412,
246 except as provided in s. 736.0412(4)(b).
247 (l) The effect of a spendthrift provision and the rights
248 of certain creditors and assignees to reach a trust as provided
249 in part V.
250 (m) The trustee's duty under s. 736.05053 to pay expenses
251 and obligations of the settlor's estate.
252 (n) The trustee's duty under s. 736.05055 to file a notice
253 of trust at the settlor's death.
254 (o) The right of a trustee under s. 736.0701 to decline a
255 trusteeship and the right of a trustee under s. 736.0705 to
256 resign a trusteeship.
257 (p) The power of the court under s. 736.0702 to require,
258 dispense with, modify, or terminate a bond.
259 (q) The power of the court under s. 736.0708(2) to adjust
260 a trustee's compensation specified in the terms of the trust
261 that is unreasonably low or high.
262 (r) The duty under s. 736.0813(1)(a) and (b) to notify
263 qualified beneficiaries of an irrevocable trust of the existence
264 of the trust, of the identity of the trustee, and of their
265 rights to trust accountings.
266 (s) The duty under s. 736.0813(1)(c) and (d) to provide a
267 complete copy of the trust instrument and to account to
268 qualified beneficiaries.
269 (t) The duty under s. 736.0813(1)(e) to respond to the
270 request of a qualified beneficiary of an irrevocable trust for
271 relevant information about the assets and liabilities of the
272 trust and the particulars relating to trust administration.

273 (u) The effect of an exculpatory term under s. 736.1011.
274 (v) The rights under ss. 736.1013-736.1017 of a person
275 other than a trustee or beneficiary.
276 (w) The effect of a penalty clause for contesting a trust
277 under s. 736.1108.
278 736.0106 Common law of trusts; principles of equity.--The
279 common law of trusts and principles of equity supplement this
280 code, except to the extent modified by this code or another law
281 of this state.
282 736.0107 Governing law.--The meaning and effect of the
283 terms of a trust are determined by:
284 (1) The law of the jurisdiction designated in the terms of
285 the trust, provided there is a sufficient nexus to the
286 designated jurisdiction at the time of the creation of the trust
287 or during the trust administration, including, but not limited
288 to, the location of real property held by the trust or the
289 residence of location of an office of the settlor, trustee, or
290 any beneficiary; or
291 (2) In the absence of a controlling designation in the
292 terms of the trust, the law of the jurisdiction where the
293 settlor resides at the time the trust is first created.
294
295 Notwithstanding subsection (1) or subsection (2), a designation
296 in the terms of a trust is not controlling as to any matter for
297 which the designation would be contrary to a strong public
298 policy of this state.
299 736.0108 Principal place of administration.--

300 (1) Terms of a trust designating the principal place of
301 administration of the trust are valid only if there is a
302 sufficient connection with the designated jurisdiction. Without
303 precluding other means for establishing a sufficient connection,
304 terms of a trust designating the principal place of
305 administration are valid and controlling if:
306 (a) A trustee's principal place of business is located in
307 or a trustee is a resident of the designated jurisdiction; or
308 (b) All or part of the administration occurs in the
309 designated jurisdiction.
310 (2) Unless otherwise validly designated in the trust
311 instrument, the principal place of administration of a trust is
312 the trustee's usual place of business where the records
313 pertaining to the trust are kept or, if the trustee has no place
314 of business, the trustee's residence. In the case of cotrustees,
315 the principal place of administration is:
316 (a) The usual place of business of the corporate trustee,
317 if there is only one corporate cotrustee;
318 (b) The usual place of business or residence of the
319 individual trustee who is a professional fiduciary, if there is
320 only one such person and no corporate cotrustee; or otherwise
321 (c) The usual place of business or residence of any of the
322 cotrustees as agreed on by the cotrustees.
323 (3) Notwithstanding any other provision of this section,
324 the principal place of administration of a trust, for which a
325 bank, association, or trust company organized under the laws of
326 this state or bank or savings association organized under the
327 laws of the United States with its main office in this state has

328 been appointed trustee, shall not be moved or otherwise affected
329 solely because the trustee engaged in an interstate merger
330 transaction with an out-of-state bank pursuant to s. 658.2953 in
331 which the out-of-state bank is the resulting bank.
332 (4) A trustee is under a continuing duty to administer the
333 trust at a place appropriate to its purposes and its
334 administration.
335 (5) Without precluding the right of the court to order,
336 approve, or disapprove a transfer, the trustee, in furtherance
337 of the duty prescribed by subsection (4), may transfer the
338 trust's principal place of administration to another state or to
339 a jurisdiction outside of the United States.
340 (6) The trustee shall notify the qualified beneficiaries
341 of a proposed transfer of a trust's principal place of
342 administration not less than 60 days before initiating the
343 transfer. The notice of proposed transfer must include:
344 (a) The name of the jurisdiction to which the principal
345 place of administration is to be transferred.
346 (b) The address and telephone number at the new location
347 at which the trustee can be contacted.
348 (c) An explanation of the reasons for the proposed
349 transfer.
350 (d) The date on which the proposed transfer is anticipated
351 to occur.
352 (e) The date, not less than 60 days after the notice is
353 provided, by which the qualified beneficiary must notify the
354 trustee of an objection to the proposed transfer.

355 (7) The authority of a trustee to act under this section
356 without court approval to transfer a trust's principal place of
357 administration is suspended if a qualified beneficiary files a
358 lawsuit objecting to the proposed transfer on or before the date
359 specified in the notice. The suspension is effective until the
360 lawsuit is dismissed or withdrawn.
361 (8) In connection with a transfer of the trust's principal
362 place of administration, the trustee may transfer any of the
363 trust property to a successor trustee designated in the terms of
364 the trust or appointed pursuant to s. 736.0704.
365 736.0109 Methods and waiver of notice.--
366 (1) Notice to a person under this code or the sending of a
367 document to a person under this code must be accomplished in a
368 manner reasonably suitable under the circumstances and likely to
369 result in receipt of the notice or document. Permissible methods
370 of notice or for sending a document include first-class mail,
371 personal delivery, delivery to the person's last known place of
372 residence or place of business, or a properly directed facsimile
373 or other electronic message.
374 (2) Notice otherwise required under this code or a
375 document otherwise required to be sent under this code need not
376 be provided to a person whose identity or location is unknown to
377 and not reasonably ascertainable by the trustee.
378 (3) Notice under this code or the sending of a document
379 under this code may be waived by the person to be notified or to
380 whom the document is to be sent.
381 (4) Notice of a judicial proceeding must be given as
382 provided in the Florida Rules of Civil Procedure.

383 736.0110 Others treated as qualified beneficiaries.--
384 (1) A charitable organization expressly designated to
385 receive distributions under the terms of a charitable trust has
386 the rights of a qualified beneficiary under this code if the
387 charitable organization, on the date the charitable
388 organization's qualification is being determined:
389 (a) Is a distributee or permissible distributee of trust
390 income or principal;
391 (b) Would be a distributee or permissible distributee of
392 trust income or principal on termination of the interests of
393 other distributees or permissible distributees then receiving or
394 eligible to receive distributions; or
395 (c) Would be a distributee or permissible distributee of
396 trust income or principal if the trust terminated on that date.
397 (2) A person appointed to enforce a trust created for the
398 care of an animal or another noncharitable purpose as provided
399 in s. 736.0408 or s. 736.0409 has the rights of a qualified
400 beneficiary under this code.
401 (3) The Attorney General may assert the rights of a
402 qualified beneficiary with respect to a charitable trust having
403 its principal place of administration in this state.
404 736.0111 Nonjudicial settlement agreements.--
405 (1) For purposes of this section, the term "interested
406 persons" means persons whose interest would be affected by a
407 settlement agreement.
408 (2) Except as otherwise provided in subsection (3),
409 interested persons may enter into a binding nonjudicial

410 settlement agreement with respect to any matter involving a
411 trust.
412 (3) A nonjudicial settlement agreement among the trustee
413 and trust beneficiaries is valid only to the extent the terms
414 and conditions could be properly approved by the court. A
415 nonjudicial settlement may not be used to produce a result not
416 authorized by other provisions of this code, including, but not
417 limited to, terminating or modifying a trust in an impermissible
418 manner.
419 (4) Matters that may be resolved by a nonjudicial
420 settlement agreement include:
421 (a) The interpretation or construction of the terms of the
422 trust.
423 (b) The approval of a trustee's report or accounting.
424 (c) The direction to a trustee to refrain from performing
425 a particular act or the grant to a trustee of any necessary or
426 desirable power.
427 (d) The resignation or appointment of a trustee and the
428 determination of a trustee's compensation.
429 (e) The transfer of a trust's principal place of
430 administration.
431 (f) The liability of a trustee for an action relating to
432 the trust.
433 (5) Any interested person may request the court to approve
434 or disapprove a nonjudicial settlement agreement.
435 736.0112 Qualification of foreign trustee.--Unless
436 otherwise doing business in this state, local qualification by a
437 foreign trustee is not required for the trustee to receive

438 distribution from a local estate. Nothing in this chapter shall
439 affect the provisions of s. 660.41.
440 Section 2. Part II of chapter 736, Florida Statutes,
441 consisting of sections 736.0201, 736.0202, 736.0203, 736.0204,
442 736.0205, 736.0206, and 736.0207, is created to read:
443
444 PART II
445 JUDICIAL PROCEEDINGS
446
447 736.0201 Role of court in trust proceedings.--
448 (1) Except as provided in subsection (5) and s. 736.0206,
449 proceedings concerning trusts shall be commenced by filing a
450 complaint and shall be governed by the Florida Rules of Civil
451 Procedure.
452 (2) The court may intervene in the administration of a
453 trust to the extent the court's jurisdiction is invoked by an
454 interested person or as provided by law.
455 (3) A trust is not subject to continuing judicial
456 supervision unless ordered by the court.
457 (4) A judicial proceeding involving a trust may relate to
458 the validity, administration, or distribution of a trust,
459 including proceedings to:
460 (a) Determine the validity of all or part of a trust;
461 (b) Appoint or remove a trustee;
462 (c) Review trustees' fees;
463 (d) Review and settle interim or final accounts;
464 (e) Ascertain beneficiaries; determine any question
465 arising in the administration or distribution of any trust,

466 including questions of construction of trust instruments;
467 instruct trustees; and determine the existence or nonexistence
468 of any immunity, power, privilege, duty, or right;
469 (f) Obtain a declaration of rights; or
470 (g) Determine any other matters involving trustees and
471 beneficiaries.
472 (5) A proceeding for the construction of a testamentary
473 trust may be filed in the probate proceeding for the testator's
474 estate. The proceeding shall be governed by the Florida Probate
475 Rules.
476 736.0202 Jurisdiction over trustee and beneficiary.--
477 (1) By accepting the trusteeship of a trust having its
478 principal place of administration in this state or by moving the
479 principal place of administration to this state, the trustee
480 submits personally to the jurisdiction of the courts of this
481 state regarding any matter involving the trust.
482 (2) With respect to their interests in the trust, the
483 beneficiaries of a trust having its principal place of
484 administration in this state are subject to the jurisdiction of
485 the courts of this state regarding any matter involving the
486 trust. By accepting a distribution from such a trust, the
487 recipient submits personally to the jurisdiction of the courts
488 of this state regarding any matter involving the distribution.
489 (3) This section does not preclude other methods of
490 obtaining jurisdiction over a trustee, beneficiary, or other
491 person receiving property from the trust.

492 736.0203 Subject-matter jurisdiction.--The circuit court
493 has original jurisdiction in this state of all proceedings
494 arising under this code.
495 736.0204 Venue.--Venue for actions and proceedings
496 concerning trusts, including those under s. 736.0201, may be
497 laid in:
498 (1) Any county where the venue is proper under chapter 47;
499 (2) Any county where the beneficiary suing or being sued
500 resides or has its principal place of business; or
501 (3) The county where the trust has its principal place of
502 administration.
503 736.0205 Trust proceedings; dismissal of matters relating
504 to foreign trusts.--Over the objection of a party, the court
505 shall not entertain proceedings under s. 736.0201 for a trust
506 registered, or having its principal place of administration, in
507 another state unless all interested parties could not be bound
508 by litigation in the courts of the state where the trust is
509 registered or has its principal place of administration. The
510 court may condition a stay or dismissal of a proceeding under
511 this section on the consent of any party to jurisdiction of the
512 state where the trust is registered or has its principal place
513 of business, or the court may grant a continuance or enter any
514 other appropriate order.
515 736.0206 Proceedings for review of employment of agents
516 and review of compensation of trustee and employees of trust.--
517 (1) After notice to all interested persons, the court may
518 review the propriety of the employment by a trustee of any
519 person, including any attorney, auditor, investment adviser, or

520 other specialized agent or assistant, and the reasonableness of
521 any compensation paid to that person or to the trustee.
522 (2) If the settlor's estate is being probated, and the
523 settlor's trust or the trustee of the settlor's trust is a
524 beneficiary under the settlor's will, the trustee, any person
525 employed by the trustee, or any interested person may have the
526 propriety of employment and the reasonableness of the
527 compensation of the trustee or any person employed by the
528 trustee determined in the probate proceeding.
529 (3) The burden of proof of the propriety of the employment
530 and the reasonableness of the compensation shall be on the
531 trustee and the person employed by the trustee. Any person who
532 is determined to have received excessive compensation from a
533 trust for services rendered may be ordered to make appropriate
534 refunds.
535 (4) Court proceedings to determine reasonable compensation
536 of a trustee or any person employed by a trustee, if required,
537 are a part of the trust administration process. The costs,
538 including attorney's fees, of the person assuming the burden of
539 proof of propriety of the employment and reasonableness of the
540 compensation shall be determined by the court and paid from the
541 assets of the trust unless the court finds the compensation paid
542 or requested to be substantially unreasonable. The court shall
543 direct from which part of the trust assets the compensation
544 shall be paid.
545 (5) The court may determine reasonable compensation for a
546 trustee or any person employed by a trustee without receiving
547 expert testimony. Any party may offer expert testimony after

548 notice to interested persons. If expert testimony is offered, a
549 reasonable expert witness fee shall be awarded by the court and
550 paid from the assets of the trust. The court shall direct from
551 which part of the trust assets the fee shall be paid.
552 (6) Persons given notice as provided in this section shall
553 be bound by all orders entered on the complaint.
554 (7) In a proceeding pursuant to subsection (2), the
555 petitioner may serve formal notice as provided in the Florida
556 Probate Rules, and such notice shall be sufficient for the court
557 to acquire jurisdiction over the person receiving the notice to
558 the extent of the person's interest in the trust.
559 736.0207 Trust contests.--An action to contest the
560 validity of all or part of a trust may not be commenced until
561 the trust becomes irrevocable, except this section does not
562 prohibit such action by the guardian of the property of an
563 incapacitated settlor.
564 Section 3. Part III of chapter 736, Florida Statutes,
565 consisting of sections 736.0301, 736.0302, 736.0303, 736.0304,
566 736.0305, and 736.0306, is created to read:
567
568 PART III
569 REPRESENTATION
570
571 736.0301 Representation; basic effect.--
572 (1) Notice, information, accountings, or reports given to
573 a person who may represent and bind another person under this
574 part may serve as a substitute for and have the same effect as

575 notice, information, accountings, or reports given directly to
576 the other person.
577 (2) Actions taken by a person who represents the interests
578 of another person under this part are binding on the person
579 whose interests are represented to the same extent as if the
580 actions had been taken by the person whose interests are
581 represented.
582 (3) Except as otherwise provided in s. 736.0602, a person
583 under this part who represents a settlor lacking capacity may
584 receive notice and give a binding consent on the settlor's
585 behalf.
586 (4) A trustee is not liable for giving notice,
587 information, accountings, or reports to a beneficiary who is
588 represented by another person under this part and nothing in
589 this part prohibits the trustee from giving notice, information,
590 accountings, or reports to the person represented.
591 736.0302 Representation by holder of power of
592 appointment.--
593 (1) The holder of a power of appointment may represent and
594 bind persons whose interests, as permissible appointees, takers
595 in default, or otherwise, are subject to the power.
596 (2) Subsection (1) does not apply to:
597 (a) Any matter determined by the court to involve fraud or
598 bad faith by the trustee;
599 (b) A power of a trustee to distribute trust property; or
600 (c) A power of appointment held by a person while the
601 person is the sole trustee.

602 736.0303 Representation by fiduciaries and parents.--To
603 the extent there is no conflict of interest between the
604 representative and the person represented or among those being
605 represented with respect to a particular question or dispute:
606 (1) A guardian of the property may represent and bind the
607 estate that the guardian of the property controls.
608 (2) An agent having authority to act with respect to the
609 particular question or dispute may represent and bind the
610 principal.
611 (3) A trustee may represent and bind the beneficiaries of
612 the trust.
613 (4) A personal representative of a decedent's estate may
614 represent and bind persons interested in the estate.
615 (5) A parent may represent and bind the parent's unborn
616 child, or the parent's minor child if a guardian of the property
617 for the minor child has not been appointed.
618 736.0304 Representation by person having substantially
619 identical interest.--Unless otherwise represented, a minor,
620 incapacitated, or unborn individual, or a person whose identity
621 or location is unknown and not reasonably ascertainable, may be
622 represented by and bound by another person having a
623 substantially identical interest with respect to the particular
624 question or dispute, but only to the extent there is no conflict
625 of interest between the representative and the person
626 represented.
627 736.0305 Appointment of representative.--
628 (1) If the court determines that an interest is not
629 represented under this part, or that the otherwise available

630 representation might be inadequate, the court may appoint a
631 representative to receive notice, give consent, and otherwise
632 represent, bind, and act on behalf of a minor, incapacitated, or
633 unborn individual, or a person whose identity or location is
634 unknown. If not precluded by a conflict of interest, a
635 representative may be appointed to represent several persons or
636 interests.
637 (2) A representative may act on behalf of the individual
638 represented with respect to any matter arising under this code,
639 whether or not a judicial proceeding concerning the trust is
640 pending.
641 (3) In making decisions, a representative may consider
642 general benefits accruing to the living members of the
643 represented individual's family.
644 736.0306 Designated representative.--
645 (1) If authorized in the trust instrument, one or more
646 persons may be designated to represent and bind a beneficiary
647 and receive any notice, information, accounting, or report.
648 (2) Except as otherwise provided in this code, a person
649 designated, as provided in subsection (1) may not represent and
650 bind a beneficiary while that person is serving as trustee.
651 (3) Except as otherwise provided in this code, a person
652 designated, as provided in subsection (1) may not represent and
653 bind another beneficiary if the person designated also is a
654 beneficiary, unless:
655 (a) That person was named by the settlor; or

656 (b) That person is the beneficiary's spouse or a
657 grandparent or descendant of a grandparent of the beneficiary or
658 the beneficiary's spouse.
659 (4) No person designated, as provided in subsection (1) is
660 liable to the beneficiary whose interests are represented, or to
661 anyone claiming through that beneficiary, for any actions or
662 omissions to act made in good faith.
663 Section 4. Part IV of chapter 736, Florida Statutes,
664 consisting of sections 736.0401, 736.0402, 736.0403, 736.0404,
665 736.0405, 736.0406, 736.0407, 736.0408, 736.0409, 736.0410,
666 736.04113, 736.04115, 736.0412, 736.0413, 736.0414, 736.0415,
667 736.0416, and 736.0417, is created to read:
668
669 PART IV
670 CREATION, VALIDITY, MODIFICATION, AND TERMINATION
671
672 736.0401 Methods of creating trust.--A trust may be
673 created by:
674 (1) Transfer of property to another person as trustee
675 during the settlor's lifetime or by will or other disposition
676 taking effect on the settlor's death;
677 (2) Declaration by the owner of property that the owner
678 holds identifiable property as trustee; or
679 (3) Exercise of a power of appointment in favor of a
680 trustee.
681 736.0402 Requirements for creation.--
682 (1) A trust is created only if:
683 (a) The settlor has capacity to create a trust.

684 (b) The settlor indicates an intent to create the trust.
685 (c) The trust has a definite beneficiary or is:
686 1. A charitable trust;
687 2. A trust for the care of an animal, as provided in s.
688 736.0408; or
689 3. A trust for a noncharitable purpose, as provided in s.
690 736.0409.
691 (d) The trustee has duties to perform.
692 (e) The same person is not the sole trustee and sole
693 beneficiary.
694 (2) A beneficiary is definite if the beneficiary can be
695 ascertained now or in the future, subject to any applicable rule
696 against perpetuities.
697 (3) A power of a trustee to select a beneficiary from an
698 indefinite class is valid. If the power is not exercised within
699 a reasonable time, the power fails and the property subject to
700 the power passes to the persons who would have taken the
701 property had the power not been conferred.
702 736.0403 Trusts created in other jurisdictions;
703 formalities required for revocable trusts.--
704 (1) A trust not created by will is validly created if the
705 creation of the trust complies with the law of the jurisdiction
706 in which the trust instrument was executed or the law of the
707 jurisdiction in which, at the time of creation, the settlor was
708 domiciled.
709 (2) Notwithstanding subsection (1):

710 (a) No trust or confidence of or in any messuages, lands,
711 tenements, or hereditaments shall arise or result unless the
712 trust complies with the provisions of s. 689.05.
713 (b) The testamentary aspects of a revocable trust,
714 executed by a settlor who is a domiciliary of this state at the
715 time of execution, are invalid unless the trust instrument is
716 executed by the settlor with the formalities required for the
717 execution of a will in this state. For purposes of this
718 subsection, the term "testamentary aspects" means those
719 provisions of the trust instrument that dispose of the trust
720 property on or after the death of the settlor other than to the
721 settlor's estate.
722 (3) This section does not apply to trusts established as
723 part of an employee annuity described in s. 403 of the Internal
724 Revenue Code of 1986, as amended, an individual retirement
725 account as described in s. 408 of the Internal Revenue Code of
726 1986, as amended, a Keogh (HR-10) Plan, or a retirement or other
727 plan that is qualified under s. 401 of the Internal Revenue Code
728 of 1986, as amended.
729 (4) This section applies to trusts created on or after the
730 effective date of this code. Section 737.111, as in effect prior
731 to the effective date of this code, continues to apply to trusts
732 created before the effective date of this code.
733 736.0404 Trust purposes.--A trust may be created only to
734 the extent the purposes of the trust are lawful, not contrary to
735 public policy, and possible to achieve. A trust and its terms
736 must be for the benefit of its beneficiaries.
737 736.0405 Charitable purposes; enforcement.--

738 (1) A trust may be created for charitable purposes.
739 Charitable purposes include, but are not limited to, the relief
740 of poverty; the advancement of arts, sciences, education, or
741 religion; and the promotion of health, governmental, or
742 municipal purposes.
743 (2) If the terms of a charitable trust do not indicate a
744 particular charitable purpose or beneficiary, the court may
745 select one or more charitable purposes or beneficiaries. The
746 selection must be consistent with the settlor's intent to the
747 extent such intent can be ascertained.
748 (3) The settlor of a charitable trust, among others, has
749 standing to enforce the trust.
750 736.0406 Effect of fraud, duress, mistake, or undue
751 influence.--A trust is void if the creation of the trust is
752 procured by fraud, duress, mistake, or undue influence. Any part
753 of the trust is void if procured by such means, but the
754 remainder of the trust not procured by such means is valid if
755 the remainder is not invalid for other reasons.
756 736.0407 Evidence of oral trust.--Except as required by s.
757 736.0403 or a law other than this code, a trust need not be
758 evidenced by a trust instrument but the creation of an oral
759 trust and its terms may be established only by clear and
760 convincing evidence.
761 736.0408 Trust for care of an animal.--
762 (1) A trust may be created to provide for the care of an
763 animal alive during the settlor's lifetime. The trust terminates
764 on the death of the animal or, if the trust was created to

765 provide for the care of more than one animal alive during the
766 settlor's lifetime, on the death of the last surviving animal.
767 (2) A trust authorized by this section may be enforced by
768 a person appointed in the terms of the trust or, if no person is
769 appointed, by a person appointed by the court. A person having
770 an interest in the welfare of the animal may request the court
771 to appoint a person to enforce the trust or to remove a person
772 appointed.
773 (3) Property of a trust authorized by this section may be
774 applied only to the intended use of the property, except to the
775 extent the court determines that the value of the trust property
776 exceeds the amount required for the intended use. Except as
777 otherwise provided in the terms of the trust, property not
778 required for the intended use must be distributed to the
779 settlor, if then living, otherwise as part of the settlor's
780 estate.
781 736.0409 Noncharitable trust without ascertainable
782 beneficiary.--Except as otherwise provided in s. 736.0408 or by
783 another provision of law, the following rules apply:
784 (1) A trust may be created for a noncharitable purpose
785 without a definite or definitely ascertainable beneficiary or
786 for a noncharitable but otherwise valid purpose to be selected
787 by the trustee. The trust may not be enforced for more than 21
788 years.
789 (2) A trust authorized by this section may be enforced by
790 a person appointed in the terms of the trust or, if no person is
791 appointed, by a person appointed by the court.

792 (3) Property of a trust authorized by this section may be
793 applied only to the intended use of the property, except to the
794 extent the court determines that the value of the trust property
795 exceeds the amount required for the intended use. Except as
796 otherwise provided in the terms of the trust, property not
797 required for the intended use must be distributed to the
798 settlor, if then living, otherwise as part of the settlor's
799 estate.
800 736.0410 Modification or termination of trust; proceedings
801 for disapproval of nonjudicial acts.--
802 (1) In addition to the methods of termination prescribed
803 by ss. 736.04113-736.0414, a trust terminates to the extent the
804 trust expires or is revoked or is properly distributed pursuant
805 to the terms of the trust.
806 (2) A proceeding to disapprove a proposed modification or
807 termination under s. 736.0412 or a trust combination or division
808 under s. 736.0417 may be commenced by any beneficiary.
809 (3) A proceeding to disapprove a proposed termination
810 under s. 736.0414(1) may be commenced by any qualified
811 beneficiary.
812 736.04113 Judicial modification of irrevocable trust when
813 modification is not inconsistent with settlor's purpose.--
814 (1) Upon the application of a trustee of the trust or any
815 qualified beneficiary, a court at any time may modify the terms
816 of a trust that is not then revocable in the manner provided in
817 subsection (2), if:

818 (a) The purposes of the trust have been fulfilled or have
819 become illegal, impossible, wasteful, or impracticable to
820 fulfill;
821 (b) Because of circumstances not anticipated by the
822 settlor, compliance with the terms of the trust would defeat or
823 substantially impair the accomplishment of a material purpose of
824 the trust; or
825 (c) A material purpose of the trust no longer exists.
826 (2) In modifying a trust under this section, a court may:
827 (a) Amend or change the terms of the trust, including
828 terms governing distribution of the trust income or principal or
829 terms governing administration of the trust;
830 (b) Terminate the trust in whole or in part;
831 (c) Direct or permit the trustee to do acts that are not
832 authorized or that are prohibited by the terms of the trust; or
833 (d) Prohibit the trustee from performing acts that are
834 permitted or required by the terms of the trust.
835 (3) In exercising discretion to modify a trust under this
836 section:
837 (a) The court shall consider the terms and purposes of the
838 trust, the facts and circumstances surrounding the creation of
839 the trust, and extrinsic evidence relevant to the proposed
840 modification.
841 (b) The court shall consider spendthrift provisions as a
842 factor in making a decision but the court is not precluded from
843 modifying a trust because the trust contains spendthrift
844 provisions.

845 (4) The provisions of this section are in addition to, and
846 not in derogation of, rights under the common law to modify,
847 amend, terminate, or revoke trusts.
848 736.04115 Judicial modification of irrevocable trust when
849 modification is in best interest of beneficiaries.--
850 (1) Without regard to the reasons for modification
851 provided in s. 736.04113, if compliance with the terms of a
852 trust is not in the best interests of the beneficiaries, upon
853 the application of a trustee or any qualified beneficiary, a
854 court may at any time modify a trust that is not then revocable
855 as provided in s. 736.04113(2).
856 (2) In exercising discretion to modify a trust under this
857 section:
858 (a) The court shall exercise discretion in a manner that
859 conforms to the extent possible with the intent of the settlor,
860 taking into account the current circumstances and best interests
861 of the beneficiaries.
862 (b) The court shall consider the terms and purposes of the
863 trust, the facts and circumstances surrounding the creation of
864 the trust, and extrinsic evidence relevant to the proposed
865 modification.
866 (c) The court shall consider spendthrift provisions as a
867 factor in making a decision but the court is not precluded from
868 modifying a trust because the trust contains spendthrift
869 provisions.
870 (3) This section shall not apply to:
871 (a) Any trust created prior to January 1, 2001.
872 (b) Any trust created after December 31, 2000, if:

873 1. Under the terms of the trust, all beneficial interests
874 in the trust must vest or terminate within the period prescribed
875 by the rule against perpetuities in s. 689.225(2),
876 notwithstanding s. 689.225(2)(f).
877 2. The terms of the trust expressly prohibit judicial
878 modification.
879 (4) For purposes of subsection (3), a revocable trust
880 shall be treated as created when the right of revocation
881 terminates.
882 (5) The provisions of this section are in addition to, and
883 not in derogation of, rights under the common law to modify,
884 amend, terminate, or revoke trusts.
885 736.0412 Nonjudicial modification of irrevocable trust.--
886 (1) After the settlor's death, a trust may be modified at
887 any time as provided in s. 736.04113(2) upon the unanimous
888 agreement of the trustee and all qualified beneficiaries.
889 (2) Modification of a trust as authorized in this section
890 is not prohibited by a spendthrift clause or by a provision in
891 the trust instrument that prohibits amendment or revocation of
892 the trust.
893 (3) An agreement to modify a trust under this section is
894 binding on a beneficiary whose interest is represented by
895 another person under part III of this code.
896 (4) This section shall not apply to:
897 (a) Any trust created prior to January 1, 2001.
898 (b) Any trust created after December 31, 2000, if, under
899 the terms of the trust, all beneficial interests in the trust
900 must vest or terminate within the period prescribed by the rule

901 against perpetuities in s. 689.225(2), notwithstanding s.
902 689.225(2)(f), unless the terms of the trust expressly authorize
903 nonjudicial modification.
904 (c) Any trust for which a charitable deduction is allowed
905 or allowable under the Internal Revenue Code until the
906 termination of all charitable interests in the trust.
907 (5) For purposes of subsection (4), a revocable trust
908 shall be treated as created when the right of revocation
909 terminates.
910 (6) The provisions of this section are in addition to, and
911 not in derogation of, rights under the common law to modify,
912 amend, terminate, or revoke trusts.
913 736.0413 Cy pres.--
914 (1) If a particular charitable purpose becomes unlawful,
915 impracticable, impossible to achieve, or wasteful, the court may
916 apply the doctrine of cy pres to modify or terminate the trust
917 by directing that the trust property be applied or distributed,
918 in whole or in part, in a manner consistent with the settlor's
919 charitable purposes.
920 (2) A proceeding to modify or terminate a trust under this
921 section may be commenced by a settlor, a trustee, or any
922 qualified beneficiary.
923 736.0414 Modification or termination of uneconomic
924 trust.--
925 (1) After notice to the qualified beneficiaries, the
926 trustee of a trust consisting of trust property having a total
927 value less than $50,000 may terminate the trust if the trustee

928 concludes that the value of the trust property is insufficient
929 to justify the cost of administration.
930 (2) Upon application of a trustee or any qualified
931 beneficiary, the court may modify or terminate a trust or remove
932 the trustee and appoint a different trustee if the court
933 determines that the value of the trust property is insufficient
934 to justify the cost of administration.
935 (3) Upon termination of a trust under this section, the
936 trustee shall distribute the trust property in a manner
937 consistent with the purposes of the trust. The trustee may enter
938 into agreements or make such other provisions that the trustee
939 deems necessary or appropriate to protect the interests of the
940 beneficiaries and the trustee and to carry out the intent and
941 purposes of the trust.
942 (4) The existence of a spendthrift provision in the trust
943 does not make this section inapplicable unless the trust
944 instrument expressly provides that the trustee may not terminate
945 the trust pursuant to this section.
946 (5) This section does not apply to an easement for
947 conservation or preservation.
948 736.0415 Reformation to correct mistakes.--Upon
949 application of a settlor or any interested person, the court may
950 reform the terms of a trust, even if unambiguous, to conform the
951 terms to the settlor's intent if it is proved by clear and
952 convincing evidence that both the accomplishment of the
953 settlor's intent and the terms of the trust were affected by a
954 mistake of fact or law, whether in expression or inducement. In
955 determining the settlor's original intent, the court may

956 consider evidence relevant to the settlor's intent even though
957 the evidence contradicts an apparent plain meaning of the trust
958 instrument.
959 736.0416 Modification to achieve settlor's tax
960 objectives.--Upon application of any interested person, to
961 achieve the settlor's tax objectives the court may modify the
962 terms of a trust in a manner that is not contrary to the
963 settlor's probable intent. The court may provide that the
964 modification has retroactive effect.
965 736.0417 Combination and division of trusts.--
966 (1) After notice to the qualified beneficiaries, a trustee
967 may combine two or more trusts into a single trust or divide a
968 trust into two or more separate trusts, if the result does not
969 impair rights of any beneficiary or adversely affect achievement
970 of the purposes of the trusts or trust, respectively.
971 (2) Subject to the terms of the trust, the trustee may
972 take into consideration differences in federal tax attributes
973 and other pertinent factors in administering the trust property
974 of any separate account or trust, in making applicable tax
975 elections, and in making distributions. A separate trust created
976 by severance must be treated as a separate trust for all
977 purposes from the date on which the severance is effective. The
978 effective date of the severance may be retroactive to a date
979 before the date on which the trustee exercises such power.
980 Section 5. Part V of chapter 736, Florida Statutes,
981 consisting of sections 736.0501, 736.0502, 736.0503, 736.0504,
982 736.0505, 736.05053, 736.05055, 736.0506, and 736.0507, is
983 created to read:

984
985 PART V
986 CREDITORS' CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS
987
988 736.0501 Rights of beneficiary's creditor or assignee.--To
989 the extent a beneficiary's interest is not subject to a
990 spendthrift provision, the court may authorize a creditor or
991 assignee of the beneficiary to reach the beneficiary's interest
992 by attachment of present or future distributions to or for the
993 benefit of the beneficiary or by other means. The court may
994 limit the award to such relief as is appropriate under the
995 circumstances.
996 736.0502 Spendthrift provision.--
997 (1) A spendthrift provision is valid only if the provision
998 restrains both voluntary and involuntary transfer of a
999 beneficiary's interest. This subsection does not apply to any
1000 trust in existence on the effective date of this code.
1001 (2) A term of a trust providing that the interest of a
1002 beneficiary is held subject to a spendthrift trust, or words of
1003 similar import, is sufficient to restrain both voluntary and
1004 involuntary transfer of the beneficiary's interest.
1005 (3) A beneficiary may not transfer an interest in a trust
1006 in violation of a valid spendthrift provision and, except as
1007 otherwise provided in this part, a creditor or assignee of the
1008 beneficiary may not reach the interest or a distribution by the
1009 trustee before receipt of the interest or distribution by the
1010 beneficiary.

1011 (4) A valid spendthrift provision does not prevent the
1012 appointment of interests through the exercise of a power of
1013 appointment.
1014 736.0503 Exceptions to spendthrift provision.--
1015 (1) As used in this section, the term "child" includes any
1016 person for whom an order or judgment for child support has been
1017 entered in this or any other state.
1018 (2) To the extent provided in subsection (3), a
1019 spendthrift provision is unenforceable against:
1020 (a) A beneficiary's child, spouse, or former spouse who
1021 has a judgment or court order against the beneficiary for
1022 support or maintenance.
1023 (b) A judgment creditor who has provided services for the
1024 protection of a beneficiary's interest in the trust.
1025 (c) A claim of this state or the United States to the
1026 extent a law of this state or a federal law so provides.
1027 (3) Except as otherwise provided in this subsection, a
1028 claimant against which a spendthrift provision may not be
1029 enforced may obtain from a court, or pursuant to the Uniform
1030 Interstate Family Support Act, an order attaching present or
1031 future distributions to or for the benefit of the beneficiary.
1032 The court may limit the award to such relief as is appropriate
1033 under the circumstances. Notwithstanding this subsection, the
1034 remedies provided in this subsection apply to a claim by a
1035 beneficiary's child, spouse, former spouse, or a judgment
1036 creditor described in paragraph (2)(a) or paragraph (2)(b) only
1037 as a last resort upon an initial showing that traditional
1038 methods of enforcing the claim are insufficient.

1039 736.0504 Discretionary trusts; effect of standard.--
1040 (1) Whether or not a trust contains a spendthrift
1041 provision, a creditor of a beneficiary may not compel a
1042 distribution that is subject to the trustee's discretion, even
1043 if:
1044 (a) The discretion is expressed in the form of a standard
1045 of distribution; or
1046 (b) The trustee has abused the discretion.
1047 (2) If the trustee's discretion to make distributions for
1048 the trustee's own benefit is limited by an ascertainable
1049 standard, a creditor may not reach or compel distribution of the
1050 beneficial interest except to the extent the interest would be
1051 subject to the creditor's claim were the beneficiary not acting
1052 as trustee.
1053 (3) This section does not limit the right of a beneficiary
1054 to maintain a judicial proceeding against a trustee for an abuse
1055 of discretion or failure to comply with a standard for
1056 distribution.
1057 736.0505 Creditors' claims against settlor.--
1058 (1) Whether or not the terms of a trust contain a
1059 spendthrift provision, the following rules apply:
1060 (a) The property of a revocable trust is subject to the
1061 claims of the settlor's creditors during the settlor's lifetime
1062 to the extent the property would not otherwise be exempt by law
1063 if owned directly by the settlor.
1064 (b) With respect to an irrevocable trust, a creditor or
1065 assignee of the settlor may reach the maximum amount that can be
1066 distributed to or for the settlor's benefit. If a trust has more

1067 than one settlor, the amount the creditor or assignee of a
1068 particular settlor may reach may not exceed the settlor's
1069 interest in the portion of the trust attributable to that
1070 settlor's contribution.
1071 (2) For purposes of this section:
1072 (a) During the period the power may be exercised, the
1073 holder of a power of withdrawal is treated in the same manner as
1074 the settlor of a revocable trust to the extent of the property
1075 subject to the power.
1076 (b) Upon the lapse, release, or waiver of the power, the
1077 holder is treated as the settlor of the trust only to the extent
1078 the value of the property affected by the lapse, release, or
1079 waiver exceeds the greater of the amount specified in:
1080 1. Section 2041(b)(2) or s. 2514(e); or
1081 2. Section 2503(b),
1082
1083 of the Internal Revenue Code of 1986, as amended.
1084 736.05053 Trustee's duty to pay expenses and obligations
1085 of settlor's estate.--
1086 (1) A trustee of a trust described in s. 733.707(3) shall
1087 pay to the personal representative of a settlor's estate any
1088 amounts that the personal representative certifies in writing to
1089 the trustee are required to pay the expenses of the
1090 administration and obligations of the settlor's estate. Payments
1091 made by a trustee, unless otherwise provided in the trust
1092 instrument, must be charged as expenses of the trust without a
1093 contribution from anyone. The interests of all beneficiaries of
1094 such a trust are subject to the provisions of this subsection;

1095 however, the payments must be made from assets, property, or the
1096 proceeds of the assets or property, other than assets proscribed
1097 in s. 733.707(3), that are included in the settlor's gross
1098 estate for federal estate tax purposes.
1099 (2) Unless a settlor provides by will, or designates in a
1100 trust described in s. 733.707(3) funds or property passing under
1101 the trust to be used as designated, the expenses of the
1102 administration and obligations of the settlor's estate must be
1103 paid from the trust in the following order:
1104 (a) Property of the residue of the trust remaining after
1105 all distributions that are to be satisfied by reference to a
1106 specific property or type of property, fund, or sum.
1107 (b) Property that is not to be distributed from specified
1108 or identified property or a specified or identified item of
1109 property.
1110 (c) Property that is to be distributed from specified or
1111 identified property or a specified or identified item of
1112 property.
1113 (3) Trust distributions that are to be satisfied from
1114 specified or identified property must be classed as
1115 distributions to be satisfied from the general assets of the
1116 trust and not otherwise disposed of in the trust instrument on
1117 the failure or insufficiency of funds or property from which
1118 payment should be made, to the extent of the insufficiency.
1119 Trust distributions given for valuable consideration abate with
1120 other distributions of the same class only to the extent of the
1121 excess over the value of the consideration until all others of
1122 the same class are exhausted. Except as provided in this

1123 section, trust distributions abate equally and ratably and
1124 without preference or priority between real and personal
1125 property. When a specified or identified item of property that
1126 has been designated for distribution in the trust instrument or
1127 that is charged with a distribution is sold or taken by the
1128 trustee, other beneficiaries shall contribute according to their
1129 respective interests to the beneficiary whose property has been
1130 sold or taken. Before distribution, the trustee shall determine
1131 the amounts of the respective contributions and such amounts
1132 must be paid or withheld before distribution is made.
1133 (4) The trustee shall pay the expenses of trust
1134 administration, including compensation of trustees and attorneys
1135 of the trustees, before and in preference to the expenses of the
1136 administration and obligations of the settlor's estate.
1137 736.05055 Notice of trust.--
1138 (1) Upon the death of a settlor of a trust described in s.
1139 733.707(3), the trustee must file a notice of trust with the
1140 court of the county of the settlor's domicile and the court
1141 having jurisdiction of the settlor's estate.
1142 (2) The notice of trust must contain the name of the
1143 settlor, the settlor's date of death, the title of the trust, if
1144 any, the date of the trust, and the name and address of the
1145 trustee.
1146 (3) If the settlor's probate proceeding has been
1147 commenced, the clerk shall notify the trustee in writing of the
1148 date of the commencement of the probate proceeding and the file
1149 number.

1150 (4) The clerk shall file and index the notice of trust in
1151 the same manner as a caveat unless there exists a probate
1152 proceeding for the settlor's estate, in which case the notice of
1153 trust must be filed in the probate proceeding and the clerk
1154 shall send a copy to the personal representative.
1155 (5) The clerk shall send a copy of any caveat filed
1156 regarding the settlor to the trustee, and the notice of trust to
1157 any caveator, unless there is a probate proceeding pending and
1158 the personal representative and the trustee are the same.
1159 (6) Any proceeding affecting the expenses of the
1160 administration or obligations of the settlor's estate prior to
1161 the trustee filing a notice of trust are binding on the trustee.
1162 (7) The trustee's failure to file the notice of trust does
1163 not affect the trustee's obligation to pay expenses of
1164 administration and obligations of the settlor's estate as
1165 provided in s. 733.607(2).
1166 736.0506 Overdue distribution.--
1167 (1) As used in this section, the term "mandatory
1168 distribution" means a distribution of income or principal the
1169 trustee is required to make to a beneficiary under the terms of
1170 the trust, including a distribution on termination of the trust.
1171 The term does not include a distribution subject to the exercise
1172 of the trustee's discretion even if:
1173 (a) The discretion is expressed in the form of a standard
1174 of distribution; or
1175 (b) The terms of the trust authorizing a distribution
1176 couple language of discretion with language of direction.

1177 (2) A creditor or assignee of a beneficiary may reach a
1178 mandatory distribution of income or principal, including a
1179 distribution upon termination of the trust, if the trustee has
1180 not made the distribution to the beneficiary within a reasonable
1181 time after the designated distribution date, whether or not a
1182 trust contains a spendthrift provision.
1183 736.0507 Personal obligations of trustee.--Except to the
1184 extent of the trustee's interest in the trust other than as a
1185 trustee, trust property is not subject to personal obligations
1186 of the trustee, even if the trustee becomes insolvent or
1187 bankrupt.
1188 Section 6. Part VI of chapter 736, Florida Statutes,
1189 consisting of sections 736.0601, 736.0602, 736.0603, and
1190 736.0604, is created to read:
1191
1192 PART VI
1193 REVOCABLE TRUSTS
1194
1195 736.0601 Capacity of settlor of revocable trust.--The
1196 capacity required to create, amend, revoke, or add property to a
1197 revocable trust, or to direct the actions of the trustee of a
1198 revocable trust, is the same as that required to make a will.
1199 736.0602 Revocation or amendment of revocable trust.--
1200 (1) Unless the terms of a trust expressly provide that the
1201 trust is irrevocable, the settlor may revoke or amend the trust.
1202 This subsection does not apply to a trust created under an
1203 instrument executed before the effective date of this code.

1204 (2) If a revocable trust is created or funded by more than
1205 one settlor:
1206 (a) To the extent the trust consists of community
1207 property, the trust may be revoked by either spouse acting alone
1208 but may be amended only by joint action of both spouses.
1209 (b) To the extent the trust consists of property other
1210 than community property, each settlor may revoke or amend the
1211 trust with regard to the portion of the trust property
1212 attributable to that settlor's contribution.
1213 (c) Upon the revocation or amendment of the trust by fewer
1214 than all of the settlors, the trustee shall promptly notify the
1215 other settlors of the revocation or amendment.
1216 (3) Subject to s. 736.0403(2), the settlor may revoke or
1217 amend a revocable trust:
1218 (a) By substantial compliance with a method provided in
1219 the terms of the trust; or
1220 (b) If the terms of the trust do not provide a method, by:
1221 1. A later will or codicil that expressly refers to the
1222 trust or specifically devises property that would otherwise have
1223 passed according to the terms of the trust; or
1224 2. Any other method manifesting clear and convincing
1225 evidence of the settlor's intent.
1226 (4) Upon revocation of a revocable trust, the trustee
1227 shall deliver the trust property as the settlor directs.
1228 (5) A settlor's powers with respect to revocation,
1229 amendment, or distribution of trust property may be exercised by
1230 an agent under a power of attorney only as authorized by s.
1231 709.08.

1232 (6) A guardian of the property of the settlor may exercise
1233 a settlor's powers with respect to revocation, amendment, or
1234 distribution of trust property only as provided in s. 744.441.
1235 (7) A trustee who does not know that a trust has been
1236 revoked or amended is not liable for distributions made and
1237 other actions taken on the assumption that the trust had not
1238 been amended or revoked.
1239 736.0603 Settlor's powers; powers of withdrawal.--
1240 (1) While a trust is revocable, the duties of the trustee
1241 are owed exclusively to the settlor.
1242 (2) During the period the power may be exercised, the
1243 holder of a power of withdrawal has the rights of a settlor of a
1244 revocable trust under this section to the extent of the property
1245 subject to the power.
1246 736.0604 Limitation on action contesting validity of
1247 revocable trust.--An action to contest the validity of a trust
1248 that was revocable at the settlor's death is barred, if not
1249 commenced within the earlier of:
1250 (1) The time as provided in chapter 95; or
1251 (2) Six months after the trustee sent the person a copy of
1252 the trust instrument and a notice informing the person of the
1253 trust's existence, of the trustee's name and address, and of the
1254 time allowed for commencing a proceeding.
1255 Section 7. Part VII of chapter 736, Florida Statutes,
1256 consisting of sections 736.0701, 736.0702, 736.0703, 736.0704,
1257 736.0705, 736.0706, 736.0707, 736.0708, and 736.0709, is created
1258 to read:
1259

1260 PART VII
1261 OFFICE OF TRUSTEE
1262
1263 736.0701 Accepting or declining trusteeship.--
1264 (1) Except as otherwise provided in subsection (3), a
1265 person designated as trustee accepts the trusteeship:
1266 (a) By substantially complying with a method of acceptance
1267 provided in the terms of the trust; or
1268 (b) If the terms of the trust do not provide a method or
1269 the method provided in the terms is not expressly made
1270 exclusive, by accepting delivery of the trust property,
1271 exercising powers or performing duties as trustee, or otherwise
1272 indicating acceptance of the trusteeship.
1273 (2) A person designated as trustee who has not accepted
1274 the trusteeship may decline the trusteeship. A designated
1275 trustee who does not accept the trusteeship within a reasonable
1276 time after knowing of the designation is deemed to have declined
1277 the trusteeship.
1278 (3) A person designated as trustee may, without accepting
1279 the trusteeship:
1280 (a) Act to preserve the trust property if, within a
1281 reasonable time after acting, the person sends to a qualified
1282 beneficiary a written statement declining the trusteeship.
1283 (b) Inspect or investigate trust property to determine
1284 potential liability under environmental or other law or for any
1285 other purpose.
1286 736.0702 Trustee's bond.--

1287 (1) A trustee shall give bond to secure performance of the
1288 trustee's duties only if the court finds that a bond is needed
1289 to protect the interests of the beneficiaries or is required by
1290 the terms of the trust and the court has not dispensed with the
1291 requirement.
1292 (2) The court may specify the amount of a bond, the
1293 trustee's liabilities under the bond, and whether sureties are
1294 necessary. The court may modify or terminate a bond at any time.
1295 736.0703 Cotrustees.--
1296 (1) Cotrustees who are unable to reach a unanimous
1297 decision may act by majority decision.
1298 (2) If a vacancy occurs in a cotrusteeship, the remaining
1299 cotrustees or a majority of the remaining cotrustees may act for
1300 the trust.
1301 (3) A cotrustee must participate in the performance of a
1302 trustee's function unless the cotrustee is unavailable to
1303 perform the function because of absence, illness,
1304 disqualification under other provision of law, or other
1305 temporary incapacity or the cotrustee has properly delegated the
1306 performance of the function to another cotrustee.
1307 (4) If a cotrustee is unavailable to perform duties
1308 because of absence, illness, disqualification under other law,
1309 or other temporary incapacity, and prompt action is necessary to
1310 achieve the purposes of the trust or to avoid injury to the
1311 trust property, the remaining cotrustee or a majority of the
1312 remaining cotrustees may act for the trust.
1313 (5) A cotrustee may not delegate to another cotrustee the
1314 performance of a function the settlor reasonably expected the

1315 cotrustees to perform jointly. A cotrustee may revoke a
1316 delegation previously made.
1317 (6) Except as otherwise provided in subsection (7), a
1318 cotrustee who does not join in an action of another cotrustee is
1319 not liable for the action.
1320 (7) Each cotrustee shall exercise reasonable care to:
1321 (a) Prevent a cotrustee from committing a breach of trust.
1322 (b) Compel a cotrustee to redress a breach of trust.
1323 (8) A dissenting cotrustee who joins in an action at the
1324 direction of the majority of the cotrustees and who notifies any
1325 cotrustee of the dissent at or before the time of the action is
1326 not liable for the action.
1327 736.0704 Vacancy in trusteeship; appointment of
1328 successor.--
1329 (1) A vacancy in a trusteeship occurs if:
1330 (a) A person designated as trustee declines the
1331 trusteeship;
1332 (b) A person designated as trustee cannot be identified or
1333 does not exist;
1334 (c) A trustee resigns;
1335 (d) A trustee is disqualified or removed;
1336 (e) A trustee dies; or
1337 (f) A trustee is adjudicated to be incapacitated.
1338 (2) If one or more cotrustees remain in office, a vacancy
1339 in a trusteeship need not be filled. A vacancy in a trusteeship
1340 must be filled if the trust has no remaining trustee.

1341 (3) A vacancy in a trusteeship of a noncharitable trust
1342 that is required to be filled must be filled in the following
1343 order of priority:
1344 (a) By a person named or designated pursuant to the terms
1345 of the trust to act as successor trustee.
1346 (b) By a person appointed by unanimous agreement of the
1347 qualified beneficiaries.
1348 (c) By a person appointed by the court.
1349 (4) A vacancy in a trusteeship of a charitable trust that
1350 is required to be filled must be filled in the following order
1351 of priority:
1352 (a) By a person named or designated pursuant to the terms
1353 of the trust to act as successor trustee.
1354 (b) By a person selected by unanimous agreement of the
1355 charitable organizations expressly designated to receive
1356 distributions under the terms of the trust.
1357 (c) By a person appointed by the court.
1358 (5) The court may appoint an additional trustee or special
1359 fiduciary whenever the court considers the appointment necessary
1360 for the administration of the trust, whether or not a vacancy in
1361 a trusteeship exists or is required to be filled.
1362 736.0705 Resignation of trustee.--
1363 (1) A trustee may resign:
1364 (a) Upon at least 30 days' notice to the qualified
1365 beneficiaries, the settlor, if living, and all cotrustees; or
1366 (b) With the approval of the court.

1367 (2) In approving a resignation, the court may issue orders
1368 and impose conditions reasonably necessary for the protection of
1369 the trust property.
1370 (3) Any liability of a resigning trustee or of any
1371 sureties on the trustee's bond for acts or omissions of the
1372 trustee is not discharged or affected by the trustee's
1373 resignation.
1374 736.0706 Removal of trustee.--
1375 (1) The settlor, a cotrustee, or a beneficiary may request
1376 the court to remove a trustee or a trustee may be removed by the
1377 court on the court's own initiative.
1378 (2) The court may remove a trustee if:
1379 (a) The trustee has committed a serious breach of trust;
1380 (b) The lack of cooperation among cotrustees substantially
1381 impairs the administration of the trust;
1382 (c) Due to the unfitness, unwillingness, or persistent
1383 failure of the trustee to administer the trust effectively, the
1384 court determines that removal of the trustee best serves the
1385 interests of the beneficiaries; or
1386 (d) There has been a substantial change of circumstances
1387 or removal is requested by all of the qualified beneficiaries,
1388 the court finds that removal of the trustee best serves the
1389 interests of all of the beneficiaries and is not inconsistent
1390 with a material purpose of the trust, and a suitable cotrustee
1391 or successor trustee is available.
1392 (3) Pending a final decision on a request to remove a
1393 trustee, or in lieu of or in addition to removing a trustee, the
1394 court may order such appropriate relief under s. 736.1001(2) as

1395 may be necessary to protect the trust property or the interests
1396 of the beneficiaries.
1397 736.0707 Delivery of property by former trustee.--
1398 (1) Unless a cotrustee remains in office or the court
1399 otherwise orders and until the trust property is delivered to a
1400 successor trustee or other person entitled to the property, a
1401 trustee who has resigned or been removed has the duties of a
1402 trustee and the powers necessary to protect the trust property.
1403 (2) A trustee who has resigned or been removed shall
1404 within a reasonable time deliver the trust property within the
1405 trustee's possession to the cotrustee, successor trustee, or
1406 other person entitled to the property, subject to the right of
1407 the trustee to retain a reasonable reserve for the payment of
1408 debts, expenses, and taxes. The provisions of this subsection
1409 are in addition to and are not in derogation of the rights of a
1410 removed or resigning trustee under the common law.
1411 736.0708 Compensation of trustee.--
1412 (1) If the terms of a trust do not specify the trustee's
1413 compensation, a trustee is entitled to compensation that is
1414 reasonable under the circumstances.
1415 (2) If the terms of a trust specify the trustee's
1416 compensation, the trustee is entitled to be compensated as
1417 specified but the court may allow more or less compensation if:
1418 (a) The duties of the trustee are substantially different
1419 from those contemplated when the trust was created; or
1420 (b) The compensation specified by the terms of the trust
1421 would be unreasonably low or high.

1422 (3) If the trustee has rendered other services in
1423 connection with the administration of the trust, the trustee
1424 shall also be allowed reasonable compensation for the other
1425 services rendered in addition to reasonable compensation as
1426 trustee.
1427 736.0709 Reimbursement of expenses.--
1428 (1) A trustee is entitled to be reimbursed out of the
1429 trust property, with interest as appropriate, for reasonable
1430 expenses that were properly incurred in the administration of
1431 the trust.
1432 (2) An advance by the trustee of money for the protection
1433 of the trust gives rise to a lien against trust property to
1434 secure reimbursement with reasonable interest.
1435 Section 8. Part VIII of chapter 736, Florida Statutes,
1436 consisting of sections 736.0801, 736.0802, 736.0803, 736.0804,
1437 736.0805, 736.0806, 736.0807, 736.0808, 736.0809, 736.0810,
1438 736.08105, 736.0811, 736.0812, 736.08125, 736.0813, 736.08135,
1439 736.0814, 736.08147, 736.0815, 736.0816, 736.08163, 736.08165,
1440 and 736.0817, is created to read:
1441
1442 PART VIII
1443 DUTIES AND POWERS OF TRUSTEE
1444
1445 736.0801 Duty to administer trust.--Upon acceptance of a
1446 trusteeship, the trustee shall administer the trust in good
1447 faith, in accordance with its terms and purposes and the
1448 interests of the beneficiaries, and in accordance with this
1449 code.

1450 736.0802 Duty of loyalty.--
1451 (1) As between a trustee and the beneficiaries, a trustee
1452 shall administer the trust solely in the interests of the
1453 beneficiaries.
1454 (2) Subject to the rights of persons dealing with or
1455 assisting the trustee as provided in s. 736.1016, a sale,
1456 encumbrance, or other transaction involving the investment or
1457 management of trust property entered into by the trustee for the
1458 trustee's own personal account or which is otherwise affected by
1459 a conflict between the trustee's fiduciary and personal
1460 interests is voidable by a beneficiary affected by the
1461 transaction unless:
1462 (a) The transaction was authorized by the terms of the
1463 trust;
1464 (b) The transaction was approved by the court;
1465 (c) The beneficiary did not commence a judicial proceeding
1466 within the time allowed by s. 736.1008;
1467 (d) The beneficiary consented to the trustee's conduct,
1468 ratified the transaction, or released the trustee in compliance
1469 with s. 736.1012;
1470 (e) The transaction involves a contract entered into or
1471 claim acquired by the trustee when that person had not become or
1472 contemplated becoming trustee; or
1473 (f) The transaction was consented to in writing by a
1474 settlor of the trust while the trust was revocable.
1475 (3) A sale, encumbrance, or other transaction involving
1476 the investment or management of trust property is presumed to be
1477 affected by a conflict between personal and fiduciary interests

1478 if the sale, encumbrance, or other transaction is entered into
1479 by the trustee with:
1480 (a) The trustee's spouse;
1481 (b) The trustee's descendants, siblings, parents, or their
1482 spouses;
1483 (c) An officer, director, employee, agent, or attorney of
1484 the trustee; or
1485 (d) A corporation or other person or enterprise in which
1486 the trustee, or a person that owns a significant interest in the
1487 trustee, has an interest that might affect the trustee's best
1488 judgment.
1489 (4) A transaction not concerning trust property in which
1490 the trustee engages in the trustee's individual capacity
1491 involves a conflict between personal and fiduciary interests if
1492 the transaction concerns an opportunity properly belonging to
1493 the trust.
1494 (5)(a) An investment by a trustee authorized by lawful
1495 authority to engage in trust business, as defined in s.
1496 658.12(20), in investment instruments, as defined in s.
1497 660.25(6), that are owned or controlled by the trustee or its
1498 affiliate, or from which the trustee or its affiliate receives
1499 compensation for providing services in a capacity other than as
1500 trustee, is not presumed to be affected by a conflict between
1501 personal and fiduciary interests provided the investment
1502 otherwise complies with chapters 518 and 660 and the trustee
1503 complies with the disclosure requirements of this subsection.
1504 (b) A trustee who invests trust funds in investment
1505 instruments that are owned or controlled by the trustee or its

1506 affiliate shall disclose the following to all qualified
1507 beneficiaries:
1508 1. Notice that the trustee has invested trust funds in
1509 investment instruments owned or controlled by the trustee or its
1510 affiliate.
1511 2. The identity of the investment instruments.
1512 3. The identity and relationship to the trustee of any
1513 affiliate that owns or controls the investment instruments.
1514 (c) A trustee who invests trust funds in investment
1515 instruments with respect to which the trustee or its affiliate
1516 receives compensation for providing services in a capacity other
1517 than as trustee shall disclose to all qualified beneficiaries,
1518 all compensation, including, but not limited to, fees or
1519 commissions, paid or to be paid by the account and received or
1520 to be received by an affiliate arising from such affiliated
1521 investment.
1522 (d) Disclosure required by this subsection shall be made
1523 at least annually unless there has been no change in the method
1524 or increase in the rate at which such compensation is calculated
1525 since the most recent disclosure. The disclosure may be given in
1526 a trust disclosure document as defined in s. 736.1008, in a copy
1527 of the prospectus for the investment instrument, in any other
1528 written disclosure prepared for the investment instrument under
1529 applicable federal or state law, or in a written summary that
1530 includes all compensation received or to be received by the
1531 trustee and any affiliate of the trustee and an explanation of
1532 the manner in which such compensation is calculated, either as a
1533 percentage of the assets invested or by some other method.

1534 (e) This subsection shall apply as follows:
1535 1. This subsection does not apply to qualified investment
1536 instruments or to a trust for which a right of revocation
1537 exists.
1538 2. For investment instruments other than qualified
1539 investment instruments, paragraphs (a), (b), (c), and (d) shall
1540 apply to irrevocable trusts created on or after July 1, 2007,
1541 the assets of which are valued in excess of $5 million on the
1542 date the trust is created.
1543 3. For investment instruments other than qualified
1544 investment instruments, paragraphs (a), (b), (c), and (d) shall
1545 apply to irrevocable trusts not described in subparagraph 2.
1546 only as follows:
1547 a. Such paragraphs shall not apply until 60 days after the
1548 statement required in paragraph (f) is provided and no objection
1549 is made or any objection which is made has been terminated.
1550 (I) An objection is made if, within 60 days after the date
1551 of the statement required in paragraph (f), a super majority of
1552 the eligible beneficiaries deliver to the trustee written
1553 objections to the application of this subsection to such trust.
1554 An objection shall be deemed to be delivered to the trustee on
1555 the date the objection is mailed to the mailing address listed
1556 in the notice provided in paragraph (f).
1557 (II) An objection is terminated upon the earlier of the
1558 receipt of consent from a super majority of eligible
1559 beneficiaries of the class that made the objection or the
1560 resolution of the objection pursuant to this subparagraph.

1561 (III) If an objection is delivered to the trustee, the
1562 trustee may petition the court for an order overruling the
1563 objection and authorizing the trustee to make investments under
1564 this subsection. The burden shall be on the trustee to show good
1565 cause for the relief sought.
1566 (IV) Any qualified beneficiary may petition the court for
1567 an order to prohibit, limit, or restrict a trustee's authority
1568 to make investments under this subsection. The burden shall be
1569 upon the petitioning beneficiary to show good cause for the
1570 relief sought.
1571 (V) The court may award costs and attorney's fees relating
1572 to any petition under this subparagraph in the same manner as in
1573 chancery actions. When costs and attorney's fees are to be paid
1574 out of the trust, the court, in its discretion, may direct from
1575 which part of the trust such costs and fees shall be paid.
1576 b. The objection of a super majority of eligible
1577 beneficiaries under this subparagraph may thereafter be removed
1578 by the written consent of a super majority of the class or
1579 classes of those eligible beneficiaries that made the objection.
1580 (f)1. Any time prior to initially investing in any
1581 investment instrument described in this subsection other than a
1582 qualified investment instrument, the trustee of a trust
1583 described in subparagraph (e)3. shall provide to all qualified
1584 beneficiaries a statement containing the following:
1585 a. The name, telephone number, street address, and mailing
1586 address of the trustee and of any individuals who may be
1587 contacted for further information.

1588 b. A statement that, unless a super majority of the
1589 eligible beneficiaries objects to the application of this
1590 subsection to the trust within 60 days after the date the
1591 statement pursuant to this subsection was delivered, this
1592 subsection shall apply to the trust.
1593 c. A statement that, if this subsection applies to the
1594 trust, the trustee will have the right to make investments in
1595 investment instruments, as defined in s. 658.12(20), that are
1596 owned or controlled by the trustee or its affiliate, or from
1597 which the trustee or its affiliate receives compensation for
1598 providing services in a capacity other than as trustee, and that
1599 the trustee or its affiliate may receive fees in addition to the
1600 trustee's compensation for administering the trust.
1601
1602 A statement by the trustee is not delivered if the statement is
1603 accompanied by another written communication other than a
1604 written communication by the trustee that refers only to the
1605 statement.
1606 2. For purposes of paragraph (e) and this paragraph:
1607 a. "Eligible beneficiaries" means:
1608 (I) If at the time the determination is made there are one
1609 or more beneficiaries as described in s. 736.0103(14)(c), the
1610 beneficiaries described in s. 736.0103(14)(a) and (c); or
1611 (II) If there is no beneficiary described in s.
1612 736.0103(14)(c), the beneficiaries described in s.
1613 736.0103(14)(a) and (b).
1614 b. "Super majority of the eligible beneficiaries" means:

1615 (I) If at the time the determination is made there are one
1616 or more beneficiaries as described in s. 736.0103(14)(c), at
1617 least two-thirds in interest of the beneficiaries described in
1618 s. 736.0103(14)(a) or two-thirds in interest of the
1619 beneficiaries described in s. 736.0103(14)(c), if the interests
1620 of the beneficiaries are reasonably ascertainable; otherwise,
1621 two-thirds in number of either such class; or
1622 (II) If there is no beneficiary as described in s.
1623 736.0103(14)(c), at least two-thirds in interest of the
1624 beneficiaries described in s. 736.0103(14)(a) or two-thirds in
1625 interest of the beneficiaries described in s. 736.0103(14)(b),
1626 if the interests of the beneficiaries are reasonably
1627 ascertainable; otherwise, two-thirds in number of either such
1628 class.
1629 c. "Qualified investment instrument" means a mutual fund,
1630 common trust fund, or money market fund described in and
1631 governed by s. 736.0816(3).
1632 d. An irrevocable trust is created upon execution of the
1633 trust instrument. If a trust that was revocable when created
1634 thereafter becomes irrevocable, the irrevocable trust is created
1635 when the right of revocation terminates.
1636 (6) In voting shares of stock or in exercising powers of
1637 control over similar interests in other forms of enterprise, the
1638 trustee shall act in the best interests of the beneficiaries. If
1639 the trust is the sole owner of a corporation or other form of
1640 enterprise, the trustee shall elect or appoint directors or
1641 other managers who will manage the corporation or enterprise in
1642 the best interests of the beneficiaries.

1643 (7) This section does not preclude the following
1644 transactions, if fair to the beneficiaries:
1645 (a) An agreement between a trustee and a beneficiary
1646 relating to the appointment or compensation of the trustee;
1647 (b) A payment of reasonable compensation to the trustee;
1648 (c) A transaction between a trust and another trust, the
1649 decedent's estate, or a guardian of the property of which the
1650 trustee is a fiduciary or in which a beneficiary has an
1651 interest;
1652 (d) A deposit of trust money in a regulated financial-
1653 service institution operated by the trustee; or
1654 (e) An advance by the trustee of money for the protection
1655 of the trust.
1656 (8) This section does not preclude the employment of
1657 persons, including, but not limited to, attorneys, accountants,
1658 investment advisers, or agents, even if they are the trustee, an
1659 affiliate of the trustee, or otherwise associated with the
1660 trustee, to advise or assist the trustee in the exercise of any
1661 of the trustee's powers and to pay reasonable compensation and
1662 costs incurred in connection with such employment from the
1663 assets of the trust; to act without independent investigation on
1664 their recommendations; and, instead of acting personally, to
1665 employ one or more agents to perform any act of administration,
1666 whether or not discretionary.
1667 (9) The court may appoint a special fiduciary to act with
1668 respect to any proposed transaction that might violate this
1669 section if entered into by the trustee.

1670 (10) Payment of costs or attorney's fees incurred in any
1671 trust proceeding from the assets of the trust may be made by the
1672 trustee without the approval of any person and without court
1673 authorization, except that court authorization shall be required
1674 if an action has been filed or defense asserted against the
1675 trustee based upon a breach of trust. Court authorization is not
1676 required if the action or defense is later withdrawn or
1677 dismissed by the party that is alleging a breach of trust or
1678 resolved without a determination by the court that the trustee
1679 has committed a breach of trust.
1680 736.0803 Impartiality.--If a trust has two or more
1681 beneficiaries, the trustee shall act impartially in
1682 administering the trust property, giving due regard to the
1683 beneficiaries' respective interests.
1684 736.0804 Prudent administration.--A trustee shall
1685 administer the trust as a prudent person would, by considering
1686 the purposes, terms, distribution requirements, and other
1687 circumstances of the trust. In satisfying this standard, the
1688 trustee shall exercise reasonable care, skill, and caution.
1689 736.0805 Expenses of administration.--In administering a
1690 trust, the trustee shall only incur expenses that are reasonable
1691 in relation to the trust property, the purposes of the trust,
1692 and the skills of the trustee.
1693 736.0806 Trustee's skills.--A trustee who has special
1694 skills or expertise, or is named trustee in reliance on the
1695 trustee's representation that the trustee has special skills or
1696 expertise, shall use those special skills or expertise.
1697 736.0807 Delegation by trustee.--

1698 (1) A trustee may delegate duties and powers that a
1699 prudent trustee of comparable skills could properly delegate
1700 under the circumstances. The trustee shall exercise reasonable
1701 care, skill, and caution in:
1702 (a) Selecting an agent.
1703 (b) Establishing the scope and terms of the delegation,
1704 consistent with the purposes and terms of the trust.
1705 (c) Reviewing the agent's actions periodically, in order
1706 to monitor the agent's performance and compliance with the terms
1707 of the delegation.
1708 (2) In performing a delegated function, an agent owes a
1709 duty to the trust to exercise reasonable care to comply with the
1710 terms of the delegation.
1711 (3) A trustee who complies with subsection (1) is not
1712 liable to the beneficiaries or to the trust for an action of the
1713 agent to whom the function was delegated.
1714 (4) By accepting a delegation of powers or duties from the
1715 trustee of a trust that is subject to the law of this state, an
1716 agent submits to the jurisdiction of the courts of this state.
1717 736.0808 Powers to direct.--
1718 (1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the
1719 trustee may follow a direction of the settlor that is contrary
1720 to the terms of the trust while a trust is revocable.
1721 (2) If the terms of a trust confer on a person other than
1722 the settlor of a revocable trust, the power to direct certain
1723 actions of the trustee, the trustee shall act in accordance with
1724 an exercise of the power unless the attempted exercise is
1725 manifestly contrary to the terms of the trust or the trustee

1726 knows the attempted exercise would constitute a serious breach
1727 of a fiduciary duty that the person holding the power owes to
1728 the beneficiaries of the trust.
1729 (3) The terms of a trust may confer on a trustee or other
1730 person a power to direct the modification or termination of the
1731 trust.
1732 (4) A person, other than a beneficiary, who holds a power
1733 to direct is presumptively a fiduciary who, as such, is required
1734 to act in good faith with regard to the purposes of the trust
1735 and the interests of the beneficiaries. The holder of a power to
1736 direct is liable for any loss that results from breach of a
1737 fiduciary duty.
1738 736.0809 Control and protection of trust property.--A
1739 trustee shall take reasonable steps to take control of and
1740 protect the trust property.
1741 736.0810 Recordkeeping and identification of trust
1742 property.--
1743 (1) A trustee shall keep clear, distinct, and accurate
1744 records of the administration of the trust.
1745 (2) A trustee shall keep trust property separate from the
1746 trustee's own property.
1747 (3) Except as otherwise provided in subsection (4), a
1748 trustee shall cause the trust property to be designated so that
1749 the interest of the trust, to the extent feasible, appears in
1750 records maintained by a party other than a trustee or
1751 beneficiary.

1752 (4) If the trustee maintains records clearly indicating
1753 the respective interests, a trustee may invest as a whole the
1754 property of two or more separate trusts.
1755 736.08105 Duty to ascertain marketable title of trust real
1756 property.--A trustee holding title to real property received
1757 from a settlor or estate shall not be required to obtain title
1758 insurance or proof of marketable title until a marketable title
1759 is required for a sale or conveyance of the real property.
1760 736.0811 Enforcement and defense of claims.--A trustee
1761 shall take reasonable steps to enforce claims of the trust and
1762 to defend claims against the trust.
1763 736.0812 Collecting trust property.--A trustee shall take
1764 reasonable steps to compel a former trustee or other person to
1765 deliver trust property to the trustee and, except as provided in
1766 s. 736.08125, to redress a breach of trust known to the trustee
1767 to have been committed by a former trustee.
1768 736.08125 Protection of successor trustees.--
1769 (1) A successor trustee is not personally liable for
1770 actions taken by any prior trustee, nor does any successor
1771 trustee have a duty to institute any proceeding against any
1772 prior trustee, or file any claim against any prior trustee's
1773 estate, for any of the prior trustee's actions as trustee under
1774 any of the following circumstances:
1775 (a) As to a successor trustee who succeeds a trustee who
1776 was also the settlor of a trust that was revocable during the
1777 time that the settlor served as trustee;

1778 (b) As to any beneficiary who has waived any accounting
1779 required by s. 736.0813, but only as to the periods included in
1780 the waiver;
1781 (c) As to any beneficiary who has released the successor
1782 trustee from the duty to institute any proceeding or file any
1783 claim;
1784 (d) As to any person who is not an eligible beneficiary;
1785 or
1786 (e) As to any eligible beneficiary:
1787 1. If a supermajority of the eligible beneficiaries have
1788 released the successor trustee;
1789 2. If the eligible beneficiary has not delivered a written
1790 request to the successor trustee to institute an action or file
1791 a claim against the prior trustee within 6 months after the date
1792 of the successor trustee's acceptance of the trust, if the
1793 successor trustee has notified the eligible beneficiary in
1794 writing of acceptance by the successor trustee in accordance
1795 with 736.0813(1)(a) and that writing advises the beneficiary
1796 that, unless the beneficiary delivers the written request within
1797 6 months after the date of acceptance, the right to proceed
1798 against the successor trustee will be barred pursuant to this
1799 section; or
1800 3. For any action or claim that the eligible beneficiary
1801 is barred from bringing against the prior trustee.
1802 (2) For the purposes of this section, the term:
1803 (a) "Eligible beneficiaries" means:

1804 1. At the time the determination is made, if there are one
1805 or more beneficiaries as described in s. 736.0103(14)(c), the
1806 beneficiaries described in s. 736.0103(14)(a) and (c); or
1807 2. If there is no beneficiary as described in s.
1808 736.0103(14)(c), the beneficiaries described in s.
1809 736.0103(14)(a) and (b).
1810 (b) "Supermajority of eligible beneficiaries" means at
1811 least two-thirds in interest of the eligible beneficiaries if
1812 the interests of the eligible beneficiaries are reasonably
1813 ascertainable, otherwise, at least two-thirds in number of the
1814 eligible beneficiaries.
1815 (3) Nothing in this section affects any liability of the
1816 prior trustee or the right of the successor trustee or any
1817 beneficiary to pursue an action or claim against the prior
1818 trustee.
1819 736.0813 Duty to inform and account.--The trustee shall
1820 keep the qualified beneficiaries of the trust reasonably
1821 informed of the trust and its administration.
1822 (1) The trustee's duty to inform and account includes, but
1823 is not limited to, the following:
1824 (a) Within 60 days after acceptance of the trust, the
1825 trustee shall give notice to the qualified beneficiaries of the
1826 acceptance of the trust and the full name and address of the
1827 trustee.
1828 (b) Within 60 days after the date the trustee acquires
1829 knowledge of the creation of an irrevocable trust, or the date
1830 the trustee acquires knowledge that a formerly revocable trust
1831 has become irrevocable, whether by the death of the settlor or

1832 otherwise, the trustee shall give notice to the qualified
1833 beneficiaries of the trust's existence, the identity of the
1834 settlor or settlors, the right to request a copy of the trust
1835 instrument, and the right to accountings under this section.
1836 (c) Upon reasonable request, the trustee shall provide a
1837 qualified beneficiary with a complete copy of the trust
1838 instrument.
1839 (d) A trustee of an irrevocable trust shall provide a
1840 trust accounting, as set forth in s. 736.08135, to each
1841 qualified beneficiary annually and on termination of the trust
1842 or on change of the trustee.
1843 (e) Upon reasonable request, the trustee shall provide a
1844 qualified beneficiary with relevant information about the assets
1845 and liabilities of the trust and the particulars relating to
1846 administration.
1847
1848 Paragraphs (a) and (b) do not apply to an irrevocable trust
1849 created before the effective date of this code, or to a
1850 revocable trust that becomes irrevocable before the effective
1851 date of this code. Paragraph (a) does not apply to a trustee who
1852 accepts a trusteeship before the effective date of this code.
1853 (2) A qualified beneficiary may waive the trustee's duty
1854 to account under paragraph (1)(d). A qualified beneficiary may
1855 withdraw a waiver previously given. Waivers and withdrawals of
1856 prior waivers under this subsection must be in writing.
1857 Withdrawals of prior waivers are effective only with respect to
1858 accountings for future periods.

1859 (3) The representation provisions of part III apply with
1860 respect to all rights of a qualified beneficiary under this
1861 section.
1862 (4) As provided in s. 736.0603(1), the trustee's duties
1863 under this section extend only to the settlor while a trust is
1864 revocable.
1865 (5) This section applies to trust accountings rendered for
1866 accounting periods beginning on or after January 1, 2008.
1867 736.08135 Trust accountings.--
1868 (1) A trust accounting must be a reasonably understandable
1869 report from the date of the last accounting or, if none, from
1870 the date on which the trustee became accountable, that
1871 adequately discloses the information required in subsection (2).
1872 (2)(a) The accounting must begin with a statement
1873 identifying the trust, the trustee furnishing the accounting,
1874 and the time period covered by the accounting.
1875 (b) The accounting must show all cash and property
1876 transactions and all significant transactions affecting
1877 administration during the accounting period, including
1878 compensation paid to the trustee and the trustee's agents. Gains
1879 and losses realized during the accounting period and all
1880 receipts and disbursements must be shown.
1881 (c) To the extent feasible, the accounting must identify
1882 and value trust assets on hand at the close of the accounting
1883 period. For each asset or class of assets reasonably capable of
1884 valuation, the accounting shall contain two values, the asset
1885 acquisition value or carrying value and the estimated current
1886 value. The accounting must identify each known noncontingent

1887 liability with an estimated current amount of the liability if
1888 known.
1889 (d) To the extent feasible, the accounting must show
1890 significant transactions that do not affect the amount for which
1891 the trustee is accountable, including name changes in investment
1892 holdings, adjustments to carrying value, a change of custodial
1893 institutions, and stock splits.
1894 (e) The accounting must reflect the allocation of
1895 receipts, disbursements, accruals, or allowances between income
1896 and principal when the allocation affects the interest of any
1897 beneficiary of the trust.
1898 (f) The trustee shall include in the final accounting a
1899 plan of distribution for any undistributed assets shown on the
1900 final accounting.
1901 (3) This section applies to all trust accountings rendered
1902 for any accounting periods beginning on or after January 1,
1903 2003.
1904 736.0814 Discretionary powers; tax savings.--
1905 (1) Notwithstanding the breadth of discretion granted to a
1906 trustee in the terms of the trust, including the use of such
1907 terms as "absolute," "sole," or "uncontrolled," the trustee
1908 shall exercise a discretionary power in good faith and in
1909 accordance with the terms and purposes of the trust and the
1910 interests of the beneficiaries. A court shall not determine that
1911 a trustee abused its discretion merely because the court would
1912 have exercised the discretion in a different manner or would not
1913 have exercised the discretion.

1914 (2) Subject to subsection (3) and unless the terms of the
1915 trust expressly indicate that a rule in this subsection does not
1916 apply, a person who is a beneficiary and a trustee may not:
1917 (a) Make discretionary distributions of either principal
1918 or income to or for the benefit of that trustee, other than
1919 distributions subject to an ascertainable standard;
1920 (b) Make discretionary allocations of receipts or expenses
1921 as between principal and income, unless the trustee acts in a
1922 fiduciary capacity whereby the trustee has no power to enlarge
1923 or shift any beneficial interest except as an incidental
1924 consequence of the discharge of the trustee's fiduciary duties;
1925 (c) Make discretionary distributions of either principal
1926 or income to satisfy any of the trustee's legal support
1927 obligations; or
1928 (d) Exercise any other power, including, but not limited
1929 to, the right to remove or to replace any trustee, so as to
1930 cause the powers enumerated in paragraph (a), paragraph (b), or
1931 paragraph (c) to be exercised on behalf of, or for the benefit
1932 of, a beneficiary who is also a trustee.
1933 (3) Subsection (2) does not apply to:
1934 (a) A power held by the settlor of the trust;
1935 (b) A power held by the settlor's spouse who is the
1936 trustee of a trust for which a marital deduction, as defined in
1937 s. 2056(a) or s. 2523(a) of the Internal Revenue Code of 1986,
1938 as amended, was previously allowed;
1939 (c) Any trust during any period that the trust may be
1940 revoked or amended by its settlor; or

1941 (d) A trust if contributions to the trust qualify for the
1942 annual exclusion under s. 2503(c) of the Internal Revenue Code
1943 of 1986, as amended.
1944 (4) A power whose exercise is limited or prohibited by
1945 subsection (2) may be exercised by the remaining trustees whose
1946 exercise of the power is not so limited or prohibited. If there
1947 is no trustee qualified to exercise the power, on petition by
1948 any qualified beneficiary, the court may appoint an independent
1949 trustee with authority to exercise the power.
1950 (5) A person who has the right to remove or to replace a
1951 trustee does not possess nor may that person be deemed to
1952 possess, by virtue of having that right, the powers of the
1953 trustee that is subject to removal or to replacement.
1954 736.08147 Duty to distribute trust income.--If a will or
1955 trust instrument granting income to the settlor's or testator's
1956 spouse for life is silent as to the time of distribution of
1957 income and the frequency of distributions, the trustee shall
1958 distribute all net income, as defined in chapter 738, to the
1959 spouse no less frequently than annually. This provision shall
1960 apply to any trust established before, on, or after July 1,
1961 2007, unless the trust instrument expressly directs or permits
1962 net income to be distributed less frequently than annually.
1963 736.0815 General powers of trustee.--
1964 (1) A trustee, without authorization by the court, may,
1965 except as limited or restricted by this code, exercise:
1966 (a) Powers conferred by the terms of the trust.
1967 (b) Except as limited by the terms of the trust:

1968 1. All powers over the trust property that an unmarried
1969 competent owner has over individually owned property.
1970 2. Any other powers appropriate to achieve the proper
1971 investment, management, and distribution of the trust property.
1972 3. Any other powers conferred by this code.
1973 (2) The exercise of a power is subject to the fiduciary
1974 duties prescribed by this code.
1975 736.0816 Specific powers of trustee.--Except as limited or
1976 restricted by this code, a trustee may:
1977 (1) Collect trust property and accept or reject additions
1978 to the trust property from a settlor, including an asset in
1979 which the trustee is personally interested, and hold property in
1980 the name of a nominee or in other form without disclosure of the
1981 trust so that title to the property may pass by delivery but the
1982 trustee is liable for any act of the nominee in connection with
1983 the property so held.
1984 (2) Acquire or sell property, for cash or on credit, at
1985 public or private sale.
1986 (3) Acquire an undivided interest in a trust asset,
1987 including, but not limited to, a money market mutual fund,
1988 mutual fund, or common trust fund, in which asset the trustee
1989 holds an undivided interest in any trust capacity, including any
1990 money market or other mutual fund from which the trustee or any
1991 affiliate or associate of the trustee is entitled to receive
1992 reasonable compensation for providing necessary services as an
1993 investment adviser, portfolio manager, or servicing agent. A
1994 trustee or affiliate or associate of the trustee may receive
1995 compensation for such services in addition to fees received for

1996 administering the trust provided such compensation is fully
1997 disclosed in writing to all qualified beneficiaries.
1998 (4) Exchange, partition, or otherwise change the character
1999 of trust property.
2000 (5) Deposit trust money in an account in a regulated
2001 financial-service institution.
2002 (6) Borrow money, with or without security, and mortgage
2003 or pledge trust property for a period within or extending beyond
2004 the duration of the trust and advance money for the protection
2005 of the trust.
2006 (7) With respect to an interest in a proprietorship,
2007 partnership, limited liability company, business trust,
2008 corporation, or other form of business or enterprise, continue
2009 the business or other enterprise and take any action that may be
2010 taken by shareholders, members, or property owners, including,
2011 but not limited to, merging, dissolving, or otherwise changing
2012 the form of business organization or contributing additional
2013 capital.
2014 (8) With respect to stocks or other securities, exercise
2015 the rights of an absolute owner, including, but not limited to,
2016 the right to:
2017 (a) Vote, or give proxies to vote, with or without power
2018 of substitution, or enter into or continue a voting trust
2019 agreement.
2020 (b) Hold a security in the name of a nominee or in other
2021 form without disclosure of the trust so that title may pass by
2022 delivery.

2023 (c) Pay calls, assessments, and other sums chargeable or
2024 accruing against the securities, and sell or exercise stock
2025 subscription or conversion rights.
2026 (d) Deposit the securities with a depositary or other
2027 regulated financial-service institution.
2028 (9) With respect to an interest in real property,
2029 construct, or make ordinary or extraordinary repairs to,
2030 alterations to, or improvements in, buildings or other
2031 structures, demolish improvements, raze existing or erect new
2032 party walls or buildings, subdivide or develop land, dedicate
2033 land to public use or grant public or private easements, and
2034 make or vacate plats and adjust boundaries.
2035 (10) Enter into a lease for any purpose as lessor or
2036 lessee, including a lease or other arrangement for exploration
2037 and removal of natural resources, with or without the option to
2038 purchase or renew, for a period within or extending beyond the
2039 duration of the trust.
2040 (11) Grant an option involving a sale, lease, or other
2041 disposition of trust property or acquire an option for the
2042 acquisition of property, including an option exercisable beyond
2043 the duration of the trust, and exercise an option so acquired.
2044 (12) Insure the property of the trust against damage or
2045 loss and insure the trustee, trustee's agents, and beneficiaries
2046 against liability arising from the administration of the trust.
2047 (13) Abandon or decline to administer property of no value
2048 or of insufficient value to justify the collection or continued
2049 administration of such property.

2050 (14) Pay or contest any claim, settle a claim by or
2051 against the trust, and release, in whole or in part, a claim
2052 belonging to the trust.
2053 (15) Pay taxes, assessments, compensation of the trustee
2054 and of employees and agents of the trust, and other expenses
2055 incurred in the administration of the trust.
2056 (16) Allocate items of income or expense to trust income
2057 or principal, as provided by law.
2058 (17) Exercise elections with respect to federal, state,
2059 and local taxes.
2060 (18) Select a mode of payment under any employee benefit
2061 or retirement plan, annuity, or life insurance payable to the
2062 trustee, exercise rights under such plan, annuity, or insurance,
2063 including exercise of the right to indemnification for expenses
2064 and against liabilities, and take appropriate action to collect
2065 the proceeds.
2066 (19) Make loans out of trust property, including, but not
2067 limited to, loans to a beneficiary on terms and conditions that
2068 are fair and reasonable under the circumstances, and the trustee
2069 has a lien on future distributions for repayment of those loans.
2070 (20) Employ persons, including, but not limited to,
2071 attorneys, accountants, investment advisers, or agents, even if
2072 they are the trustee, an affiliate of the trustee, or otherwise
2073 associated with the trustee, to advise or assist the trustee in
2074 the exercise of any of the trustee's powers and pay reasonable
2075 compensation and costs incurred in connection with such
2076 employment from the assets of the trust and act without

2077 independent investigation on the recommendations of such
2078 persons.
2079 (21) Pay an amount distributable to a beneficiary who is
2080 under a legal disability or who the trustee reasonably believes
2081 is incapacitated, by paying the amount directly to the
2082 beneficiary or applying the amount for the beneficiary's
2083 benefit, or by:
2084 (a) Paying the amount to the beneficiary's guardian of the
2085 property or, if the beneficiary does not have a guardian of the
2086 property, the beneficiary's guardian of the person;
2087 (b) Paying the amount to the beneficiary's custodian under
2088 a Uniform Transfers to Minors Act or custodial trustee under a
2089 Uniform Custodial Trust Act, and, for that purpose, creating a
2090 custodianship or custodial trust;
2091 (c) Paying the amount to an adult relative or other person
2092 having legal or physical care or custody of the beneficiary, to
2093 be expended on the beneficiary's behalf, if the trustee does not
2094 know of a guardian of the property, guardian of the person,
2095 custodian, or custodial trustee; or
2096 (d) Managing the amount as a separate fund on the
2097 beneficiary's behalf, subject to the beneficiary's continuing
2098 right to withdraw the distribution.
2099 (22) On distribution of trust property or the division or
2100 termination of a trust, make distributions in divided or
2101 undivided interests, allocate particular assets in proportionate
2102 or disproportionate shares, value the trust property for those
2103 purposes, and adjust for resulting differences in valuation.

2104 (23) Prosecute or defend, including appeals, an action,
2105 claim, or judicial proceeding in any jurisdiction to protect
2106 trust property or the trustee in the performance of the
2107 trustee's duties.
2108 (24) Sign and deliver contracts and other instruments that
2109 are useful to achieve or facilitate the exercise of the
2110 trustee's powers.
2111 (25) On termination of the trust, exercise the powers
2112 appropriate to wind up the administration of the trust and
2113 distribute the trust property to the persons entitled to the
2114 property, subject to the right of the trustee to retain a
2115 reasonable reserve for the payment of debts, expenses, and
2116 taxes.
2117 736.08163 Powers of trustees relating to environmental or
2118 human health laws or to trust property contaminated with
2119 hazardous or toxic substances; liability.--
2120 (1) From the creation of a trust until final distribution
2121 of the assets from the trust, the trustee has, without court
2122 authorization, the powers specified in subsection (2).
2123 (2) Unless otherwise provided in the trust instrument, a
2124 trustee has the power, acting reasonably, to:
2125 (a) Inspect or investigate, or cause to be inspected or
2126 investigated, property held by the trustee, including interests
2127 in sole proprietorships, partnerships, or corporations and any
2128 assets owned by any such business entity for the purpose of
2129 determining compliance with an environmental law affecting that
2130 property or to respond to an actual or threatened violation of
2131 an environmental law affecting that property;

2132 (b) Take, on behalf of the trust, any action necessary to
2133 prevent, abate, or otherwise remedy an actual or potential
2134 violation of an environmental law affecting property held by the
2135 trustee, before or after initiation of an enforcement action by
2136 a governmental body;
2137 (c) Refuse to accept property in trust if the trustee
2138 determines that any property to be donated or conveyed to the
2139 trustee is contaminated with a hazardous substance or is being
2140 used or has been used for an activity directly or indirectly
2141 involving a hazardous substance, which circumstance could result
2142 in liability to the trust or trustee or otherwise impair the
2143 value of the assets to be held;
2144 (d) Settle or compromise at any time any claim against the
2145 trust or trustee that may be asserted by a governmental body or
2146 private party that involves the alleged violation of an
2147 environmental law affecting property of any trust over which the
2148 trustee has responsibility;
2149 (e) Disclaim any power granted by any document, law, or
2150 rule of law that, in the sole judgment of the trustee, may cause
2151 the trustee to incur personal liability, or the trust to incur
2152 liability, under any environmental law;
2153 (f) Decline to serve as a trustee, or having undertaken to
2154 serve as a trustee, resign at any time, if the trustee believes
2155 there is or may be a conflict of interest in its fiduciary
2156 capacity and in its individual capacity because of potential
2157 claims or liabilities that may be asserted against the trustee
2158 on behalf of the trust by reason of the type or condition of the
2159 assets held; or

2160 (g) Charge against the income and principal of the trust
2161 the cost of any inspection, investigation, review, abatement,
2162 response, cleanup, or remedial action that this section
2163 authorizes the trustee to take and, if the trust terminates or
2164 closes or the trust property is transferred to another trustee,
2165 hold assets sufficient to cover the cost of cleaning up any
2166 known environmental problem.
2167 (3) A trustee is not personally liable to any beneficiary
2168 or any other person for a decrease in value of assets in a trust
2169 by reason of the trustee's compliance or efforts to comply with
2170 an environmental law, specifically including any reporting
2171 requirement under that law.
2172 (4) A trustee that acquires ownership or control of a
2173 vessel or other property, without having owned, operated, or
2174 materially participated in the management of that vessel or
2175 property before assuming ownership or control as trustee, is not
2176 considered an owner or operator for purposes of liability under
2177 chapter 376, chapter 403, or any other environmental law. A
2178 trustee that willfully, knowingly, or recklessly causes or
2179 exacerbates a release or threatened release of a hazardous
2180 substance is personally liable for the cost of the response, to
2181 the extent that the release or threatened release is
2182 attributable to the trustee's activities. This subsection does
2183 not preclude the filing of claims against the assets that
2184 constitute the trust held by the trustee or the filing of
2185 actions against the trustee in its representative capacity and
2186 in any such action, an award or judgment against the trustee
2187 must be satisfied only from the assets of the trust.

2188 (5) The acceptance by the trustee of the property or a
2189 failure by the trustee to inspect or investigate the property
2190 does not create any inference as to whether there is liability
2191 under an environmental law with respect to that property.
2192 (6) For the purposes of this section, the term "hazardous
2193 substance" means a substance defined as hazardous or toxic, or
2194 any contaminant, pollutant, or constituent thereof, or otherwise
2195 regulated, by an environmental law.
2196 (7) This section does not apply to any trust created under
2197 a document executed before July 1, 1995, unless the trust is
2198 amendable and the settlor amends the trust at any time to
2199 incorporate the provisions of this section.
2200 736.08165 Administration pending outcome of contest or
2201 other proceeding.--
2202 (1) Pending the outcome of a proceeding filed to determine
2203 the validity of all or part of a trust or the beneficiaries of
2204 all or part of a trust, the trustee shall proceed with the
2205 administration of the trust as if no proceeding had been
2206 commenced, except no action may be taken and no distribution may
2207 be made to a beneficiary in contravention of the rights of those
2208 persons who may be affected by the outcome of the proceeding.
2209 (2) Upon motion of a party and after notice to interested
2210 persons, a court, on good cause shown, may make an exception to
2211 the prohibition under subsection (1) and authorize the trustee
2212 to act or to distribute trust assets to a beneficiary subject to
2213 any conditions the court, in the court's discretion, may impose,
2214 including the posting of bond by the beneficiary.

2215 736.0817 Distribution on termination.--Upon the occurrence
2216 of an event terminating or partially terminating a trust, the
2217 trustee shall proceed expeditiously to distribute the trust
2218 property to the persons entitled to the property, subject to the
2219 right of the trustee to retain a reasonable reserve for the
2220 payment of debts, expenses, and taxes. The provisions of this
2221 section are in addition to and are not in derogation of the
2222 rights of a trustee under the common law with respect to final
2223 distribution of a trust.
2224 Section 9. Part IX of chapter 736, Florida Statutes,
2225 consisting of section 736.0901, is created to read:
2226
2227 PART IX
2228 TRUST INVESTMENTS
2229
2230 736.0901 Applicability of chapter 518.--A trustee shall
2231 invest trust property in accordance with chapter 518.
2232 Section 10. Part X of chapter 736, Florida Statutes,
2233 consisting of sections 736.1001, 736.1002, 736.1003, 736.1004,
2234 736.1005, 736.1006, 736.1007, 736.1008, 736.1009, 736.1010,
2235 736.1011, 736.1012, 736.1013, 736.1014, 736.1015, 736.1016,
2236 736.1017, and 736.1018, is created to read:
2237
2238 PART X
2239 LIABILITY OF TRUSTEE AND RIGHTS OF PERSONS DEALING WITH TRUSTEE
2240
2241 736.1001 Remedies for breach of trust.--

2242 (1) A violation by a trustee of a duty the trustee owes to
2243 a beneficiary is a breach of trust.
2244 (2) To remedy a breach of trust that has occurred or may
2245 occur, the court may:
2246 (a) Compel the trustee to perform the trustee's duties;
2247 (b) Enjoin the trustee from committing a breach of trust;
2248 (c) Compel the trustee to redress a breach of trust by
2249 paying money or restoring property or by other means;
2250 (d) Order a trustee to account;
2251 (e) Appoint a special fiduciary to take possession of the
2252 trust property and administer the trust;
2253 (f) Suspend the trustee;
2254 (g) Remove the trustee as provided in s. 736.706;
2255 (h) Reduce or deny compensation to the trustee;
2256 (i) Subject to s. 736.1016, void an act of the trustee,
2257 impose a lien or a constructive trust on trust property, or
2258 trace trust property wrongfully disposed of and recover the
2259 property or its proceeds; or
2260 (j) Order any other appropriate relief.
2261 (3) As an illustration of the remedies available to the
2262 court and without limiting the court's discretion as provided in
2263 subsection (2), if a breach of trust results in the favoring of
2264 any beneficiary to the detriment of any other beneficiary or
2265 consists of an abuse of the trustee's discretion:
2266 (a) To the extent the breach of trust has resulted in no
2267 distribution to a beneficiary or a distribution that is too
2268 small, the court may require the trustee to pay from the trust
2269 to the beneficiary an amount the court determines will restore

2270 the beneficiary, in whole or in part, to his or her appropriate
2271 position.
2272 (b) To the extent the breach of trust has resulted in a
2273 distribution to a beneficiary that is too large, the court may
2274 restore the beneficiaries, the trust, or both, in whole or in
2275 part, to their appropriate positions by requiring the trustee to
2276 withhold an amount from one or more future distributions to the
2277 beneficiary who received the distribution that was too large or
2278 by requiring that beneficiary to return some or all of the
2279 distribution to the trust.
2280 736.1002 Damages for breach of trust.--
2281 (1) A trustee who commits a breach of trust is liable for
2282 the greater of:
2283 (a) The amount required to restore the value of the trust
2284 property and trust distributions to what they would have been if
2285 the breach had not occurred, including lost income, capital
2286 gain, or appreciation that would have resulted from proper
2287 administration; or
2288 (b) The profit the trustee made by reason of the breach.
2289 (2) Except as otherwise provided in this subsection, if
2290 more than one person, including a trustee or trustees, is liable
2291 to the beneficiaries for a breach of trust, each liable person
2292 is entitled to pro rata contribution from the other person or
2293 persons. A person is not entitled to contribution if the person
2294 committed the breach of trust in bad faith. A person who
2295 received a benefit from the breach of trust is not entitled to
2296 contribution from another person to the extent of the benefit
2297 received.

2298 (3) In determining the pro rata shares of liable persons
2299 in the entire liability for a breach of trust:
2300 (a) Their relative degrees of fault shall be the basis for
2301 allocation of liability.
2302 (b) If equity requires, the collective liability of some
2303 as a group shall constitute a single share.
2304 (c) Principles of equity applicable to contribution
2305 generally shall apply.
2306 (4) The right of contribution shall be enforced as
2307 follows:
2308 (a) Contribution may be enforced by separate action,
2309 whether or not judgment has been entered in an action against
2310 two or more liable persons for the same breach of trust.
2311 (b) When a judgment has been entered in an action against
2312 two or more liable persons for the same breach of trust,
2313 contribution may be enforced in that action by judgment in favor
2314 of one judgment defendant against any other judgment defendants
2315 by motion upon notice to all parties to the action.
2316 (c) If there is a judgment for breach of trust against the
2317 liable person seeking contribution, any separate action by that
2318 person to enforce contribution must be commenced within 1 year
2319 after the judgment has become final by lapse of time for appeal
2320 or after appellate review.
2321 (d) If there is no judgment for the breach of trust
2322 against the liable person seeking contribution, the person's
2323 right of contribution is barred unless the person has:
2324 1. Discharged by payment the common liability within the
2325 period of the statute of limitations applicable to the

2326 beneficiary's right of action against the liable person and the
2327 person has commenced an action for contribution within 1 year
2328 after payment, or
2329 2. Agreed, while action is pending against the liable
2330 person, to discharge the common liability and has within 1 year
2331 after the agreement paid the liability and commenced the
2332 person's action for contribution.
2333 (5) The beneficiary's recovery of a judgment for breach of
2334 trust against one liable person does not of itself discharge
2335 other liable persons from liability for the breach of trust
2336 unless the judgment is satisfied. The satisfaction of the
2337 judgment does not impair any right of contribution.
2338 (6) The judgment of the court in determining the liability
2339 of several defendants to the beneficiary for breach of trust is
2340 binding upon such defendants in determining the right of such
2341 defendants to contribution.
2342 (7) Subsection (2) applies to all causes of action for
2343 breach of trust pending on July 1, 2007, under which causes of
2344 action the right of contribution among persons jointly and
2345 severally liable is involved and to all causes of action filed
2346 after July 1, 2007.
2347 736.1003 Damages in absence of breach.--Absent a breach of
2348 trust, a trustee is not liable to a beneficiary for a loss or
2349 depreciation in the value of trust property or for not having
2350 made a profit.
2351 736.1004 Attorney's fees and costs.--

2352 (1)(a) In all actions for breach of fiduciary duty or
2353 challenging the exercise of, or failure to exercise, a trustee's
2354 powers; and
2355 (b) In proceedings arising under ss. 736.0410-736.0417,
2356
2357 the court shall award taxable costs as in chancery actions,
2358 including attorney fees and guardian ad litem fees.
2359 (2) When awarding taxable costs under this section,
2360 including attorney fees and guardian ad litem fees, the court,
2361 in its discretion, may direct payment from a party's interest,
2362 if any, in the trust or enter a judgment that may be satisfied
2363 from other property of the party, or both.
2364 736.1005 Attorney's fees for services to the trust.--
2365 (1) Any attorney who has rendered services to a trust may
2366 be awarded reasonable compensation from the trust. The attorney
2367 may apply to the court for an order awarding attorney's fees
2368 and, after notice and service on the trustee and all
2369 beneficiaries entitled to an accounting under s. 736.0813, the
2370 court shall enter an order on the fee application.
2371 (2) Whenever attorney's fees are to be paid out of the
2372 trust, the court, in its discretion, may direct from what part
2373 of the trust the fees shall be paid.
2374 (3) Except when a trustee's interest may be adverse in a
2375 particular matter, the attorney shall give reasonable notice in
2376 writing to the trustee of the attorney's retention by an
2377 interested person and the attorney's entitlement to fees
2378 pursuant to this section. A court may reduce any fee award for
2379 services rendered by the attorney prior to the date of actual

2380 notice to the trustee, if the actual notice date is later than a
2381 date of reasonable notice. In exercising this discretion, the
2382 court may exclude compensation for services rendered after the
2383 reasonable notice date but prior to the date of actual notice.
2384 736.1006 Costs in trust proceedings.--
2385 (1) In all trust proceedings, costs may be awarded as in
2386 chancery actions.
2387 (2) Whenever costs are to be paid out of the trust, the
2388 court, in its discretion, may direct from what part of the trust
2389 the costs shall be paid.
2390 736.1007 Trustee's attorney's fees.--
2391 (1) If the trustee of a revocable trust retains an
2392 attorney to render legal services in connection with the initial
2393 administration of the trust, the attorney is entitled to
2394 reasonable compensation for those legal services, payable from
2395 the assets of the trust without court order. The trustee and the
2396 attorney may agree to compensation that is determined in a
2397 manner or amount other than the manner or amount provided in
2398 this section. The agreement is not binding on a person who bears
2399 the impact of the compensation unless that person is a party to
2400 or otherwise consents to be bound by the agreement. The
2401 agreement may provide that the trustee is not individually
2402 liable for the attorney's fees and costs.
2403 (2) Unless otherwise agreed, compensation based on the
2404 value of the trust assets immediately following the settlor's
2405 death and the income earned by the trust during initial
2406 administration at the rate of 75 percent of the schedule
2407 provided in s. 733.6171(3)(a)-(h) is presumed to be reasonable

2408 total compensation for ordinary services of all attorneys
2409 employed generally to advise a trustee concerning the trustee's
2410 duties in initial trust administration.
2411 (3) An attorney who is retained to render only limited and
2412 specifically defined legal services shall be compensated as
2413 provided in the retaining agreement. If the amount or method of
2414 determining compensation is not provided in the agreement, the
2415 attorney is entitled to a reasonable fee, taking into account
2416 the factors set forth in subsection (6).
2417 (4) Ordinary services of the attorney in an initial trust
2418 administration include legal advice and representation
2419 concerning the trustee's duties relating to:
2420 (a) Review of the trust instrument and each amendment for
2421 legal sufficiency and interpretation.
2422 (b) Implementation of substitution of the successor
2423 trustee.
2424 (c) Persons who must or should be served with required
2425 notices and the method and timing of such service.
2426 (d) The obligation of a successor to require a former
2427 trustee to provide an accounting.
2428 (e) The trustee's duty to protect, insure, and manage
2429 trust assets and the trustee's liability relating to these
2430 duties.
2431 (f) The trustee's duty regarding investments imposed by
2432 the prudent investor rule.
2433 (g) The trustee's obligation to inform and account to
2434 beneficiaries and the method of satisfaction of such
2435 obligations, the liability of the trust and trustee to the

2436 settlor's creditors, and the advisability or necessity for
2437 probate proceedings to bar creditors.
2438 (h) Contributions due to the personal representative of
2439 the settlor's estate for payment of expenses of administration
2440 and obligations of the settlor's estate.
2441 (i) Identifying tax returns required to be filed by the
2442 trustee, the trustee's liability for payment of taxes, and the
2443 due date of returns.
2444 (j) Filing a nontaxable affidavit, if not filed by a
2445 personal representative.
2446 (k) Order of payment of expenses of administration of the
2447 trust and order and priority of abatement of trust
2448 distributions.
2449 (l) Distribution of income or principal to beneficiaries
2450 or funding of further trusts provided in the governing
2451 instrument.
2452 (m) Preparation of any legal documents required to effect
2453 distribution.
2454 (n) Fiduciary duties, avoidance of self-dealing, conflicts
2455 of interest, duty of impartiality, and obligations to
2456 beneficiaries.
2457 (o) If there is a conflict of interest between a trustee
2458 who is a beneficiary and other beneficiaries of the trust,
2459 advice to the trustee on limitations of certain authority of the
2460 trustee regarding discretionary distributions or exercise of
2461 certain powers and alternatives for appointment of an
2462 independent trustee and appropriate procedures.

2463 (p) Procedures for the trustee's discharge from liability
2464 for administration of the trust on termination or resignation.
2465 (5) In addition to the attorney's fees for ordinary
2466 services, the attorney for the trustee shall be allowed further
2467 reasonable compensation for any extraordinary service. What
2468 constitutes an extraordinary service may vary depending on many
2469 factors, including the size of the trust. Extraordinary services
2470 may include, but are not limited to:
2471 (a) Involvement in a trust contest, trust construction, a
2472 proceeding for determination of beneficiaries, a contested
2473 claim, elective share proceedings, apportionment of estate
2474 taxes, or other adversary proceedings or litigation by or
2475 against the trust.
2476 (b) Representation of the trustee in an audit or any
2477 proceeding for adjustment, determination, or collection of any
2478 taxes.
2479 (c) Tax advice on postmortem tax planning, including, but
2480 not limited to, disclaimer, renunciation of fiduciary
2481 commission, alternate valuation date, allocation of
2482 administrative expenses between tax returns, the QTIP or reverse
2483 QTIP election, allocation of GST exemption, qualification for
2484 Internal Revenue Code ss. 303 and 6166 privileges, deduction of
2485 last illness expenses, distribution planning, asset basis
2486 considerations, throwback rules, handling income or deductions
2487 in respect of a decedent, valuation discounts, special use and
2488 other valuation, handling employee benefit or retirement
2489 proceeds, prompt assessment request, or request for release from
2490 personal liability for payment of tax.

2491 (d) Review of an estate tax return and preparation or
2492 review of other tax returns required to be filed by the trustee.
2493 (e) Preparation of decedent's federal estate tax return.
2494 If this return is prepared by the attorney, a fee of one-half of
2495 1 percent up to a value of $10 million and one-fourth of 1
2496 percent on the value in excess of $10 million, of the gross
2497 estate as finally determined for federal estate tax purposes, is
2498 presumed to be reasonable compensation for the attorney for this
2499 service. These fees shall include services for routine audit of
2500 the return, not beyond the examining agent level, if required.
2501 (f) Purchase, sale, lease, or encumbrance of real property
2502 by the trustee or involvement in zoning, land use,
2503 environmental, or other similar matters.
2504 (g) Legal advice regarding carrying on of decedent's
2505 business or conducting other commercial activity by the trustee.
2506 (h) Legal advice regarding claims for damage to the
2507 environment or related procedures.
2508 (i) Legal advice regarding homestead status of trust real
2509 property or proceedings involving the status.
2510 (j) Involvement in fiduciary, employee, or attorney
2511 compensation disputes.
2512 (k) Considerations of special valuation of trust assets,
2513 including discounts for blockage, minority interests, lack of
2514 marketability, and environmental liability.
2515 (6) Upon petition of any interested person in a proceeding
2516 to review the compensation paid or to be paid to the attorney
2517 for the trustee, the court may increase or decrease the
2518 compensation for ordinary services of the attorney for the

2519 trustee or award compensation for extraordinary services if the
2520 facts and circumstances of the particular administration
2521 warrant. In determining reasonable compensation, the court shall
2522 consider all of the following factors giving such weight to each
2523 as the court may determine to be appropriate:
2524 (a) The promptness, efficiency, and skill with which the
2525 initial administration was handled by the attorney.
2526 (b) The responsibilities assumed by, and potential
2527 liabilities of, the attorney.
2528 (c) The nature and value of the assets that are affected
2529 by the decedent's death.
2530 (d) The benefits or detriments resulting to the trust or
2531 the trust's beneficiaries from the attorney's services.
2532 (e) The complexity or simplicity of the administration and
2533 the novelty of issues presented.
2534 (f) The attorney's participation in tax planning for the
2535 estate, the trust, and the trust's beneficiaries and tax return
2536 preparation or review and approval.
2537 (g) The nature of the trust assets, the expenses of
2538 administration, and the claims payable by the trust and the
2539 compensation paid to other professionals and fiduciaries.
2540 (h) Any delay in payment of the compensation after the
2541 services were furnished.
2542 (i) Any other relevant factors.
2543 (7) The court may determine reasonable attorney's
2544 compensation without receiving expert testimony. Any party may
2545 offer expert testimony after notice to interested persons. If
2546 expert testimony is offered, an expert witness fee may be

2547 awarded by the court and paid from the assets of the trust. The
2548 court shall direct from what part of the trust the fee is to be
2549 paid.
2550 (8) If a separate written agreement regarding compensation
2551 exists between the attorney and the settlor, the attorney shall
2552 furnish a copy to the trustee prior to commencement of
2553 employment and, if employed, shall promptly file and serve a
2554 copy on all interested persons. A separate agreement or a
2555 provision in the trust suggesting or directing the trustee to
2556 retain a specific attorney does not obligate the trustee to
2557 employ the attorney or obligate the attorney to accept the
2558 representation but, if the attorney who is a party to the
2559 agreement or who drafted the trust is employed, the compensation
2560 paid shall not exceed the compensation provided in the
2561 agreement.
2562 (9) Court proceedings to determine compensation, if
2563 required, are a part of the trust administration process and the
2564 costs, including fees for the trustee's attorney, shall be
2565 determined by the court and paid from the assets of the trust
2566 unless the court finds the attorney's fees request to be
2567 substantially unreasonable. The court shall direct from what
2568 part of the trust the fees are to be paid.
2569 (10) As used in this section, the term "initial trust
2570 administration" means administration of a revocable trust during
2571 the period that begins with the death of the settlor and ends on
2572 the final distribution of trust assets outright or to continuing
2573 trusts created under the trust agreement but, if an estate tax
2574 return is required, not until after issuance of an estate tax

2575 closing letter or other evidence of termination of the estate
2576 tax proceeding. This initial period is not intended to include
2577 continued regular administration of the trust.
2578 736.1008 Limitations on proceedings against trustees.--
2579 (1) Except as provided in subsection (2), all claims by a
2580 beneficiary against a trustee for breach of trust are barred as
2581 provided in chapter 95 as to:
2582 (a) All matters adequately disclosed in a trust disclosure
2583 document issued by the trustee, with the limitations period
2584 beginning on the date of receipt of adequate disclosure.
2585 (b) All matters not adequately disclosed in a trust
2586 disclosure document if the trustee has issued a final trust
2587 accounting and has given written notice to the beneficiary of
2588 the availability of the trust records for examination and that
2589 any claims with respect to matters not adequately disclosed may
2590 be barred unless an action is commenced within the applicable
2591 limitations period provided in chapter 95. The limitations
2592 period begins on the date of receipt of the final trust
2593 accounting and notice.
2594 (2) Unless sooner barred by adjudication, consent, or
2595 limitations, a beneficiary is barred from bringing an action
2596 against a trustee for breach of trust with respect to a matter
2597 that was adequately disclosed in a trust disclosure document
2598 unless a proceeding to assert the claim is commenced within 6
2599 months after receipt from the trustee of the trust disclosure
2600 document or a limitation notice that applies to that disclosure
2601 document, whichever is received later.

2602 (3) When a trustee has not issued a final trust accounting
2603 or has not given written notice to the beneficiary of the
2604 availability of the trust records for examination and that
2605 claims with respect to matters not adequately disclosed may be
2606 barred, a claim against the trustee for breach of trust based on
2607 a matter not adequately disclosed in a trust disclosure document
2608 accrues when the beneficiary has actual knowledge of the
2609 trustee's repudiation of the trust or adverse possession of
2610 trust assets, and is barred as provided in chapter 95.
2611 (4) As used in this section, the term:
2612 (a) "Trust disclosure document" means a trust accounting
2613 or any other written report of the trustee. A trust disclosure
2614 document adequately discloses a matter if the document provides
2615 sufficient information so that a beneficiary knows of a claim or
2616 reasonably should have inquired into the existence of a claim
2617 with respect to that matter.
2618 (b) "Trust accounting" means an accounting that adequately
2619 discloses the information required by and that substantially
2620 complies with the standards set forth in s. 736.08135.
2621 (c) "Limitation notice" means a written statement of the
2622 trustee that an action by a beneficiary against the trustee for
2623 breach of trust based on any matter adequately disclosed in a
2624 trust disclosure document may be barred unless the action is
2625 commenced within 6 months after receipt of the trust disclosure
2626 document or receipt of a limitation notice that applies to that
2627 trust disclosure document, whichever is later. A limitation
2628 notice may but is not required to be in the following form: "An
2629 action for breach of trust based on matters disclosed in a trust

2630 accounting or other written report of the trustee may be subject
2631 to a 6-month statute of limitations from the receipt of the
2632 trust accounting or other written report. If you have questions,
2633 please consult your attorney."
2634 (5) For purposes of this section, a limitation notice
2635 applies to a trust disclosure document when the limitation
2636 notice is:
2637 (a) Contained as a part of the trust disclosure document
2638 or as a part of another trust disclosure document received
2639 within 1 year prior to the receipt of the latter trust
2640 disclosure document;
2641 (b) Accompanied concurrently by the trust disclosure
2642 document or by another trust disclosure document that was
2643 received within 1 year prior to the receipt of the latter trust
2644 disclosure document;
2645 (c) Delivered separately within 10 days after the delivery
2646 of the trust disclosure document or of another trust disclosure
2647 document that was received within 1 year prior to the receipt of
2648 the latter trust disclosure document. For purposes of this
2649 paragraph, a limitation notice is not delivered separately if
2650 the notice is accompanied by another written communication,
2651 other than a written communication that refers only to the
2652 limitation notice; or
2653 (d) Received more than 10 days after the delivery of the
2654 trust disclosure document but only if the limitation notice
2655 references that trust disclosure document and:
2656 1. Offers to provide to the beneficiary on request another
2657 copy of that trust disclosure document if the document was

2658 received by the beneficiary within 1 year prior to receipt of
2659 the limitation notice; or
2660 2. Is accompanied by another copy of that trust disclosure
2661 document if the trust disclosure document was received by the
2662 beneficiary 1 year or more prior to the receipt of the
2663 limitation notice.
2664 (6) This section applies to trust accountings for
2665 accounting periods beginning on or after January 1, 2008, and to
2666 written reports, other than trust accountings, received by a
2667 beneficiary on or after January 1, 2008.
2668 736.1009 Reliance on trust instrument.--A trustee who acts
2669 in reasonable reliance on the terms of the trust as expressed in
2670 the trust instrument is not liable to a beneficiary for a breach
2671 of trust to the extent the breach resulted from the reliance.
2672 736.1010 Event affecting administration or
2673 distribution.--If the happening of an event, including marriage,
2674 divorce, performance of educational requirements, or death,
2675 affects the administration or distribution of a trust, a trustee
2676 who has exercised reasonable care to ascertain the happening of
2677 the event is not liable for a loss resulting from the trustee's
2678 lack of knowledge.
2679 736.1011 Exculpation of trustee.--
2680 (1) A term of a trust relieving a trustee of liability for
2681 breach of trust is unenforceable to the extent that the term:
2682 (a) Relieves the trustee of liability for breach of trust
2683 committed in bad faith or with reckless indifference to the
2684 purposes of the trust or the interests of the beneficiaries; or

2685 (b) Was inserted into the trust instrument as the result
2686 of an abuse by the trustee of a fiduciary or confidential
2687 relationship with the settlor.
2688 (2) An exculpatory term drafted or caused to be drafted by
2689 the trustee is invalid as an abuse of a fiduciary or
2690 confidential relationship unless the trustee proves that the
2691 exculpatory term is fair under the circumstances and that the
2692 term's existence and contents were adequately communicated
2693 directly to the settlor.
2694 736.1012 Beneficiary's consent, release, or
2695 ratification.--A trustee is not liable to a beneficiary for
2696 breach of trust if the beneficiary consented to the conduct
2697 constituting the breach, released the trustee from liability for
2698 the breach, or ratified the transaction constituting the breach,
2699 unless:
2700 (1) The consent, release, or ratification of the
2701 beneficiary was induced by improper conduct of the trustee; or
2702 (2) At the time of the consent, release, or ratification,
2703 the beneficiary did not know of the beneficiary's rights or of
2704 the material facts relating to the breach.
2705 736.1013 Limitation on personal liability of trustee.--
2706 (1) Except as otherwise provided in the contract, a
2707 trustee is not personally liable on a contract properly entered
2708 into in the trustee's fiduciary capacity in the course of
2709 administering the trust if the trustee in the contract disclosed
2710 the fiduciary capacity.
2711 (2) A trustee is personally liable for torts committed in
2712 the course of administering a trust or for obligations arising

2713 from ownership or control of trust property only if the trustee
2714 is personally at fault.
2715 (3) A claim based on a contract entered into by a trustee
2716 in the trustee's fiduciary capacity, on an obligation arising
2717 from ownership or control of trust property, or on a tort
2718 committed in the course of administering a trust may be asserted
2719 in a judicial proceeding against the trustee in the trustee's
2720 fiduciary capacity, whether or not the trustee is personally
2721 liable for the claim.
2722 (4) Issues of liability between the trust estate and the
2723 trustee individually may be determined in a proceeding for
2724 accounting, surcharge, or indemnification or in any other
2725 appropriate proceeding.
2726 736.1014 Limitations on actions against certain trusts.--
2727 (1) After the death of a settlor, no creditor of the
2728 settlor may bring, maintain, or continue any direct action
2729 against a trust described in s. 733.707(3), the trustee of the
2730 trust, or any beneficiary of the trust that is dependent on the
2731 individual liability of the settlor. Such claims and causes of
2732 action against the settlor shall be presented and enforced
2733 against the settlor's estate as provided in part VII of chapter
2734 733 and the personal representative of the settlor's estate may
2735 obtain payment from the trustee of a trust described in s.
2736 733.707(3) as provided in ss. 733.607(2), 733.707(3), and
2737 736.05053.
2738 (2) This section does not preclude a direct action against
2739 a trust described in s. 733.707(3), the trustee of the trust, or

2740 a beneficiary of the trust that is not dependent on the
2741 individual liability of the settlor.
2742 (3) This section does not affect the lien of any duly
2743 recorded mortgage or security interest or the lien of any person
2744 in possession of personal property or the right to foreclose and
2745 enforce the mortgage or lien.
2746 736.1015 Interest as general partner.--
2747 (1) Unless personal liability is imposed in the contract,
2748 a trustee who holds an interest as a general partner in a
2749 general or limited partnership is not personally liable on a
2750 contract entered into by the partnership after the trust's
2751 acquisition of the interest if the fiduciary capacity was
2752 disclosed in the contract or in a statement previously filed
2753 pursuant to a Uniform Partnership Act or Uniform Limited
2754 Partnership Act.
2755 (2) A trustee who holds an interest as a general partner
2756 is not personally liable for torts committed by the partnership
2757 or for obligations arising from ownership or control of the
2758 interest unless the trustee is personally at fault.
2759 (3) If the trustee of a revocable trust holds an interest
2760 as a general partner, the settlor is personally liable for
2761 contracts and other obligations of the partnership as if the
2762 settlor were a general partner.
2763 736.1016 Protection of person dealing with trustee.--
2764 (1) A person other than a beneficiary who in good faith
2765 assists a trustee or who in good faith and for value deals with
2766 a trustee, without knowledge that the trustee is exceeding or

2767 improperly exercising the trustee's powers, is protected from
2768 liability as if the trustee properly exercised the power.
2769 (2) A person other than a beneficiary who in good faith
2770 deals with a trustee is not required to inquire into the extent
2771 of the trustee's powers or the propriety of their exercise.
2772 (3) A person who in good faith delivers assets to a
2773 trustee need not ensure their proper application.
2774 (4) A person other than a beneficiary who in good faith
2775 assists a former trustee or who in good faith and for value
2776 deals with a former trustee, without knowledge that the
2777 trusteeship has terminated, is protected from liability as if
2778 the former trustee were still a trustee.
2779 (5) Comparable protective provisions of other laws
2780 relating to commercial transactions or transfer of securities by
2781 fiduciaries prevail over the protection provided by this
2782 section.
2783 736.1017 Certification of trust.--
2784 (1) Instead of furnishing a copy of the trust instrument
2785 to a person other than a beneficiary, the trustee may furnish to
2786 the person a certification of trust containing the following
2787 information:
2788 (a) The trust exists and the date the trust instrument was
2789 executed.
2790 (b) The identity of the settlor.
2791 (c) The identity and address of the currently acting
2792 trustee.
2793 (d) The powers of the trustee.

2794 (e) The revocability or irrevocability of the trust and
2795 the identity of any person holding a power to revoke the trust.
2796 (f) The authority of cotrustees to sign or otherwise
2797 authenticate and whether all or less than all are required in
2798 order to exercise powers of the trustee.
2799 (g) The manner of taking title to trust property.
2800 (2) A certification of trust may be signed or otherwise
2801 authenticated by any trustee.
2802 (3) A certification of trust must state that the trust has
2803 not been revoked, modified, or amended in any manner that would
2804 cause the representations contained in the certification of
2805 trust to be incorrect.
2806 (4) A certification of trust need not contain the
2807 dispositive terms of a trust.
2808 (5) A recipient of a certification of trust may require
2809 the trustee to furnish copies of any excerpts from the original
2810 trust instrument and later amendments that designate the trustee
2811 and confer upon the trustee the power to act in the pending
2812 transaction.
2813 (6) A person who acts in reliance on a certification of
2814 trust without knowledge that the representations contained in
2815 the certification are incorrect is not liable to any person for
2816 so acting and may assume without inquiry the existence of the
2817 facts contained in the certification. Knowledge of the terms of
2818 the trust may not be inferred solely from the fact that a copy
2819 of all or part of the trust instrument is held by the person
2820 relying on the certification.

2821 (7) A person who in good faith enters into a transaction
2822 in reliance on a certification of trust may enforce the
2823 transaction against the trust property as if the representations
2824 contained in the certification were correct.
2825 (8) This section does not limit the right of a person to
2826 obtain a copy of the trust instrument when required to be
2827 furnished by law or in a judicial proceeding concerning the
2828 trust.
2829 736.1018 Improper distribution or payment; liability of
2830 distributee.--Any person who received a distribution or was paid
2831 improperly from a trust shall return the assets or funds
2832 received and the income from those assets or interest on the
2833 funds from the date of distribution or payment unless the
2834 distribution or payment cannot be questioned because of
2835 adjudication, estoppel, or limitations. If the person does not
2836 have the assets or funds, the value of the assets or funds at
2837 the date of disposition, income from the assets or funds, and
2838 gain received by the person from the assets or funds shall be
2839 returned.
2840 Section 11. Part XI of chapter 736, Florida Statutes,
2841 consisting of sections 736.1101, 736.1102, 736.1103, 736.1104,
2842 736.1105, 736.1106, 736.1107, and 736.1108, is created to read:
2843
2844 PART XI
2845 RULES OF CONSTRUCTION
2846
2847 736.1101 Rules of construction; general
2848 provisions.--Except as provided in s. 736.0105(2):

2849 (1) The intent of the settlor as expressed in the terms of
2850 the trust controls the legal effect of the dispositions made in
2851 the trust.
2852 (2) The rules of construction as expressed in this part
2853 shall apply unless a contrary intent is indicated by the terms
2854 of the trust.
2855 736.1102 Construction of generic terms.--Adopted persons
2856 and persons born out of wedlock are included in class gift
2857 terminology and terms of relationship, in accordance with rules
2858 for determining relationships for purposes of intestate
2859 succession.
2860 736.1103 Gifts to multi-generation classes to be per
2861 stirpes.--Class gifts to descendants, issue, and other multi-
2862 generation classes shall be per stirpes.
2863 736.1104 Killer not entitled to receive property or other
2864 benefits by reason of victim's death.--
2865 (1) A beneficiary of a trust who unlawfully and
2866 intentionally kills or unlawfully and intentionally participates
2867 in procuring the death of the settlor or another person on whose
2868 death such beneficiary's interest depends, is not entitled to
2869 any trust interest, including homestead, dependent on the
2870 victim's death and such interest shall devolve as though the
2871 killer had predeceased the victim.
2872 (2) A final judgment of conviction of murder in any degree
2873 is conclusive for the purposes of this section. In the absence
2874 of a murder conviction in any degree, the court may determine by
2875 the greater weight of the evidence whether the killing was
2876 unlawful and intentional for purposes of this section.

2877 736.1105 Dissolution of marriage; effect on revocable
2878 trust.--Unless the trust instrument or the judgment for
2879 dissolution of marriage or divorce expressly provides otherwise,
2880 if a revocable trust is executed by a husband or wife as settlor
2881 prior to annulment of the marriage or entry of a judgment for
2882 dissolution of marriage or divorce of the settlor from the
2883 settlor's spouse, any provision of the trust that affects the
2884 settlor's spouse will become void upon annulment of the marriage
2885 or entry of the judgment of dissolution of marriage or divorce
2886 and any such trust shall be administered and construed as if the
2887 settlor's spouse had died on the date of the annulment or on
2888 entry of the judgment for dissolution of marriage or divorce.
2889 736.1106 Antilapse; survivorship with respect to future
2890 interests under terms of inter vivos and testamentary trusts;
2891 substitute takers.--
2892 (1) As used in this section, the term:
2893 (a) "Beneficiary" means the beneficiary of a future
2894 interest and includes a class member if the future interest is
2895 in the form of a class gift.
2896 (b) "Distribution date," with respect to a future
2897 interest, means the time when the future interest is to take
2898 effect in possession or enjoyment. The distribution date need
2899 not occur at the beginning or end of a calendar day, but can
2900 occur at a time during the course of a day.
2901 (c) "Future interest" includes an alternative future
2902 interest and a future interest in the form of a class gift.
2903 (d) "Future interest under the terms of a trust" means a
2904 future interest created by an inter vivos or testamentary

2905 transfer to an existing trust or creating a trust or by an
2906 exercise of a power of appointment to an existing trust
2907 directing the continuance of an existing trust, designating a
2908 beneficiary of an existing trust, or creating a trust.
2909 (e) "Surviving beneficiary" or "surviving descendant"
2910 means a beneficiary or a descendant who did not predecease the
2911 distribution date or is not deemed to have predeceased the
2912 distribution date by operation of law.
2913 (2) A future interest under the terms of a trust is
2914 contingent upon the beneficiary surviving the distribution date.
2915 Unless a contrary intent appears in the trust instrument, if a
2916 beneficiary of a future interest under the terms of a trust
2917 fails to survive the distribution date, and the deceased
2918 beneficiary leaves surviving descendants, a substitute gift is
2919 created in the beneficiary's surviving descendants. They take
2920 per stirpes the property to which the beneficiary would have
2921 been entitled if the beneficiary had survived the distribution
2922 date.
2923 (3) In the application of this section:
2924 (a) Words of survivorship attached to a future interest
2925 are a sufficient indication of an intent contrary to the
2926 application of this section.
2927 (b) A residuary clause in a will is not a sufficient
2928 indication of an intent contrary to the application of this
2929 section, whether or not the will specifically provides that
2930 lapsed or failed devises are to pass under the residuary clause.

2931 (4) If, after the application of subsections (2) and (3),
2932 there is no surviving taker, the property passes in the
2933 following order:
2934 (a) If the future interest was created by the exercise of
2935 a power of appointment, the property passes under the donor's
2936 gift-in-default clause, if any, which clause is treated as
2937 creating a future interest under the terms of a trust.
2938 (b) If no taker is produced by the application of
2939 paragraph (a) and the trust was created in a nonresiduary devise
2940 or appointment in the transferor's will, the property passes
2941 under the residuary clause in the transferor's will. For
2942 purposes of this section, the residuary clause is treated as
2943 creating a future interest under the terms of a trust.
2944 (c) If no taker is produced by the application of
2945 paragraph (a) or paragraph (b), the property passes to those
2946 persons, including the state, and in such shares as would
2947 succeed to the transferor's intestate estate under the intestate
2948 succession law of the transferor's domicile if the transferor
2949 died when the disposition is to take effect in possession or
2950 enjoyment.
2951
2952 For purposes of paragraphs (b) and (c), the term "transferor"
2953 with respect to a future interest created by the exercise of a
2954 power of appointment, means the donor if the power was a
2955 nongeneral power and the donee if the power was a general power.
2956 (5) This section applies to all trusts other than trusts
2957 that were irrevocable before the effective date of this code.

2958 736.1107 Change in securities; accessions;
2959 nonademption.--A gift of specific securities, rather than their
2960 equivalent value, entitles the beneficiary only to:
2961 (1) As much of the gifted securities of the same issuer
2962 held by the trust estate at the time of the occurrence of the
2963 event entitling the beneficiary to distribution.
2964 (2) Any additional or other securities of the same issuer
2965 held by the trust estate because of action initiated by the
2966 issuer, excluding any acquired by exercise of purchase options.
2967 (3) Securities of another issuer held by the trust estate
2968 as a result of a merger, consolidation, reorganization, or other
2969 similar action initiated by the original issuer.
2970 736.1108 Penalty clause for contest.--
2971 (1) A provision in a trust instrument purporting to
2972 penalize any interested person for contesting the trust
2973 instrument or instituting other proceedings relating to a trust
2974 estate or trust assets is unenforceable.
2975 (2) This section applies to trusts created on or after
2976 October 1, 1993. For purposes of this subsection, a revocable
2977 trust shall be treated as created when the right of revocation
2978 terminates.
2979 Section 12. Part XII of chapter 736, Florida Statutes,
2980 consisting of sections 736.1201, 736.1202, 736.1203, 736.1204,
2981 736.1205, 736.1206, 736.1207, 736.1208, 736.1209, and 736.1210,
2982 is created to read:
2983
2984 PART XII
2985 CHARITABLE TRUSTS

2986
2987 736.1201 Definitions.--As used in this part:
2988 (1) "Charitable organization" means an organization
2989 described in s. 501(c)(3) of the Internal Revenue Code and
2990 exempt from tax under s. 501(a) of the Internal Revenue Code.
2991 (2) "Internal Revenue Code" means the Internal Revenue
2992 Code of 1986, as amended.
2993 (3) "Private foundation trust" means a trust, including a
2994 trust described in s. 4947(a)(1) of the Internal Revenue Code,
2995 as defined in s. 509(a) of the Internal Revenue Code.
2996 (4) "Split interest trust" means a trust for individual
2997 and charitable beneficiaries that is subject to the provisions
2998 of s. 4947(a)(2) of the Internal Revenue Code.
2999 (5) "State attorney" means the state attorney for the
3000 judicial circuit of the principal place of administration of the
3001 trust pursuant to s. 736.0108.
3002 736.1202 Application of this part.--Except as otherwise
3003 provided in the trust, the provisions of this part apply to all
3004 private foundation trusts and split interest trusts, whether
3005 created or established before or after November 1, 1971, and to
3006 all trust assets acquired by the trustee before or after
3007 November 1, 1971.
3008 736.1203 Trustee of a private foundation trust or a split
3009 interest trust.--Except as provided in s. 736.1205, the trustee
3010 of a private foundation trust or a split interest trust has the
3011 duties and powers conferred on the trustee by this part.
3012 736.1204 Powers and duties of trustee of a private
3013 foundation trust or a split interest trust.--

3014 (1) In the exercise of a trustee's powers, including the
3015 powers granted by this part, a trustee has a duty to act with
3016 due regard to the trustee's obligation as a fiduciary, including
3017 a duty not to exercise any power in such a way as to:
3018 (a) Deprive the trust of an otherwise available tax
3019 exemption, deduction, or credit for tax purposes;
3020 (b) Deprive a donor of a trust asset or tax deduction or
3021 credit; or
3022 (c) Operate to impose a tax on a donor, trust, or other
3023 person.
3024
3025 For purposes of this subsection, the term "tax" includes, but is
3026 not limited to, any federal, state, or local excise, income,
3027 gift, estate, or inheritance tax.
3028 (2) Except as provided in s. 736.1205, a trustee of a
3029 private foundation trust shall make distributions at such time
3030 and in such manner as not to subject the trust to tax under s.
3031 4942 of the Internal Revenue Code.
3032 (3) Except as provided in subsection (4) and in s.
3033 736.1205, a trustee of a private foundation trust, or a split
3034 interest trust to the extent that the split interest trust is
3035 subject to the provisions of s. 4947(a)(2) of the Internal
3036 Revenue Code, in the exercise of the trustee's powers shall not:
3037 (a) Engage in any act of self-dealing as defined in s.
3038 4941(d) of the Internal Revenue Code;
3039 (b) Retain any excess business holdings as defined in s.
3040 4943(c) of the Internal Revenue Code;

3041 (c) Make any investments in a manner that subjects the
3042 foundation to tax under s. 4944 of the Internal Revenue Code; or
3043 (d) Make any taxable expenditures as defined in s. 4945(d)
3044 of the Internal Revenue Code.
3045 (4) Paragraphs (3)(b) and (c) shall not apply to a split
3046 interest trust if:
3047 (a) All the interest from income, and none of the
3048 remainder interest, of the trust is devoted solely to one or
3049 more of the purposes described in s. 170(c)(2)(B) of the
3050 Internal Revenue Code, and all amounts in the trust for which a
3051 deduction was allowed under s. 170, s. 545(b)(2), s. 556(b)(2),
3052 s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 of the Internal
3053 Revenue Code have an aggregate fair market value of not more
3054 than 60 percent of the aggregate fair market value of all
3055 amounts in the trust; or
3056 (b) A deduction was allowed under s. 170, s. 545(b)(2), s.
3057 556(b)(2), s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 of the
3058 Internal Revenue Code for amounts payable under the terms of the
3059 trust to every remainder beneficiary but not to any income
3060 beneficiary.
3061 736.1205 Notice that this part does not apply.--In the
3062 case of a power to make distributions, if the trustee determines
3063 that the governing instrument contains provisions that are more
3064 restrictive than s. 736.1204(2), or if the trust contains other
3065 powers, inconsistent with the provisions of s. 736.1204(3) that
3066 specifically direct acts by the trustee, the trustee shall
3067 notify the state attorney when the trust becomes subject to this
3068 part. Section 736.1204 does not apply to any trust for which

3069 notice has been given pursuant to this section unless the trust
3070 is amended to comply with the terms of this part.
3071 736.1206 Power to amend trust instrument.--
3072 (1) In the case of a trust that is solely for a named
3073 charitable organization or organizations and for which the
3074 trustee does not possess any discretion concerning the
3075 distribution of income or principal among two or more such
3076 organizations, the trustee may amend the governing instrument to
3077 comply with the provisions of s. 736.1204(2) with the consent of
3078 the named charitable organization or organizations.
3079 (2) In the case of a charitable trust that is not subject
3080 to the provisions of subsection (1), the trustee may amend the
3081 governing instrument to comply with the provisions of s.
3082 736.1204(2) with the consent of the state attorney.
3083 736.1207 Power of court to permit deviation.--This part
3084 does not affect the power of a court to relieve a trustee from
3085 any restrictions on the powers and duties that are placed on the
3086 trustee by the governing instrument or applicable law for cause
3087 shown and on complaint of the trustee, state attorney, or an
3088 affected beneficiary and notice to the affected parties.
3089 736.1208 Release; property and persons affected; manner of
3090 effecting.--
3091 (1) The trustee of a trust, all of the unexpired interests
3092 in which are devoted to one or more charitable purposes, may
3093 release a power to select charitable donees unless the creating
3094 instrument provides otherwise.
3095 (2) The release of a power to select charitable donees may
3096 apply to all or any part of the property subject to the power

3097 and may reduce or limit the charitable organizations, or classes
3098 of charitable organizations, in whose favor the power is
3099 exercisable.
3100 (3) A release shall be effected by a duly acknowledged
3101 written instrument signed by the trustee and delivered as
3102 provided in subsection (4).
3103 (4) Delivery of a release shall be accomplished as
3104 follows:
3105 (a) If the release is accomplished by specifying a
3106 charitable organization or organizations as beneficiary or
3107 beneficiaries of the trust, by delivery of a copy of the release
3108 to each designated charitable organization.
3109 (b) If the release is accomplished by reducing the class
3110 of permissible charitable organizations, by delivery of a copy
3111 of the release to the state attorney.
3112 (5) If a release is accomplished by specifying a public
3113 charitable organization or organizations as beneficiary or
3114 beneficiaries of the trust, the trust at all times thereafter
3115 shall be operated exclusively for the benefit of, and be
3116 supervised by, the specified public charitable organization or
3117 organizations.
3118 736.1209 Election to come under this part.--With the
3119 consent of that organization or organizations, a trustee of a
3120 trust for the benefit of a public charitable organization or
3121 organizations may come under s. 736.0838(5) by filing with the
3122 state attorney an election, accompanied by the proof of required
3123 consent. Thereafter the trust shall be subject to s.
3124 736.1208(5).

3125 736.1210 Interpretation.--This part shall be interpreted
3126 to effectuate the intent of the state to preserve, foster, and
3127 encourage gifts to, or for the benefit of, charitable
3128 organizations.
3129 Section 13. Part XIII of chapter 736, Florida Statutes,
3130 consisting of sections 736.1301, 736.1302, and 736.1303, is
3131 created to read:
3132
3133 PART XIII
3134 MISCELLANEOUS
3135
3136 736.1301 Electronic records and signatures.--Any
3137 provisions of this code governing the legal effect, validity, or
3138 enforceability of electronic records or electronic signatures,
3139 and of contracts formed or performed with the use of such
3140 records or signatures, are deemed to conform to the requirements
3141 of s. 102 of the Electronic Signatures in Global and National
3142 Commerce Act, 15 U.S.C. s. 7002, and supersede, modify, and
3143 limit the requirements of the Electronic Signatures in Global
3144 and National Commerce Act.
3145 736.1302 Severability clause.--If any provision of this
3146 code or its application to any person or circumstances is held
3147 invalid, the invalidity does not affect other provisions or
3148 applications of this code that can be given effect without the
3149 invalid provision or application, and to this end the provisions
3150 of this code are severable.
3151 736.1303 Application to existing relationships.--

3152 (1) Except as otherwise provided in this code, on July 1,
3153 2007:
3154 (a) This code applies to all trusts created before, on, or
3155 after such date.
3156 (b) This code applies to all judicial proceedings
3157 concerning trusts commenced on or after such date.
3158 (c) This code applies to judicial proceedings concerning
3159 trusts commenced before such date, unless the court finds that
3160 application of a particular provision of this code would
3161 substantially interfere with the effective conduct of the
3162 judicial proceedings or prejudice the rights of the parties, in
3163 which case the particular provision of this code does not apply
3164 and the superseded law applies.
3165 (d) Any rule of construction or presumption provided in
3166 this code applies to trust instruments executed before the
3167 effective date of this code unless there is a clear indication
3168 of a contrary intent in the terms of the trust.
3169 (e) An act done before such date is not affected by this
3170 code.
3171 (2) If a right is acquired, extinguished, or barred on the
3172 expiration of a prescribed period that has commenced to run
3173 under any other law before July 1, 2007, that law continues to
3174 apply to the right even if it has been repealed or superseded.
3175 Section 14. Paragraph (a) of subsection (5) of section
3176 497.458, Florida Statutes, is amended to read:
3177 497.458 Disposition of proceeds received on contracts.--
3178 (5) The trustee of the trust established pursuant to this
3179 section shall only have the power to:

3180 (a) Invest in investments as prescribed in s. 215.47 and
3181 exercise the powers set forth in part VIII of chapter 736 ~~part~~
3182 ~~IV of chapter 737~~, provided that the licensing authority may by
3183 order require the trustee to liquidate or dispose of any
3184 investment within 30 days after such order, or within such other
3185 times as the order may direct. The licensing authority may issue
3186 such order if it determines that the investment violates any
3187 provision of this chapter or is not in the best interests of the
3188 preneed contract holders whose contracts are secured by the
3189 trust funds.
3190 Section 15. Section 518.117, Florida Statutes, is created
3191 to read:
3192 518.117 Permissible investments of fiduciary funds.--A
3193 fiduciary that is authorized by lawful authority to engage in
3194 trust business as defined in s. 658.12(20) may invest fiduciary
3195 funds in accordance with s. 660.417 so long as the investment
3196 otherwise complies with this chapter.
3197 Section 16. Subsection (2) of section 607.0802, Florida
3198 Statutes, is amended to read:
3199 607.0802 Qualifications of directors.--
3200 (2) In the event that the eligibility to serve as a member
3201 of the board of directors of a condominium association,
3202 cooperative association, homeowners' association, or mobile home
3203 owners' association is restricted to membership in such
3204 association and membership is appurtenant to ownership of a
3205 unit, parcel, or mobile home, a grantor of a trust described in
3206 s. 733.707(3), or a qualified beneficiary as defined in s.
3207 736.0103(14) ~~737.303(4)(b)~~ of a trust which owns a unit, parcel,

3208 or mobile home shall be deemed a member of the association and
3209 eligible to serve as a director of the condominium association,
3210 cooperative association, homeowners' association, or mobile home
3211 owners' association, provided that said beneficiary occupies the
3212 unit, parcel, or mobile home.
3213 Section 17. Subsection (2) of section 617.0802, Florida
3214 Statutes, is amended to read:
3215 617.0802 Qualifications of directors.--
3216 (2) In the event that the eligibility to serve as a member
3217 of the board of directors of a condominium association,
3218 cooperative association, homeowners' association, or mobile home
3219 owners' association is restricted to membership in such
3220 association and membership is appurtenant to ownership of a
3221 unit, parcel, or mobile home, a grantor of a trust described in
3222 s. 733.707(3), or a qualified beneficiary as defined in s.
3223 736.0103(14) ~~737.303(4)(b)~~ of a trust which owns a unit, parcel,
3224 or mobile home shall be deemed a member of the association and
3225 eligible to serve as a director of the condominium association,
3226 cooperative association, homeowners' association, or mobile home
3227 owners' association, provided that said beneficiary occupies the
3228 unit, parcel, or mobile home.
3229 Section 18. Subsection (6) of section 660.25, Florida
3230 Statutes, renumbered as subsection (7) and amended, and a new
3231 subsection (6) is added to that section, to read:
3232 660.25 Definitions.--Subject to other definitions
3233 contained in other sections of this code, and unless the context
3234 otherwise requires, in this chapter:

3235 (6) "Investment instrument" means any security as defined
3236 in s. 2(a)(1) of the Securities Act of 1933; any security of an
3237 open-end or closed-end management investment company or
3238 investment trust registered under the Investment Company Act of
3239 1940, 15 U.S.C. ss. 80a-1 et seq., as amended; any contract of
3240 sale of a commodity for future delivery within the meaning of s.
3241 2(i) of the Commodity Exchange Act; or any other interest in
3242 securities, including, but not limited to, shares or interests
3243 in a private investment fund, including, but not limited to, a
3244 private investment fund organized as a limited partnership, a
3245 limited liability company, a statutory or common law business
3246 trust, a statutory trust, or a real estate investment trust, a
3247 joint venture, or any other general or limited partnership;
3248 derivatives or other interests of any nature in securities such
3249 as options, options on futures, and variable forward contracts;
3250 mutual funds; common trust funds; money market funds; hedge
3251 funds; private equity or venture capital funds; insurance
3252 contracts; and other entities or vehicles investing in
3253 securities or interests in securities whether registered or
3254 otherwise.
3255 (7) ~~(6)~~ Terms used but not defined in this chapter, but
3256 which are expressly defined in chapter 518, the financial
3257 institutions codes, chapter 732, chapter 733, chapter 734,
3258 chapter 735, chapter 736 ~~737~~, chapter 738, chapter 744, or
3259 chapter 747, shall in this chapter, unless the context otherwise
3260 requires, have the meanings ascribed to them in said chapters;
3261 and references in any of said chapters to a "trust company" or

3262 to "trust companies" shall include every trust department as
3263 defined in s. 658.12.
3264 Section 19. Section 660.417, Florida Statutes, is amended
3265 to read:
3266 660.417 Investment of fiduciary funds in investment
3267 instruments ~~into mutual fund accounts~~; permissible activity
3268 under certain circumstances; limitations.--
3269 (1) In addition to other investments authorized by law for
3270 the investment of funds held by a fiduciary, or by the
3271 instrument governing the fiduciary relationship, ~~and~~
3272 ~~notwithstanding any other provision of law,~~ a bank or trust
3273 company acting as a fiduciary, agent or otherwise may, in the
3274 exercise of its investment discretion or at the direction of
3275 another person authorized to direct investment of funds held by
3276 the bank or trust company as fiduciary, invest and reinvest in
3277 investment instruments ~~the securities of an open-end or closed-~~
3278 ~~end management investment company or investment trust registered~~
3279 ~~under the Investment Company Act of 1940, 15 U.S.C. ss. 80a-1 et~~
3280 ~~seq., as amended,~~ so long as the ~~portfolio of such~~ investment
3281 instruments consist ~~company or investment trust consists~~
3282 substantially of investments not prohibited by the governing
3283 instrument.
3284 (2) The fact that such bank or trust company or an
3285 affiliate of the bank or trust company provides services with
3286 respect to ~~the~~ investment instruments ~~company or investment~~
3287 ~~trust~~ such as that of an investment adviser, administrator,
3288 broker, custodian, transfer agent, placement agent, servicing
3289 agent, registrar, underwriter, sponsor, distributor, or manager

3290 or in any other capacity, ~~otherwise~~ and is receiving reasonable
3291 compensation for those services, shall not preclude such bank or
3292 trust company from investing or reinvesting in investment
3293 instruments ~~the securities of the open-end or closed-end~~
3294 ~~management investment trust registered under the Investment~~
3295 ~~Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended~~.
3296 However, with respect to any funds so invested, the basis
3297 (expressed as a percentage of asset value or otherwise) upon
3298 which such compensation is calculated shall be disclosed (by
3299 prospectus, account statement or otherwise) to all persons to
3300 whom statements of such account are rendered.
3301 (3) The fact that such bank or trust company or an
3302 affiliate of the bank or trust company owns or controls
3303 investment instruments shall not preclude the bank or trust
3304 company acting as a fiduciary from investing or reinvesting in
3305 such investment instruments, provided such investment
3306 instruments:
3307 (a) Are held for sale by the bank or trust company or by
3308 an affiliate of the bank or trust company in the ordinary course
3309 of its business of providing investment services to its
3310 customers and do not include any such interests held by the bank
3311 or trust company or by an affiliate of the bank or trust company
3312 for its own account.
3313 (b) Are sold primarily to accounts for which the bank or
3314 trust company is not acting as a fiduciary upon terms that are
3315 not more favorable to the buyer than the terms upon which they
3316 are sold to accounts for which the bank or trust company is
3317 acting as a fiduciary.

3318 Section 20. Paragraphs (a), (d), and (e) of subsection (1)
3319 and subsections (2), (3), (9), and (10) of section 660.46,
3320 Florida Statutes, are amended to read:
3321 660.46 Substitution of fiduciaries.--
3322 (1) The provisions of this section shall apply to the
3323 transfer of fiduciary accounts by substitution, and for those
3324 purposes these provisions shall constitute alternative
3325 procedures to those provided or required by any other provisions
3326 of law relating to the transfer of fiduciary accounts or the
3327 substitution of persons acting or who are to act in a fiduciary
3328 capacity. In this section, and only for its purposes, the term:
3329 (a) "Limitation notice" has the meaning ascribed in s.
3330 736.1008(4) ~~737.307(3)~~.
3331 (d) "Trust accounting" has the meaning ascribed in s.
3332 736.08135 ~~737.3035~~.
3333 (e) "Trust disclosure document" has the meaning ascribed
3334 in s. 736.1008(4)(a) ~~737.307(2)~~.
3335 (2) Any original fiduciary and any proposed substitute
3336 fiduciary may, with respect to any fiduciary account or accounts
3337 which they shall mutually select, initiate proceedings by
3338 joining in the filing of a petition in the circuit court,
3339 requesting the substitution of the proposed substitute fiduciary
3340 for the original fiduciary as to such fiduciary account or
3341 accounts. The petition may be filed in the county in which the
3342 main office of the original fiduciary is located and, except to
3343 the extent inconsistent with the provisions of this section,
3344 shall be governed by the Florida Rules of Civil Procedure;
3345 however, if any fiduciary account is then the subject of a

3346 proceeding in a court in this state pursuant to the Florida
3347 Probate Code, the Florida Guardianship Law, chapter 736 ~~737~~, or
3348 chapter 747, the petition relating to such fiduciary account
3349 shall be filed in that proceeding and shall be governed by the
3350 procedural or other relevant rules applicable to such proceeding
3351 except to the extent inconsistent with the provisions of this
3352 section.
3353 (3) Unless a waiver or consent shall be filed in the
3354 proceedings as provided in subsection (4), the provisions of s.
3355 731.301(1) and (2) shall apply with respect to notice of the
3356 proceedings to all persons who are then cofiduciaries with the
3357 original fiduciary, other than a person joining as a petitioner
3358 in the proceedings; to all persons named in the governing
3359 instrument as substitutes or successors to the fiduciary
3360 capacity of the original fiduciary; to the persons then living
3361 who are entitled under the governing instrument to appoint a
3362 substitute or successor to act in the fiduciary capacity of the
3363 original fiduciary; to all vested beneficiaries of the fiduciary
3364 account; and to all then-living originators of the governing
3365 instrument. Unless a waiver or consent shall be filed in the
3366 proceedings as provided in subsection (4), the provisions of s.
3367 731.301 shall apply with respect to notice to all contingent
3368 beneficiaries of the fiduciary account. Only the persons or
3369 classes of persons described in the foregoing provisions of this
3370 subsection shall be deemed to be interested persons for the
3371 purposes of this section and the proceedings and notices
3372 provided for in this section; and the provisions of ss.
3373 731.301(3) and 731.303(3) and~~,~~ (4)~~,~~ and ~~(5),~~ part III of chapter

3374 736, relating to notice requirements, the effect of notice, and
3375 representation of interests, shall apply to the proceedings
3376 provided for in this section.
3377 (9) Unless previously or otherwise barred by adjudication,
3378 waiver, consent, limitation, or the provisions of subsection
3379 (8), an action for breach of trust or breach of fiduciary duties
3380 or responsibilities against an original fiduciary in whose place
3381 and stead another trust company or trust department has been
3382 substituted pursuant to the provisions of this section is barred
3383 for any beneficiary who has received a trust disclosure document
3384 adequately disclosing the matter unless a proceeding to assert
3385 the claim is commenced within 6 months after receipt of the
3386 trust disclosure document or the limitation notice that applies
3387 to the trust disclosure document, whichever is received later.
3388 In any event, and notwithstanding lack of adequate disclosure,
3389 all claims against such original fiduciary which has complied
3390 with the requirements of s. 736.1008 ~~issued a final trust~~
3391 ~~disclosure document received by the beneficiary and has informed~~
3392 ~~the beneficiary of the location and availability of records for~~
3393 ~~his or her examination~~ are barred as provided in chapter 95.
3394 Section 736.1008(4)(a) and (c) ~~737.307(2) and (3)~~ applies to
3395 this subsection.
3396 (10) A beneficiary has received a final trust disclosure
3397 document or a limitation notice if, when the beneficiary is an
3398 adult, it is received by him or her or if, when the beneficiary
3399 is a minor or a disabled person, it is received by his or her
3400 representative as provided in part III of chapter 736 ~~defined in~~
3401 ~~s. 731.303~~.

3402 Section 21. Section 660.418, Florida Statutes, is amended
3403 to read:
3404 660.418 Investment of fiduciary funds in syndicate
3405 securities.--Notwithstanding any other provision of law, any
3406 financial institution with fiduciary powers may, in its
3407 fiduciary capacity, purchase bonds or other securities
3408 underwritten or otherwise distributed by the financial
3409 institution or by a syndicate that includes the financial
3410 institution, or an affiliate of the financial institution,
3411 provided that such purchase is made through a licensed
3412 securities dealer, is otherwise prudent, and is not prohibited
3413 by the instrument governing the fiduciary relationship and that
3414 disclosure is made at least annually to those persons entitled
3415 to a statement of accounts pursuant to s. 736.0813 ~~737.303(4)~~
3416 indicating that such securities have been or may be purchased.
3417 This section applies to purchases of bonds or other securities
3418 made at the time of the initial offering of such bonds or
3419 securities or at any time after such initial offering.
3420 Section 22. Subsection (5) of section 689.071, Florida
3421 Statutes, is amended to read:
3422 689.071 Land trusts transferring interests in real estate;
3423 ownership vests in trustee.--
3424 (5) In addition to any other limitation on personal
3425 liability existing pursuant to statute or otherwise, the
3426 provisions of s. 736.1013 ~~737.306~~ apply to the trustee of a land
3427 trust created pursuant to this section.
3428 Section 23. Subsections (1) and (4) of section 689.075,
3429 Florida Statutes, are amended to read:

3430 689.075 Inter vivos trusts; powers retained by settlor.--
3431 (1) A trust which is otherwise valid and which complies
3432 with s. 736.0403 ~~737.111~~, including, but not limited to, a trust
3433 the principal of which is composed of real property, intangible
3434 personal property, tangible personal property, the possible
3435 expectancy of receiving as a named beneficiary death benefits as
3436 described in s. 733.808, or any combination thereof, and which
3437 has been created by a written instrument shall not be held
3438 invalid or an attempted testamentary disposition for any one or
3439 more of the following reasons:
3440 (a) Because the settlor or another person or both possess
3441 the power to revoke, amend, alter, or modify the trust in whole
3442 or in part;
3443 (b) Because the settlor or another person or both possess
3444 the power to appoint by deed or will the persons and
3445 organizations to whom the income shall be paid or the principal
3446 distributed;
3447 (c) Because the settlor or another person or both possess
3448 the power to add to, or withdraw from, the trust all or any part
3449 of the principal or income at one time or at different times;
3450 (d) Because the settlor or another person or both possess
3451 the power to remove the trustee or trustees and appoint a
3452 successor trustee or trustees;
3453 (e) Because the settlor or another person or both possess
3454 the power to control the trustee or trustees in the
3455 administration of the trust;

3456 (f) Because the settlor has retained the right to receive
3457 all or part of the income of the trust during her or his life or
3458 for any part thereof; or
3459 (g) Because the settlor is, at the time of the execution
3460 of the instrument, or thereafter becomes, sole trustee.
3461 (4) This section shall be applicable to trusts executed
3462 before or after July 1, 1969, by persons who are living on or
3463 after said date. ~~However, the requirement of conformity with the~~
3464 ~~formalities for the execution of wills as found in paragraph~~
3465 ~~(1)(g) shall not be imposed upon any trust executed prior to~~
3466 ~~July 1, 1969.~~
3467 Section 24. Section 689.175, Florida Statutes, is created
3468 to read:
3469 689.175 Worthier title doctrine abolished.--The doctrine
3470 of worthier title is abolished as a rule of law and as a rule of
3471 construction. Language in a governing instrument describing the
3472 beneficiaries of a disposition as the transferor's "heirs,"
3473 "heirs at law," "next of kin," "distributees," "relatives," or
3474 "family," or language of similar import, does not create or
3475 presumptively create a reversionary interest in the transferor.
3476 Section 25. Subsection (8) of section 709.08, Florida
3477 Statutes, is amended to read:
3478 709.08 Durable power of attorney.--
3479 (8) STANDARD OF CARE.--Except as otherwise provided in
3480 paragraph (4)(e), an attorney in fact is a fiduciary who must
3481 observe the standards of care applicable to trustees as
3482 described in s. 736.0901 ~~737.302~~. The attorney in fact is not
3483 liable to third parties for any act pursuant to the durable

3484 power of attorney if the act was authorized at the time. If the
3485 exercise of the power is improper, the attorney in fact is
3486 liable to interested persons as described in s. 731.201 for
3487 damage or loss resulting from a breach of fiduciary duty by the
3488 attorney in fact to the same extent as the trustee of an express
3489 trust.
3490 Section 26. Paragraph (c) of subsection (2) of section
3491 721.08, Florida Statutes, is amended to read:
3492 721.08 Escrow accounts; nondisturbance instruments;
3493 alternate security arrangements; transfer of legal title.--
3494 (2) One hundred percent of all funds or other property
3495 which is received from or on behalf of purchasers of the
3496 timeshare plan or timeshare interest prior to the occurrence of
3497 events required in this subsection shall be deposited pursuant
3498 to an escrow agreement approved by the division. The funds or
3499 other property may be released from escrow only as follows:
3500 (c) Compliance with conditions.--
3501 1. Timeshare licenses.--If the timeshare plan is one in
3502 which timeshare licenses are to be sold and no cancellation or
3503 default has occurred, the escrow agent may release the escrowed
3504 funds or other property to or on the order of the developer upon
3505 presentation of:
3506 a. An affidavit by the developer that all of the following
3507 conditions have been met:
3508 (I) Expiration of the cancellation period.
3509 (II) Completion of construction.
3510 (III) Closing.
3511 (IV) Either:

3512 (A) Execution, delivery, and recordation by each
3513 interestholder of the nondisturbance and notice to creditors
3514 instrument, as described in this section; or
3515 (B) Transfer by the developer of legal title to the
3516 subject accommodations and facilities, or all use rights
3517 therein, into a trust satisfying the requirements of
3518 subparagraph 4. and the execution, delivery, and recordation by
3519 each other interestholder of the nondisturbance and notice to
3520 creditors instrument, as described in this section.
3521 b. A certified copy of each recorded nondisturbance and
3522 notice to creditors instrument.
3523 c. One of the following:
3524 (I) A copy of a memorandum of agreement, as defined in s.
3525 721.05, together with satisfactory evidence that the original
3526 memorandum of agreement has been irretrievably delivered for
3527 recording to the appropriate official responsible for
3528 maintaining the public records in the county in which the
3529 subject accommodations and facilities are located. The original
3530 memorandum of agreement must be recorded within 180 days after
3531 the date on which the purchaser executed her or his purchase
3532 agreement.
3533 (II) A notice delivered for recording to the appropriate
3534 official responsible for maintaining the public records in each
3535 county in which the subject accommodations and facilities are
3536 located notifying all persons of the identity of an independent
3537 escrow agent or trustee satisfying the requirements of
3538 subparagraph 4. that shall maintain separate books and records,
3539 in accordance with good accounting practices, for the timeshare

3540 plan in which timeshare licenses are to be sold. The books and
3541 records shall indicate each accommodation and facility that is
3542 subject to such a timeshare plan and each purchaser of a
3543 timeshare license in the timeshare plan.
3544 2. Timeshare estates.--If the timeshare plan is one in
3545 which timeshare estates are to be sold and no cancellation or
3546 default has occurred, the escrow agent may release the escrowed
3547 funds or other property to or on the order of the developer upon
3548 presentation of:
3549 a. An affidavit by the developer that all of the following
3550 conditions have been met:
3551 (I) Expiration of the cancellation period.
3552 (II) Completion of construction.
3553 (III) Closing.
3554 b. If the timeshare estate is sold by agreement for deed,
3555 a certified copy of the recorded nondisturbance and notice to
3556 creditors instrument, as described in this section.
3557 c. Evidence that each accommodation and facility:
3558 (I) Is free and clear of the claims of any
3559 interestholders, other than the claims of interestholders that,
3560 through a recorded instrument, are irrevocably made subject to
3561 the timeshare instrument and the use rights of purchasers made
3562 available through the timeshare instrument;
3563 (II) Is the subject of a recorded nondisturbance and
3564 notice to creditors instrument that complies with subsection (3)
3565 and s. 721.17; or
3566 (III) Has been transferred into a trust satisfying the
3567 requirements of subparagraph 4.

3568 d. Evidence that the timeshare estate:
3569 (I) Is free and clear of the claims of any
3570 interestholders, other than the claims of interestholders that,
3571 through a recorded instrument, are irrevocably made subject to
3572 the timeshare instrument and the use rights of purchasers made
3573 available through the timeshare instrument; or
3574 (II) Is the subject of a recorded nondisturbance and
3575 notice to creditors instrument that complies with subsection (3)
3576 and s. 721.17.
3577 3. Personal property timeshare interests.--If the
3578 timeshare plan is one in which personal property timeshare
3579 interests are to be sold and no cancellation or default has
3580 occurred, the escrow agent may release the escrowed funds or
3581 other property to or on the order of the developer upon
3582 presentation of:
3583 a. An affidavit by the developer that all of the following
3584 conditions have been met:
3585 (I) Expiration of the cancellation period.
3586 (II) Completion of construction.
3587 (III) Closing.
3588 b. If the personal property timeshare interest is sold by
3589 agreement for transfer, evidence that the agreement for transfer
3590 complies fully with s. 721.06 and this section.
3591 c. Evidence that one of the following has occurred:
3592 (I) Transfer by the owner of the underlying personal
3593 property of legal title to the subject accommodations and
3594 facilities or all use rights therein into a trust satisfying the
3595 requirements of subparagraph 4.; or

3596 (II) Transfer by the owner of the underlying personal
3597 property of legal title to the subject accommodations and
3598 facilities or all use rights therein into an owners' association
3599 satisfying the requirements of subparagraph 5.
3600 d. Evidence of compliance with the provisions of
3601 subparagraph 6., if required.
3602 e. If a personal property timeshare plan is created with
3603 respect to accommodations and facilities that are located on or
3604 in an oceangoing vessel, including a "documented vessel" or a
3605 "foreign vessel," as defined and governed by 46 U.S.C., chapter
3606 301:
3607 (I) In making the transfer required in sub-subparagraph
3608 c., the developer shall use as its transfer instrument a
3609 document that establishes and protects the continuance of the
3610 use rights in the subject accommodations and facilities in a
3611 manner that is enforceable by the trust or owners' association.
3612 (II) The transfer instrument shall comply fully with the
3613 provisions of this chapter, shall be part of the timeshare
3614 instrument, and shall contain specific provisions that:
3615 (A) Prohibit the vessel owner, the developer, any manager
3616 or operator of the vessel, the owners' association or the
3617 trustee, the managing entity, or any other person from incurring
3618 any liens against the vessel except for liens that are required
3619 for the operation and upkeep of the vessel, including liens for
3620 fuel expenditures, repairs, crews' wages, and salvage, and
3621 except as provided in sub-sub-subparagraphs 4.b.(III) and
3622 5.b.(III). All expenses, fees, and taxes properly incurred in
3623 connection with the creation, satisfaction, and discharge of any

3624 such permitted lien, or a prorated portion thereof if less than
3625 all of the accommodations on the vessel are subject to the
3626 timeshare plan, shall be common expenses of the timeshare plan.
3627 (B) Grant a lien against the vessel in favor of the
3628 owners' association or trustee to secure the full and faithful
3629 performance of the vessel owner and developer of all of their
3630 obligations to the purchasers.
3631 (C) Establish governing law in a jurisdiction that
3632 recognizes and will enforce the timeshare instrument and the
3633 laws of the jurisdiction of registry of the vessel.
3634 (D) Require that a description of the use rights of
3635 purchasers be posted and displayed on the vessel in a manner
3636 that will give notice of such rights to any party examining the
3637 vessel. This notice must identify the owners' association or
3638 trustee and include a statement disclosing the limitation on
3639 incurring liens against the vessel described in sub-sub-sub-
3640 subparagraph (A).
3641 (E) Include the nondisturbance and notice to creditors
3642 instrument for the vessel owner and any other interestholders.
3643 (F) The owners' association created under subparagraph 5.
3644 or trustee created under subparagraph 4. shall have access to
3645 any certificates of classification in accordance with the
3646 timeshare instrument.
3647 (III) If the vessel is a foreign vessel, the vessel must
3648 be registered in a jurisdiction that permits a filing evidencing
3649 the use rights of purchasers in the subject accommodations and
3650 facilities, offers protection for such use rights against
3651 unfiled and inferior claims, and recognizes the document or

3652 instrument creating such use rights as a lien against the
3653 vessel.
3654 (IV) In addition to the disclosures required by s.
3655 721.07(5), the public offering statement and purchase contract
3656 must contain a disclosure in conspicuous type in substantially
3657 the following form:
3658
3659 The laws of the State of Florida govern the offering of this
3660 timeshare plan in this state. There are inherent risks in
3661 purchasing a timeshare interest in this timeshare plan because
3662 the accommodations and facilities of the timeshare plan are
3663 located on a vessel that will sail into international waters and
3664 into waters governed by many different jurisdictions. Therefore,
3665 the laws of the State of Florida cannot fully protect your
3666 purchase of an interest in this timeshare plan. Specifically,
3667 management and operational issues may need to be addressed in
3668 the jurisdiction in which the vessel is registered, which is
3669 (insert jurisdiction in which vessel is registered) . Concerns
3670 of purchasers may be sent to (insert name of applicable
3671 regulatory agency and address) .
3672
3673 4. Trust.--
3674 a. If the subject accommodations or facilities, or all use
3675 rights therein, are to be transferred into a trust in order to
3676 comply with this paragraph, such transfer shall take place
3677 pursuant to this subparagraph.
3678 b. Prior to the transfer by each interestholder of the
3679 subject accommodations and facilities, or all use rights

3680 therein, to a trust, any lien or other encumbrance against such
3681 accommodations and facilities, or use rights therein, shall be
3682 made subject to a nondisturbance and notice to creditors
3683 instrument pursuant to subsection (3). No transfer pursuant to
3684 this subparagraph shall become effective until the trustee
3685 accepts such transfer and the responsibilities set forth herein.
3686 A trust established pursuant to this subparagraph shall comply
3687 with the following provisions:
3688 (I) The trustee shall be an individual or a business
3689 entity authorized and qualified to conduct trust business in
3690 this state. Any corporation authorized to do business in this
3691 state may act as trustee in connection with a timeshare plan
3692 pursuant to this chapter. The trustee must be independent from
3693 any developer or managing entity of the timeshare plan or any
3694 interestholder of any accommodation or facility of such plan.
3695 (II) The trust shall be irrevocable so long as any
3696 purchaser has a right to occupy any portion of the timeshare
3697 property pursuant to the timeshare plan.
3698 (III) The trustee shall not convey, hypothecate, mortgage,
3699 assign, lease, or otherwise transfer or encumber in any fashion
3700 any interest in or portion of the timeshare property with
3701 respect to which any purchaser has a right of use or occupancy
3702 unless the timeshare plan is terminated pursuant to the
3703 timeshare instrument, or such conveyance, hypothecation,
3704 mortgage, assignment, lease, transfer, or encumbrance is
3705 approved by a vote of two-thirds of all voting interests of the
3706 timeshare plan and such decision is declared by a court of
3707 competent jurisdiction to be in the best interests of the

3708 purchasers of the timeshare plan. The trustee shall notify the
3709 division in writing within 10 days after receiving notice of the
3710 filing of any petition relating to obtaining such a court order.
3711 The division shall have standing to advise the court of the
3712 division's interpretation of the statute as it relates to the
3713 petition.
3714 (IV) All purchasers of the timeshare plan or the owners'
3715 association of the timeshare plan shall be the express
3716 beneficiaries of the trust. The trustee shall act as a fiduciary
3717 to the beneficiaries of the trust. The personal liability of the
3718 trustee shall be governed by ss. 736.08125, 736.08163, 736.1013,
3719 and 736.1015 ~~s. 737.306~~. The agreement establishing the trust
3720 shall set forth the duties of the trustee. The trustee shall be
3721 required to furnish promptly to the division upon request a copy
3722 of the complete list of the names and addresses of the owners in
3723 the timeshare plan and a copy of any other books and records of
3724 the timeshare plan required to be maintained pursuant to s.
3725 721.13 that are in the possession, custody, or control of the
3726 trustee. All expenses reasonably incurred by the trustee in the
3727 performance of its duties, together with any reasonable
3728 compensation of the trustee, shall be common expenses of the
3729 timeshare plan.
3730 (V) The trustee shall not resign upon less than 90 days'
3731 prior written notice to the managing entity and the division. No
3732 resignation shall become effective until a substitute trustee,
3733 approved by the division, is appointed by the managing entity
3734 and accepts the appointment.

3735 (VI) The documents establishing the trust arrangement
3736 shall constitute a part of the timeshare instrument.
3737 (VII) For trusts holding property in a timeshare plan
3738 located outside this state, the trust and trustee holding such
3739 property shall be deemed in compliance with the requirements of
3740 this subparagraph if such trust and trustee are authorized and
3741 qualified to conduct trust business under the laws of such
3742 jurisdiction and the agreement or law governing such trust
3743 arrangement provides substantially similar protections for the
3744 purchaser as are required in this subparagraph for trusts
3745 holding property in a timeshare plan in this state.
3746 (VIII) The trustee shall have appointed a registered agent
3747 in this state for service of process. In the event such a
3748 registered agent is not appointed, service of process may be
3749 served pursuant to s. 721.265.
3750 5. Owners' association.--
3751 a. If the subject accommodations or facilities, or all use
3752 rights therein, are to be transferred into an owners'
3753 association in order to comply with this paragraph, such
3754 transfer shall take place pursuant to this subparagraph.
3755 b. Prior to the transfer by each interestholder of the
3756 subject accommodations and facilities, or all use rights
3757 therein, to an owners' association, any lien or other
3758 encumbrance against such accommodations and facilities, or use
3759 rights therein, shall be made subject to a nondisturbance and
3760 notice to creditors instrument pursuant to subsection (3). No
3761 transfer pursuant to this subparagraph shall become effective
3762 until the owners' association accepts such transfer and the

3763 responsibilities set forth herein. An owners' association
3764 established pursuant to this subparagraph shall comply with the
3765 following provisions:
3766 (I) The owners' association shall be a business entity
3767 authorized and qualified to conduct business in this state.
3768 Control of the board of directors of the owners' association
3769 must be independent from any developer or managing entity of the
3770 timeshare plan or any interestholder.
3771 (II) The bylaws of the owners' association shall provide
3772 that the corporation may not be voluntarily dissolved without
3773 the unanimous vote of all owners of personal property timeshare
3774 interests so long as any purchaser has a right to occupy any
3775 portion of the timeshare property pursuant to the timeshare
3776 plan.
3777 (III) The owners' association shall not convey,
3778 hypothecate, mortgage, assign, lease, or otherwise transfer or
3779 encumber in any fashion any interest in or portion of the
3780 timeshare property with respect to which any purchaser has a
3781 right of use or occupancy, unless the timeshare plan is
3782 terminated pursuant to the timeshare instrument, or unless such
3783 conveyance, hypothecation, mortgage, assignment, lease,
3784 transfer, or encumbrance is approved by a vote of two-thirds of
3785 all voting interests of the association and such decision is
3786 declared by a court of competent jurisdiction to be in the best
3787 interests of the purchasers of the timeshare plan. The owners'
3788 association shall notify the division in writing within 10 days
3789 after receiving notice of the filing of any petition relating to
3790 obtaining such a court order. The division shall have standing

3791 to advise the court of the division's interpretation of the
3792 statute as it relates to the petition.
3793 (IV) All purchasers of the timeshare plan shall be members
3794 of the owners' association and shall be entitled to vote on
3795 matters requiring a vote of the owners' association as provided
3796 in this chapter or the timeshare instrument. The owners'
3797 association shall act as a fiduciary to the purchasers of the
3798 timeshare plan. The articles of incorporation establishing the
3799 owners' association shall set forth the duties of the owners'
3800 association. All expenses reasonably incurred by the owners'
3801 association in the performance of its duties, together with any
3802 reasonable compensation of the officers or directors of the
3803 owners' association, shall be common expenses of the timeshare
3804 plan.
3805 (V) The documents establishing the owners' association
3806 shall constitute a part of the timeshare instrument.
3807 (VI) For owners' associations holding property in a
3808 timeshare plan located outside this state, the owners'
3809 association holding such property shall be deemed in compliance
3810 with the requirements of this subparagraph if such owners'
3811 association is authorized and qualified to conduct owners'
3812 association business under the laws of such jurisdiction and the
3813 agreement or law governing such arrangement provides
3814 substantially similar protections for the purchaser as are
3815 required in this subparagraph for owners' associations holding
3816 property in a timeshare plan in this state.
3817 (VII) The owners' association shall have appointed a
3818 registered agent in this state for service of process. In the

3819 event such a registered agent cannot be located, service of
3820 process may be made pursuant to s. 721.265.
3821 6. Personal property subject to certificate of title.--If
3822 any personal property that is an accommodation or facility of a
3823 timeshare plan is subject to a certificate of title in this
3824 state pursuant to chapter 319 or chapter 328, the following
3825 notation must be made on such certificate of title pursuant to
3826 s. 319.27(1) or s. 328.15(1):
3827
3828 The further transfer or encumbrance of the property subject to
3829 this certificate of title, or any lien or encumbrance thereon,
3830 is subject to the requirements of section 721.17, Florida
3831 Statutes, and the transferee or lienor agrees to be bound by all
3832 of the obligations set forth therein.
3833 7. If the developer has previously provided a certified
3834 copy of any document required by this paragraph, she or he may
3835 for all subsequent disbursements substitute a true and correct
3836 copy of the certified copy, provided no changes to the document
3837 have been made or are required to be made.
3838 8. In the event that use rights relating to an
3839 accommodation or facility are transferred into a trust pursuant
3840 to subparagraph 4. or into an owners' association pursuant to
3841 subparagraph 5., all other interestholders, including the owner
3842 of the underlying fee or underlying personal property, must
3843 execute a nondisturbance and notice to creditors instrument
3844 pursuant to subsection (3).
3845 Section 27. Paragraph (e) of subsection (1) of section
3846 721.53, Florida Statutes, is amended to read:

3847 721.53 Subordination instruments; alternate security
3848 arrangements.--
3849 (1) With respect to each accommodation or facility of a
3850 multisite timeshare plan, the developer shall provide the
3851 division with satisfactory evidence that one of the following
3852 has occurred with respect to each interestholder prior to
3853 offering the accommodation or facility as a part of the
3854 multisite timeshare plan:
3855 (e) The interestholder has transferred the subject
3856 accommodation or facility or all use rights therein to a trust
3857 that complies with this paragraph. Prior to such transfer, any
3858 lien or other encumbrance against such accommodation or facility
3859 shall be made subject to a nondisturbance and notice to
3860 creditors instrument pursuant to paragraph (a) or a
3861 subordination and notice to creditors instrument pursuant to
3862 paragraph (b). No transfer pursuant to this paragraph shall
3863 become effective until the trust accepts such transfer and the
3864 responsibilities set forth herein. A trust established pursuant
3865 to this paragraph shall comply with the following provisions:
3866 1. The trustee shall be an individual or a business entity
3867 authorized and qualified to conduct trust business in this
3868 state. Any corporation authorized to do business in this state
3869 may act as trustee in connection with a timeshare plan pursuant
3870 to this chapter. The trustee must be independent from any
3871 developer or managing entity of the timeshare plan or any
3872 interestholder of any accommodation or facility of such plan.
3873 The same trustee may hold the accommodations and facilities, or

3874 use rights therein, for one or more of the component sites of
3875 the timeshare plan.
3876 2. The trust shall be irrevocable so long as any purchaser
3877 has a right to occupy any portion of the timeshare property
3878 pursuant to the timeshare plan.
3879 3. The trustee shall not convey, hypothecate, mortgage,
3880 assign, lease, or otherwise transfer or encumber in any fashion
3881 any interests in or portion of the timeshare property with
3882 respect to which any purchaser has a right of use or occupancy
3883 unless the timeshare plan is terminated pursuant to the
3884 timeshare instrument, or the timeshare property held in trust is
3885 deleted from a multisite timeshare plan pursuant to s.
3886 721.552(3), or such conveyance, hypothecation, mortgage,
3887 assignment, lease, transfer, or encumbrance is approved by vote
3888 of two-thirds of all voting interests of the timeshare plan and
3889 such decision is declared by a court of competent jurisdiction
3890 to be in the best interests of the purchasers of the timeshare
3891 plan.
3892 4. All purchasers of the timeshare plan or the owners'
3893 association of the timeshare plan shall be express beneficiaries
3894 of the trust. The trustee shall act as a fiduciary to the
3895 beneficiaries of the trust. The personal liability of the
3896 trustee shall be governed by ss. 736.08125, 736.08163, 736.1013,
3897 and 736.1015 ~~s. 737.306~~. The agreement establishing the trust
3898 shall set forth the duties of the trustee. The trustee shall be
3899 required to furnish promptly to the division upon request a copy
3900 of the complete list of the names and addresses of the owners in
3901 the timeshare plan and a copy of any other books and records of

3902 the timeshare plan required to be maintained pursuant to s.
3903 721.13 that are in the possession of the trustee. All expenses
3904 reasonably incurred by the trustee in the performance of its
3905 duties, together with any reasonable compensation of the
3906 trustee, shall be common expenses of the timeshare plan.
3907 5. The trustee shall not resign upon less than 90 days'
3908 prior written notice to the managing entity and the division. No
3909 resignation shall become effective until a substitute trustee,
3910 approved by the division, is appointed by the managing entity
3911 and accepts the appointment.
3912 6. The documents establishing the trust arrangement shall
3913 constitute a part of the timeshare instrument.
3914 7. For trusts holding property in component sites located
3915 outside this state, the trust holding such property shall be
3916 deemed in compliance with the requirements of this paragraph, if
3917 such trust is authorized and qualified to conduct trust business
3918 under the laws of such jurisdiction and the agreement or law
3919 governing such trust arrangement provides substantially similar
3920 protections for the purchaser as are required in this paragraph
3921 for trusts holding property in a component site located in this
3922 state.
3923 8. The trustee shall have appointed a registered agent in
3924 this state for service of process. In the event such a
3925 registered agent is not appointed, service of process may be
3926 served pursuant to s. 721.265.
3927 Section 28. Section 731.103, Florida Statutes, is amended
3928 to read:

3929 731.103 Evidence as to death or status.--In proceedings
3930 under this code and under chapter 736, the ~~rules of evidence in~~
3931 ~~civil actions are applicable unless specifically changed by the~~
3932 ~~code. The~~ following additional rules relating to determination
3933 of death and status are applicable:
3934 (1) An authenticated copy of a death certificate issued by
3935 an official or agency of the place where the death purportedly
3936 occurred is prima facie proof of the fact, place, date, and time
3937 of death and the identity of the decedent.
3938 (2) A copy of any record or report of a governmental
3939 agency, domestic or foreign, that a person is alive, missing,
3940 detained, or, from the facts related, presumed dead is prima
3941 facie evidence of the status and of the dates, circumstances,
3942 and places disclosed by the record or report.
3943 (3) A person who is absent from the place of his or her
3944 last known domicile for a continuous period of 5 years and whose
3945 absence is not satisfactorily explained after diligent search
3946 and inquiry is presumed to be dead. The person's death is
3947 presumed to have occurred at the end of the period unless there
3948 is evidence establishing that death occurred earlier. Evidence
3949 showing that the absent person was exposed to a specific peril
3950 of death may be a sufficient basis for the court determining at
3951 any time after such exposure that he or she died less than 5
3952 years after the date on which his or her absence commenced. A
3953 petition for this determination shall be filed in the county in
3954 Florida where the decedent maintained his or her domicile or in
3955 any county of this state if the decedent was not a resident of
3956 Florida at the time his or her absence commenced.

3957 (4) This section does not preclude the establishment of
3958 death by direct or circumstantial evidence prior to expiration
3959 of the 5-year time period set forth in subsection (3).
3960 Section 29. Section 731.1035, Florida Statutes, is created
3961 to read:
3962 731.1035 Applicable rules of evidence.--In proceedings
3963 under this code, the rules of evidence in civil actions are
3964 applicable unless specifically changed by the code.
3965 Section 30. Section 731.201, Florida Statutes, is amended
3966 to read:
3967 731.201 General definitions.--Subject to additional
3968 definitions in subsequent chapters that are applicable to
3969 specific chapters or parts, and unless the context otherwise
3970 requires, in this code, in s. 409.9101, and in chapters 736 ~~737~~,
3971 738, 739, and 744, the term:
3972 (1) "Authenticated," when referring to copies of documents
3973 or judicial proceedings required to be filed with the court
3974 under this code, means a certified copy or a copy authenticated
3975 according to the Federal Rules of Civil Procedure.
3976 (2) "Beneficiary" means heir at law in an intestate estate
3977 and devisee in a testate estate. The term "beneficiary" does not
3978 apply to an heir at law or a devisee after that person's
3979 interest in the estate has been satisfied. In the case of a
3980 devise to an existing trust or trustee, or to a trust or trustee
3981 described by will, the trustee is a beneficiary of the estate.
3982 Except as otherwise provided in this subsection, the beneficiary
3983 of the trust is not a beneficiary of the estate of which that
3984 trust or the trustee of that trust is a beneficiary. However, if

3985 each trustee is also a personal representative of the estate,
3986 each qualified beneficiary ~~the beneficiary or beneficiaries~~ of
3987 the trust as defined in s. 736.0103(14) ~~737.303(4)(b)~~ shall be
3988 regarded as a beneficiary of the estate.
3989 (3) "Child" includes a person entitled to take as a child
3990 under this code by intestate succession from the parent whose
3991 relationship is involved, and excludes any person who is only a
3992 stepchild, a foster child, a grandchild, or a more remote
3993 descendant.
3994 (4) "Claim" means a liability of the decedent, whether
3995 arising in contract, tort, or otherwise, and funeral expense.
3996 The term does not include an expense of administration or
3997 estate, inheritance, succession, or other death taxes.
3998 (5) "Clerk" means the clerk or deputy clerk of the court.
3999 (6) "Court" means the circuit court.
4000 (7) "Curator" means a person appointed by the court to
4001 take charge of the estate of a decedent until letters are
4002 issued.
4003 (8) "Devise," when used as a noun, means a testamentary
4004 disposition of real or personal property and, when used as a
4005 verb, means to dispose of real or personal property by will or
4006 trust. The term includes "gift," "give," "bequeath," "bequest,"
4007 and "legacy." A devise is subject to charges for debts,
4008 expenses, and taxes as provided in this code, the will, or the
4009 trust.
4010 (9) "Devisee" means a person designated in a will or trust
4011 to receive a devise. Except as otherwise provided in this
4012 subsection, in the case of a devise to an existing trust or

4013 trustee, or to a trust or trustee of a trust described by will,
4014 the trust or trustee, rather than the beneficiaries of the
4015 trust, is the devisee. However, if each trustee is also a
4016 personal representative of the estate, each qualified
4017 beneficiary ~~the beneficiary or beneficiaries~~ of the trust as
4018 defined in s. 736.0103(14) ~~737.303(4)(b)~~ shall be regarded as a
4019 devisee.
4020 (10) "Distributee" means a person who has received estate
4021 property from a personal representative or other fiduciary other
4022 than as a creditor or purchaser. A testamentary trustee is a
4023 distributee only to the extent of distributed assets or
4024 increments to them remaining in the trustee's hands. A
4025 beneficiary of a testamentary trust to whom the trustee has
4026 distributed property received from a personal representative is
4027 a distributee. For purposes of this provision, "testamentary
4028 trustee" includes a trustee to whom assets are transferred by
4029 will, to the extent of the devised assets.
4030 (11) "Domicile" means a person's usual place of dwelling
4031 and shall be synonymous with residence.
4032 (12) "Estate" means the property of a decedent that is the
4033 subject of administration.
4034 (13) "Exempt property" means the property of a decedent's
4035 estate which is described in s. 732.402.
4036 (14) "File" means to file with the court or clerk.
4037 (15) "Foreign personal representative" means a personal
4038 representative of another state or a foreign country.
4039 (16) "Formal notice" means formal notice under the Florida
4040 Probate Rules.

4041 (17) "Grantor" means one who creates or adds to a trust
4042 and includes "settlor" or "trustor" and a testator who creates
4043 or adds to a trust.
4044 (18) "Heirs" or "heirs at law" means those persons,
4045 including the surviving spouse, who are entitled under the
4046 statutes of intestate succession to the property of a decedent.
4047 (19) "Incompetent" means a minor or a person adjudicated
4048 incompetent.
4049 (20) "Informal notice" or "notice" means informal notice
4050 under the Florida Probate Rules.
4051 (21) "Interested person" means any person who may
4052 reasonably be expected to be affected by the outcome of the
4053 particular proceeding involved. In any proceeding affecting the
4054 estate or the rights of a beneficiary in the estate, the
4055 personal representative of the estate shall be deemed to be an
4056 interested person. In any proceeding affecting the expenses of
4057 the administration and obligations of a decedent's estate, or
4058 any claims described in s. 733.702(1), the trustee of a trust
4059 described in s. 733.707(3) is an interested person in the
4060 administration of the grantor's estate. The term does not
4061 include a beneficiary who has received complete distribution.
4062 The meaning, as it relates to particular persons, may vary from
4063 time to time and must be determined according to the particular
4064 purpose of, and matter involved in, any proceedings.
4065 (22) "Letters" means authority granted by the court to the
4066 personal representative to act on behalf of the estate of the
4067 decedent and refers to what has been known as letters

4068 testamentary and letters of administration. All letters shall be
4069 designated "letters of administration."
4070 (23) "Other state" means any state of the United States
4071 other than Florida and includes the District of Columbia, the
4072 Commonwealth of Puerto Rico, and any territory or possession
4073 subject to the legislative authority of the United States.
4074 (24) "Parent" excludes any person who is only a
4075 stepparent, foster parent, or grandparent.
4076 (25) "Personal representative" means the fiduciary
4077 appointed by the court to administer the estate and refers to
4078 what has been known as an administrator, administrator cum
4079 testamento annexo, administrator de bonis non, ancillary
4080 administrator, ancillary executor, or executor.
4081 (26) "Petition" means a written request to the court for
4082 an order.
4083 (27) "Power of appointment" means an authority, other than
4084 as an incident of the beneficial ownership of property, to
4085 designate recipients of beneficial interests in property.
4086 (28) ~~(27)~~ "Probate of will" means all steps necessary to
4087 establish the validity of a will and to admit a will to probate.
4088 (29) ~~(28)~~ "Property" means both real and personal property
4089 or any interest in it and anything that may be the subject of
4090 ownership.
4091 (30) ~~(29)~~ "Protected homestead" means the property
4092 described in s. 4(a)(1), Art. X of the State Constitution on
4093 which at the death of the owner the exemption inures to the
4094 owner's surviving spouse or heirs under s. 4(b), Art. X of the

4095 State Constitution. For purposes of the code, real property
4096 owned as tenants by the entirety is not protected homestead.
4097 (31) ~~(30)~~ "Residence" means a person's place of dwelling.
4098 (32) ~~(31)~~ "Residuary devise" means a devise of the assets
4099 of the estate which remain after the provision for any devise
4100 which is to be satisfied by reference to a specific property or
4101 type of property, fund, sum, or statutory amount. If the will
4102 contains no devise which is to be satisfied by reference to a
4103 specific property or type of property, fund, sum, or statutory
4104 amount, "residuary devise" or "residue" means a devise of all
4105 assets remaining after satisfying the obligations of the estate.
4106 (33) ~~(32)~~ "Security" means a security as defined in s.
4107 517.021.
4108 (34) ~~(33)~~ "Security interest" means a security interest as
4109 defined in s. 671.201.
4110 (35) ~~(34)~~ "Trust" means an express trust, private or
4111 charitable, with additions to it, wherever and however created.
4112 It also includes a trust created or determined by a judgment or
4113 decree under which the trust is to be administered in the manner
4114 of an express trust. "Trust" excludes other constructive trusts,
4115 and it excludes resulting trusts; conservatorships; custodial
4116 arrangements pursuant to the Florida Uniform Transfers to Minors
4117 Act; business trusts providing for certificates to be issued to
4118 beneficiaries; common trust funds; land trusts under s. 689.05;
4119 trusts created by the form of the account or by the deposit
4120 agreement at a financial institution; voting trusts; security
4121 arrangements; liquidation trusts; trusts for the primary purpose
4122 of paying debts, dividends, interest, salaries, wages, profits,

4123 pensions, or employee benefits of any kind; and any arrangement
4124 under which a person is nominee or escrowee for another.
4125 (36) ~~(35)~~ "Trustee" includes an original, additional,
4126 surviving, or successor trustee, whether or not appointed or
4127 confirmed by court.
4128 (37) ~~(36)~~ "Will" means an instrument, including a codicil,
4129 executed by a person in the manner prescribed by this code,
4130 which disposes of the person's property on or after his or her
4131 death and includes an instrument which merely appoints a
4132 personal representative or revokes or revises another will.
4133 Section 31. Paragraph (a) of subsection (1) and subsection
4134 (5) of section 731.303, Florida Statutes, are amended to read:
4135 731.303 Representation.--In the administration of or in
4136 judicial proceedings involving estates of decedents or trusts,
4137 the following apply:
4138 (1) Persons are bound by orders binding others in the
4139 following cases:
4140 (a) 1. Orders binding the sole holder or all coholders of a
4141 power of revocation or a general, special, or limited power of
4142 appointment, including one in the form of a power of amendment
4143 or revocation to the extent that the power has not become
4144 unexercisable in fact, bind all persons to the extent that their
4145 interests, as persons who may take by virtue of the exercise or
4146 nonexercise of the power, are subject to the power.
4147 2. Subparagraph 1. does not apply to:
4148 a. Any matter determined by the court to involve fraud or
4149 bad faith by the trustee;
4150 b. A power of a trustee to distribute trust property; or

4151 c. A power of appointment held by a person while the
4152 person is the sole trustee.
4153 (5) The holder of a power of appointment over property not
4154 held in trust may represent and bind persons whose interests, as
4155 permissible appointees, takers in default, or otherwise, are
4156 subject to the power. Representation under this subsection does
4157 not apply to:
4158 (a) Any matter determined by the court to involve fraud or
4159 bad faith by the trustee;
4160 (b) A power of a trustee to distribute trust property; or
4161 (c) A power of appointment held by a person while the
4162 person is the sole trustee ~~When a sole holder or coholder of a~~
4163 ~~general, special, or limited power of appointment, including an~~
4164 ~~exercisable power of amendment or revocation over property in an~~
4165 ~~estate or trust, is bound by:~~
4166 ~~(a) Agreements, waivers, consents, or approvals; or~~
4167 ~~(b) Accounts, trust accountings, or other written reports~~
4168 ~~that adequately disclose matters set forth therein,~~
4169
4170 ~~then all persons who may take by virtue of, and whose interests~~
4171 ~~are subject to, the exercise or nonexercise of the power are~~
4172 ~~also bound, but only to the extent of their interests which~~
4173 ~~could otherwise be affected by the exercise or nonexercise of~~
4174 ~~the power~~.
4175 Section 32. Subsection (5) of section 732.2075, Florida
4176 Statutes, is amended to read:
4177 732.2075 Sources from which elective share payable;
4178 abatement.--

4179 (5) Unless otherwise provided in the trust instrument or,
4180 in the decedent's will if there is no provision in the trust
4181 instrument, any amount to be satisfied from trust property shall
4182 be paid from the assets of the trust in the order provided for
4183 claims under s. 736.05053 ~~737.3054~~(2) and (3). A direction in
4184 the decedent's will is effective only for revocable trusts.
4185 Section 33. Subsection (2) of section 732.513, Florida
4186 Statutes, is amended to read:
4187 732.513 Devises to trustee.--
4188 (2) The devise shall not be invalid for any or all of the
4189 following reasons:
4190 (a) Because the trust is amendable or revocable, or both,
4191 by any person.
4192 (b) Because the trust has been amended or revoked in part
4193 after execution of the will or a codicil to it.
4194 ~~(c) Because the trust instrument or any amendment to it~~
4195 ~~was not executed in the manner required for wills.~~
4196 (c) ~~(d)~~ Because the only res of the trust is the possible
4197 expectancy of receiving, as a named beneficiary, a devise under
4198 a will or death benefits as described in s. 733.808, and even
4199 though the testator or other person has reserved any or all
4200 rights of ownership in the death benefit policy, contract, or
4201 plan, including the right to change the beneficiary.
4202 (d) ~~(e)~~ Because of any of the provisions of s. 689.075.
4203 Section 34. Section 732.603, Florida Statutes, is amended
4204 to read:
4205 (Substantial rewording of section. See
4206 s. 732.603, F.S., for present text.)

4207 732.603 Antilapse; deceased devisee; class gifts.--
4208 (1) Unless a contrary intent appears in the will, if a
4209 devisee who is a grandparent, or a descendant of a grandparent,
4210 of the testator:
4211 (a) Is dead at the time of the execution of the will;
4212 (b) Fails to survive the testator; or
4213 (c) Is required by the will or by operation of law to be
4214 treated as having predeceased the testator,
4215
4216 a substitute gift is created in the devisee's surviving
4217 descendants who take per stirpes the property to which the
4218 devisee would have been entitled had the devisee survived the
4219 testator.
4220 (2) When a power of appointment is exercised by will,
4221 unless a contrary intent appears in the document creating the
4222 power of appointment or in the testator's will, if an appointee
4223 who is a grandparent, or a descendant of a grandparent, of the
4224 donor of the power:
4225 (a) Is dead at the time of the execution of the will or
4226 the creation of the power;
4227 (b) Fails to survive the testator; or
4228 (c) Is required by the will, the document creating the
4229 power, or by operation of law to be treated as having
4230 predeceased the testator,
4231
4232 a substitute gift is created in the appointee's surviving
4233 descendants who take per stirpes the property to which the
4234 appointee would have been entitled had the appointee survived

4235 the testator. Unless the language creating a power of
4236 appointment expressly excludes the substitution of the
4237 descendants of an object of a power for the object, a surviving
4238 descendant of a deceased object of a power of appointment may be
4239 substituted for the object whether or not the descendant is an
4240 object of the power.
4241 (3) In the application of this section:
4242 (a) Words of survivorship in a devise or appointment to an
4243 individual, such as "if he survives me," or to "my surviving
4244 children," are a sufficient indication of an intent contrary to
4245 the application of subsections (1) and (2). Words of
4246 survivorship used by the donor of the power in a power to
4247 appoint to an individual, such as the term "if he survives the
4248 donee," or in a power to appoint to the donee's "then surviving
4249 children," are a sufficient indication of an intent contrary to
4250 the application of subsection (2).
4251 (b) The term:
4252 1. "Appointment" includes an alternative appointment and
4253 an appointment in the form of a class gift.
4254 2. "Appointee" includes:
4255 a. A class member if the appointment is in the form of a
4256 class gift.
4257 b. An individual or class member who was deceased at the
4258 time the testator executed his or her will as well as an
4259 individual or class member who was then living but who failed to
4260 survive the testator.
4261 3. "Devise" also includes an alternative devise and a
4262 devise in the form of a class gift.

4263 4. "Devisee" also includes:
4264 a. A class member if the devise is in the form of a class
4265 gift.
4266 b. An individual or class member who was deceased at the
4267 time the testator executed his or her will as well as an
4268 individual or class member who was then living but who failed to
4269 survive the testator.
4270 (4) This section applies only to outright devises and
4271 appointments. Devises and appointments in trust, including to a
4272 testamentary trust, are subject to s. 736.1106.
4273 Section 35. Section 732.604, Florida Statutes, is amended
4274 to read:
4275 732.604 Failure of testamentary provision.--
4276 (1) Except as provided in s. 732.603, if a devise other
4277 than a residuary devise fails for any reason, it becomes a part
4278 of the residue.
4279 (2) Except as provided in s. 732.603, if the residue is
4280 devised to two or more persons, the share of a residuary devisee
4281 that fails for any reason ~~and the devise to one of the residuary~~
4282 ~~devisees fails for any reason, that devise~~ passes to the other
4283 residuary devisee, or to the other residuary devisees in
4284 proportion to the ~~their~~ interests of each in the remaining part
4285 of the residue.
4286 Section 36. Section 732.611, Florida Statutes, is amended
4287 to read:
4288 732.611 Devises to multi-generation classes to be per
4289 stirpes.--Unless the will provides otherwise, all devises to

4290 descendants, issue, and other multi-generation classes shall be
4291 per stirpes.
4292 Section 37. Subsection (1) of section 733.212, Florida
4293 Statutes, is amended to read:
4294 733.212 Notice of administration; filing of objections.--
4295 (1) The personal representative shall promptly serve a
4296 copy of the notice of administration on the following persons
4297 who are known to the personal representative:
4298 (a) The decedent's surviving spouse;
4299 (b) Beneficiaries;
4300 (c) The trustee of any trust described in s. 733.707(3)
4301 and each qualified beneficiary of the trust as defined in s.
4302 736.0103(14) ~~737.303(4)(b)~~, if each trustee is also a personal
4303 representative of the estate; and
4304 (d) Persons who may be entitled to exempt property
4305
4306 in the manner provided for service of formal notice, unless
4307 served under s. 733.2123. The personal representative may
4308 similarly serve a copy of the notice on any devisees under a
4309 known prior will or heirs or others who claim or may claim an
4310 interest in the estate.
4311 Section 38. Subsection (1) of section 733.602, Florida
4312 Statutes, is amended to read:
4313 733.602 General duties.--
4314 (1) A personal representative is a fiduciary who shall
4315 observe the standards of care applicable to trustees as
4316 described by part VII of chapter 736 ~~s. 737.302~~. A personal
4317 representative is under a duty to settle and distribute the

4318 estate of the decedent in accordance with the terms of the
4319 decedent's will and this code as expeditiously and efficiently
4320 as is consistent with the best interests of the estate. A
4321 personal representative shall use the authority conferred by
4322 this code, the authority in the will, if any, and the authority
4323 of any order of the court, for the best interests of interested
4324 persons, including creditors.
4325 Section 39. Subsection (4) of section 733.805, Florida
4326 Statutes, is amended to read:
4327 733.805 Order in which assets abate.--
4328 (4) In determining the contribution required under s.
4329 733.607(2), subsections (1)-(3) of this section and s. 736.05053
4330 ~~737.3054~~(2) shall be applied as if the beneficiaries of the
4331 estate and the beneficiaries of a trust described in s.
4332 733.707(3), other than the estate or trust itself, were taking
4333 under a common instrument.
4334 Section 40. Paragraph (j) of subsection (1) of section
4335 733.817, Florida Statutes, is amended to read:
4336 733.817 Apportionment of estate taxes.--
4337 (1) For purposes of this section:
4338 (j) "Residuary devise" has the meaning set forth in s.
4339 731.201~~(31)~~.
4340 Section 41. Paragraphs (a) and (f) of subsection (8) and
4341 paragraphs (a) and (d) of subsection (9) of section 738.104,
4342 Florida Statutes, are amended to read:
4343 738.104 Trustee's power to adjust.--
4344 (8) With respect to a trust in existence on January 1,
4345 2003:

4346 (a) A trustee shall not have the power to adjust under
4347 this section until the statement required in subsection (9) is
4348 provided and either no objection is made or any objection which
4349 is made has been terminated.
4350 1. An objection is made if, within 60 days after the date
4351 of the statement required in subsection (9), a super majority of
4352 the eligible ~~trust~~ beneficiaries deliver to the trustee a
4353 written objection to the application of this section to such
4354 trust. An objection shall be deemed to be delivered to the
4355 trustee on the date the objection is mailed to the mailing
4356 address listed in the notice provided in subsection (9).
4357 2. An objection is terminated upon the earlier of the
4358 receipt of consent from a super majority of eligible ~~trust~~
4359 beneficiaries of the class that made the objection, or the
4360 resolution of the objection pursuant to paragraph (c).
4361 (f) The objection of a super majority of eligible
4362 beneficiaries under this subsection shall be valid for a period
4363 of 1 year after the date of the notice set forth in subsection
4364 (9). Upon expiration of the objection, the trustee may
4365 thereafter give a new notice under subsection (9).
4366 (9)(a) A trustee of a trust in existence on January 1,
4367 2003, that is not prohibited under subsection (3) from
4368 exercising the power to adjust shall, any time prior to
4369 initially exercising the power, provide to all eligible
4370 ~~reasonably ascertainable current~~ beneficiaries ~~described in s.~~
4371 ~~737.303(4)(b)1. and all reasonably ascertainable remainder~~
4372 ~~beneficiaries described in s. 737.303(4)(b)2.~~ a statement
4373 containing the following:

4374 1. The name, telephone number, street address, and mailing
4375 address of the trustee and of any individuals who may be
4376 contacted for further information;
4377 2. A statement that unless a super majority of the
4378 eligible beneficiaries objects to the application of this
4379 section to the trust within 60 days after the date the statement
4380 pursuant to this subsection was served, s. 738.104 shall apply
4381 to the trust; and
4382 3. A statement that, if s. 738.104 applies to the trust,
4383 the trustee will have the power to adjust between income and
4384 principal and that such a power may have an effect on the
4385 distributions to such beneficiary from the trust.
4386 (d) For purposes of subsection (8) and this subsection,
4387 the term:
4388 1. "Eligible beneficiaries" means:
4389 a. If at the time the determination is made there is one
4390 or more beneficiaries described in s. 736.0103(14)(c), the
4391 beneficiaries described in s. 736.0103(14)(a) and (c); or
4392 b. If there is no beneficiary described in s.
4393 736.0103(14)(c), the beneficiaries described in s.
4394 736.0103(14)(a) and (b).
4395 2. ~~A~~ "Super majority of the eligible ~~trust~~ beneficiaries"
4396 means:
4397 a. If at the time the determination is made there is one
4398 or more beneficiaries described in s. 736.0103(14)(c), at least
4399 two-thirds in interest of the ~~reasonably ascertainable current~~
4400 beneficiaries described in s. 736.0103(14)(a) ~~737.303(4)(b)1.~~ or
4401 two-thirds in interest of the ~~reasonably ascertainable remainder~~

4402 beneficiaries described in s. 736.0103(14)(c) ~~737.303(4)(b)2.~~,
4403 if the interests of the beneficiaries are reasonably
4404 ascertainable; otherwise, it means two-thirds in number of
4405 either such class; or
4406 b. If there is no beneficiary described in s.
4407 736.0103(14)(c), at least two-thirds in interest of the
4408 beneficiaries described in s. 736.0103(14)(a) or two-thirds in
4409 interest of the beneficiaries described in s. 736.0103(14)(b),
4410 if the interests of the beneficiaries are reasonably
4411 ascertainable, otherwise, two-thirds in number of either such
4412 class.
4413 Section 42. Subsection (4) of section 738.1041, Florida
4414 Statutes, is amended to read:
4415 738.1041 Total return unitrust.--
4416 (4) All determinations made pursuant to sub-subparagraph
4417 (2)(b)2.b. shall be conclusive if reasonable and made in good
4418 faith. Such determination shall be conclusively presumed to have
4419 been made reasonably and in good faith unless proven otherwise
4420 in a proceeding commenced by or on behalf of a person interested
4421 in the trust within the time provided in s. 736.1008 ~~737.307~~.
4422 The burden will be on the objecting interested party to prove
4423 that the determinations were not made reasonably and in good
4424 faith.
4425 Section 43. Subsection (5) of section 738.202, Florida
4426 Statutes, is amended to read:
4427 738.202 Distribution to residuary and remainder
4428 beneficiaries.--

4429 (5) The value of trust assets shall be determined on an
4430 asset-by-asset basis and shall be conclusive if reasonable and
4431 determined in good faith. Determinations based on appraisals
4432 performed within 2 years before or after the valuation date
4433 shall be presumed reasonable. The value of trust assets shall be
4434 conclusively presumed to be reasonable and determined in good
4435 faith unless proven otherwise in a proceeding commenced by or on
4436 behalf of a person interested in the trust within the time
4437 provided in s. 736.1008 ~~737.307~~.
4438 Section 44. Paragraph (a) of subsection (12) of section
4439 739.102, Florida Statutes, is amended to read:
4440 739.102 Definitions.--As used in this chapter, the term:
4441 (12) "Trust" means:
4442 (a) An express trust (including an honorary trust or a
4443 trust under s. 736.0408 ~~737.116~~), charitable or noncharitable,
4444 with additions thereto, whenever and however created; and
4445
4446 As used in this chapter, the term "trust" does not include a
4447 constructive trust or a resulting trust.
4448 Section 45. Paragraphs (b) and (f) of subsection (6) of
4449 section 744.331, Florida Statutes, are amended to read:
4450 744.331 Procedures to determine incapacity.--
4451 (6) ORDER DETERMINING INCAPACITY.--If, after making
4452 findings of fact on the basis of clear and convincing evidence,
4453 the court finds that a person is incapacitated with respect to
4454 the exercise of a particular right, or all rights, the court
4455 shall enter a written order determining such incapacity. A

4456 person is determined to be incapacitated only with respect to
4457 those rights specified in the order.
4458 (b) When an order determines that a person is incapable of
4459 exercising delegable rights, the court must consider and find
4460 whether there is an alternative to guardianship which will
4461 sufficiently address the problems of the incapacitated person. A
4462 guardian must be appointed to exercise the incapacitated
4463 person's delegable rights unless the court finds there is an
4464 alternative. A guardian may not be appointed if the court finds
4465 there is an alternative to guardianship which will sufficiently
4466 address the problems of the incapacitated person. ~~In any order~~
4467 ~~declaring a person incapacitated the court must find that~~
4468 ~~alternatives to guardianship were considered and that no~~
4469 ~~alternative to guardianship will sufficiently address the~~
4470 ~~problems of the ward.~~
4471 (f) Upon the filing of a verified statement by an
4472 interested person stating:
4473 1. That he or she has a good faith belief that the alleged
4474 incapacitated person's trust, trust amendment, or durable power
4475 of attorney is invalid; and
4476 2. A reasonable factual basis for that belief,
4477
4478 the trust, trust amendment, or durable power of attorney shall
4479 not be deemed to be an alternative to the appointment of a
4480 guardian. The appointment of a guardian does not limit the
4481 court's power to determine that certain authority granted by a
4482 durable power of attorney is to remain exercisable by the
4483 attorney in fact. ~~When an order is entered which determines that~~

4484 ~~a person is incapable of exercising delegable rights, a guardian~~
4485 ~~must be appointed to exercise those rights.~~
4486 Section 46. Paragraph (a) of subsection (6) of section
4487 744.361, Florida Statutes, is amended to read:
4488 744.361 Powers and duties of guardian.--
4489 (6) A guardian who is given authority over any property of
4490 the ward shall:
4491 (a) Protect and preserve the property and invest it
4492 prudently as provided in chapter 518 ~~defined in s. 737.302~~,
4493 apply it as provided in s. 744.397, and account for it
4494 faithfully.
4495 Section 47. Subsections (11) and (18) of section 744.441,
4496 Florida Statutes, are amended to read:
4497 744.441 Powers of guardian upon court approval.--After
4498 obtaining approval of the court pursuant to a petition for
4499 authorization to act, a plenary guardian of the property, or a
4500 limited guardian of the property within the powers granted by
4501 the order appointing the guardian or an approved annual or
4502 amended guardianship report, may:
4503 (11) Prosecute or defend claims or proceedings in any
4504 jurisdiction for the protection of the estate and of the
4505 guardian in the performance of his or her duties. Before
4506 authorizing a guardian to bring an action described in s.
4507 736.0207, the court shall first find that the action appears to
4508 be in the ward's best interests during the ward's probable
4509 lifetime. If the court denies a request that a guardian be
4510 authorized to bring an action described in s. 736.0207, the

4511 court shall review the continued need for a guardian and the
4512 extent of the need for delegation of the ward's rights.
4513 (18) When the ward's will evinces an objective to obtain a
4514 United States estate tax charitable deduction by use of a split
4515 interest trust (as that term is defined in s. 736.1201 ~~737.501~~),
4516 but the maximum charitable deduction otherwise allowable will
4517 not be achieved in whole or in part, execute a codicil on the
4518 ward's behalf amending said will to obtain the maximum
4519 charitable deduction allowable without diminishing the aggregate
4520 value of the benefits of any beneficiary under such will.
4521 Section 48. Section 744.462, Florida Statutes, is created
4522 to read:
4523 744.462 Determination regarding alternatives to
4524 guardianship.--Any judicial determination concerning the
4525 validity of the ward's durable power of attorney, trust, or
4526 trust amendment shall be promptly reported in the guardianship
4527 proceeding by the guardian of the property. If the instrument
4528 has been judicially determined to be valid or if, after the
4529 appointment of a guardian, a petition is filed alleging that
4530 there is an alternative to guardianship which will sufficiently
4531 address the problems of the ward, the court shall review the
4532 continued need for a guardian and the extent of the need for
4533 delegation of the ward's rights.
4534 Section 49. Sections 737.101, 737.105, 737.106, 737.111,
4535 737.115, 737.116, 737.201, 737.202, 737.203, 737.2035, 737.204,
4536 737.2041, 737.205, 737.206, 737.2065, 737.207, 737.208, 737.209,
4537 737.301, 737.302, 737.303, 737.3035, 737.304, 737.305, 737.3053,
4538 737.3054, 737.3055, 737.306, 737.3061, 737.307, 737.308,

4539 737.309, 737.401, 737.402, 737.4025, 737.403, 737.4031,
4540 737.4032, 737.4033, 737.404, 737.405, 737.406, 737.501, 737.502,
4541 737.503, 737.504, 737.505, 737.506, 737.507, 737.508, 737.509,
4542 737.510, 737.511, 737.512, 737.6035, 737.621, 737.622, 737.623,
4543 737.624, 737.625, 737.626, and 737.627, Florida Statutes, are
4544 repealed.
4545 Section 50. This act shall take effect July 1, 2007.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (1)

Bill No. **HB 425 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Mahon offered the following:
4
5 **Amendment**
6 Remove line(s) 115 and insert:
7 registrar, underwriter, sponsor, distributor, or
8

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (2)

Bill No. **HB 425 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Mahon offered the following:
4
5 **Amendment**
6 Remove line(s) 289 and insert:
7 residence or location of an office of the settlor, trustee, or
8

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HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (3)

Bill No. **HB 425 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Mahon offered the following:
4
5 **Amendment**
6 Remove line(s) 722 and insert:
7 1. This paragraph does not apply to trusts established as

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COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Mahon offered the following:
4
5 **Amendment**
6 Remove line(s) 729 and insert:
7 2. This paragraph applies to trusts created on or after the

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Mahon offered the following:
4
5 **Amendment**
6 Between lines 1070 and 1071 insert:
7 (c) Notwithstanding the provisions of paragraph (b), the
8 assets of an irrevocable trust shall not be subject to the
9 claims of an existing or subsequent creditor or assignee of the
10 settlor, in whole or in part, solely because of the existence of
11 a discretionary power granted to the trustee by the terms of the
12 trust or any other provision of law, to pay directly to the
13 taxing authorities or to reimburse the settlor for any tax on
14 trust income or principal that is payable by the settlor under
15 the law imposing such tax.

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Mahon offered the following:
4
5 **Amendment**
6 Remove line(s) 1518-1521 and insert:
7 the nature of the services provided by the trustee or its
8 affiliate, and all the compensation including, but not limited
9 to, fees or commissions, paid or to be paid by the account, and
10 received or to be received by an affiliate arising from such
11 affiliated investment.
12

Amendment No. (7)

Bill No. **HB 425 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Mahon offered the following:
4
5 **Amendment**
6 Remove line(s) 1541-1542 and insert:
7 that expressly authorize the trustee, by specific reference to
8 this subsection, to invest in investment instruments owned or
9 controlled by the trustee or its affiliate.
10

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Mahon offered the following:
4
5 **Amendment**
6 Remove line(s) 1595 and insert:
7 investment instruments, as defined in s. 660.25(6), that are

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Mahon offered the following:
4
5 **Amendment**
6 After line 1635 insert:
7 (g) Nothing in this chapter is intended to create or imply
8 a duty for the trustee to seek the application of this
9 subsection to invest in investment instruments described in
10 paragraph (a) of this subsection, and no inference of
11 impropriety shall be made as a result of a trustee electing not
12 to invest trust assets in investment instruments described in
13 paragraph (a) of this subsection.
14

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Mahon offered the following:
4
5 **Amendment**
6 Remove line(s) 1918-1919 and insert:
7 or income to or for the benefit of that trustee, except to
8 provide for that trustee's health, education, maintenance, or
9 support as described under Internal Revenue Code ss. 2041 and
10 2514;

HB 593
Coley

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 593 Educational Loan Marketing
SPONSOR(S): Coley
TIED BILLS: **IDEN./SIM. BILLS:** SB 686

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Economic Development, Trade & Banking Committee		Olmedillo	Carlson
2) Finance & Tax Committee			
3) Education Appropriations Committee			
4) Commerce Council			
5)			

SUMMARY ANALYSIS

The bill creates s. 1009.9997, F.S., establishing the Educational Loan Marketing Corporation of Florida. The corporation is a not-for-profit entity that will be registered, incorporated, organized, and operated in compliance with ch. 617, F.S. The corporation, its board and advisory committees, or similar groups created by the corporation are subject to provisions relating to public records and meetings.

The bill authorizes the corporation to borrow funds and incur debt, including the issuance of revenue bonds, for the purposes of purchasing, servicing, and otherwise providing access and service as a secondary market for student loans in the state. The corporation is authorized to apply for private activity bond allocation in accordance with the provisions of part VI of ch. 159, F.S.

The bill requires that proceeds of the corporation be used for the creation of incentive programs serving Florida residents, such as, but not limited to, interest rate reductions for automated and timely payments and programs for students pursuing a degree in areas of critical need in the state.

The bill requires the corporation to be administered by a 13-member board of directors composed of 11 members appointed by the Governor, one ex officio non-voting member appointed by the President of the Senate, and one ex officio non-voting member appointed by the Speaker of the House of Representatives. The 11 members appointed by the Governor must be confirmed by the Senate.

The bill requires the board of directors to annually elect a chair and vice chair. The bill provides for board members to be reimbursed for travel expenses and to file financial disclosure forms.

The bill requires the corporation to annually prepare and submit a business plan to the Department of Education (DOE) and requires the corporation to fulfill certain accounting and auditing requirements.

Bonds or other debt obligations issued by or on behalf of the corporation are not a debt of the state. Bonds issued by the corporation, their transfer, and the income therefrom are exempt from taxation.

The bill also provides that any start-up costs received from the state must be repaid by the corporation.

The bill requires the corporation to annually submit a proposed budget to the DOE for approval.

The fiscal impact of the bill is indeterminate. **See Fiscal Comments.**

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Limited Government – The bill creates the Educational Loan Marketing Corporation of Florida as a not-for-profit entity to purchase, service, and otherwise provide access and service as a secondary market for student loans in the state. The bill requires the Department of Education to monitor and set standards for the corporation. It also provides for payment of start-up costs for the corporation by the state, which must eventually be repaid.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Secondary Loan Market

Secondary markets buy student loans from education lenders, providing lenders with fresh capital they can use to originate new student loans. As a result, secondary markets are among the largest holders of student loans. The terms and conditions of a student loan do not change when it is sold to a secondary market. Secondary markets often offer repayment incentives on the loans they hold. These incentives can include principal rebates and interest rate reductions. There are national, regional, and state secondary markets.[1]

Private Activity Bonds

Sections 141-147 of the Internal Revenue Code (the Code) relate to private activity bonds, defining such bonds to mean any bond issued as part of an issue which meets the private business use test and the private security or payment test, or which meets the private loan financing test.

Section 146 of the Code provides for the allocation of private activity bonds to each state. Part IV of ch. 159, F.S., relates to private activity bonds, pursuant to s. 146 of the Code. The purpose of part IV is to allocate the state volume limitation imposed on private activity bonds under the Code. The Division of Bond Finance of the State Board of Administration annually determines the amount of private activity bonds permitted to be issued in this state.

The state allocation of private activity bonds is divided among different allocation pools. After any allocation is made to the manufacturing facility pool, 50% of the remaining allocation is received by the 17 regional pools established in law; 25% is received by the Florida Housing Finance Corporation; 5% is received by the state allocation pool; and 20% is allocated to the Florida First Business Pool (FFB Pool).[2]

The director for private activity bonds of the Division of Bond Finance of the State Board of Administration provides written confirmation for private activity bonds, including those used to finance FFB projects certified by the Office of Tourism, Trade, and Economic Development (OTTED). In the past, OTTED has certified two secondary market corporations to participate in the FFB Pool to issue tax-exempt bonds to purchase student loans or to make student loans. They are the Florida Educational Loan Marketing Corporation and the Educational Funding of the South, Inc. According to the Florida First Bond Pool Evaluation Reports, both corporations applied on the basis of providing substantial economic benefit to the state.[3]

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[1] http://www.finaid.org/loans/secondarymarkets.phtml
[2] See s. 159.804, F.S.
[3] Florida First Business Pool, Evaluation Report of FELMAC, December 13, 2002, at 1 and Evaluation Report of EdSouth, November 1, 2004, at 1.

The Governor's legal office is currently considering inviting a number of entities, including the Pecos Higher Education Association, to be eligible to apply for tax exempt bond allocation in Florida. No decision has yet been made.

According to OTTED, the following list shows the total tax exempt allocation from the Florida First Business Bond Pool (FFB) for student loans financing in the last five years:

2005	$300	million
2004	$250	million
2003	$ 0	
2002	$274.2	million
2001	$ 60	million
2000	$ 0	

The following is the availability of Public Activity Bonds' allocation and issuance for Student Loan Bonds over the past 3 years:

	2003	**2004**	**2005**
Bonds issued:	$370,219,768	$446,770,087	$457,807,420
Allocated but Unissued	$883,266,407	$705,338,247	$546,269,184
Available at Year End	-	$209,417,106	$387,696,276
Total PAB Allocation	$1,253,486,175	$1,361,525,440	$1,391,772,880
Student Loan Bonds Issued:			
From prior years' carryforward	$174,200,000	$203,031,913	-
From current year's allocation	-	$246,968,087	$300,000,000
	$174,200,000	450,000,000	$300,000,000

Total PAB allocation for 2006 is $1,423,189,120.

Secondary Markets in Florida

The Florida Educational Loan Marking Corporation (FELMAC) was incorporated as a Florida not-for-profit corporation in accordance with Section 150(d) of the Code in 1997 at the request of Governor Chiles.

FELMAC was approved for an allocation of $33 million in 1997 and utilized the entire amount allocated in a tax-exempt bond issuance. In 1998 FELMAC was approved for $30 million and was issued bonds totaling $80 million ($30 million Tax-Exempt and $50 million Taxable). The loans went to 113,397 students at 40 institutions – 41% attending vocational trade schools, 34% attending a university, 25% attending a community college.

In 2001 FELMAC was approved for a $60 million allocation and issued bonds totaling $185 million ($125 million Taxable and $60 million Tax-Exempt). In 2001 the number of institutions utilizing FELMAC loans increased by 38% and the loans benefited an additional 5,000 students. FELMAC also

began offering statewide scholarships and programs that specifically focused on nurses and teachers in Florida.[4]

In February 2004, FELMAC merged with Arizona Educational Loan Marketing Corporation, an affiliate of Southwest Student Services Corporation. Southwest is a wholly owned subsidiary of Sallie Mae, a for-profit corporation, and the nation's largest secondary market corporation.

Educational Funding of the South, Inc. (EdSouth) is a private not-for-profit, public benefit corporation organized for the sole purpose of funding postsecondary education loans under Title IV of the Federal Higher Education Act of 1965. EdSouth was established as a Tennessee corporation in 1985 and has provided approximately $3.2 billion to fund over 675,000 Title IV loans for postsecondary students in the states of Tennessee, Florida, Georgia, Alabama, Mississippi, North Carolina, Pennsylvania, Virginia, and Kentucky.[5] Under Executive Order 09-166, the Governor authorized EdSouth to serve as a secondary market for educational loans in Florida.[6]

In 2002 and 2003, EdSouth was granted a total of $252 million in tax exempt bonding authority to create the Florida Edloan program to provide low-cost eligible loans to currently certified Florida teachers who return to college for additional certification or advanced degrees and to Florida graduate and undergraduate nurses; two areas of critical need in the state.[7] In 2004, EdSouth was granted additional tax-exempt bonding authority. These funds will only be used to make new loans (not refinance existing loans or purchase defaulted loans) to Florida residents and to nonresidents enrolled at Florida educational institutions. In addition, EdSouth agreed to fund all costs of issuance and required debt service reserve deposits from taxable financing sources so that all tax-exempt bond proceeds are used to fund Florida student loans.[8]

In the 2005-06 academic year, EdSouth will offer the new Techloan program for biomedical and computer engineers to help Florida expand its talent pool in these two strategic areas.[9]

According to EdSouth, total allocations in Florida have reached $577 million and total bonds issued in Florida are $424.2 million. To date, the approximate number of students assisted by EdSouth in Florida is 33,887. In addition, the last $100 million of allocations was received after EdSouth's last bond issue; therefore, that allocation will be issued in 2005.

Effects of Proposed Changes

Educational Loan Marketing Corporation of Florida

The bill creates s. 1009.9997, F.S., establishing the Educational Loan Marketing Corporation of Florida, (the corporation). The corporation is created as a not-for-profit entity that will be registered, incorporated, organized, and operated in compliance with ch. 617, F.S. The corporation, its board and advisory committees, or similar groups created by the corporation are subject to the provisions of ch. 119, F.S., relating to public records, and the provisions of ch. 286, F.S., relating to public meetings and records.

The bill authorizes the corporation to borrow funds and incur debt, including the issuance of revenue bonds, for the purposes of purchasing, servicing, and otherwise providing access and service as a secondary market for student loans in the state. The corporation is authorized to apply for private activity bond allocation in accordance with the provisions of part VI of ch. 159, F.S.

The bill requires that proceeds of the corporation be used for the creation of incentive programs serving Florida residents, such as, but not limited to, interest rate reductions for automated and timely payments and programs for students pursuing a degree in areas of critical need in the state.

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[4] *Id.* at 1-2.
[5] Florida First Business Bond Pool Evaluation Report of EdSouth, November 1, 2004, at 1.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 2.
[9] See http://edsouth.org/programs/fltechloan.aspx.

The bill requires the corporation to be administered by a 13-member board of directors composed of 11 members appointed by the Governor. One member of the Senate is appointed by the President of the Senate to serve as an ex officio non-voting member of the board, and one member of the House is appointed by the Speaker of the House of Representatives to serve as an ex officio non-voting member of the board. The 11 members of the board appointed by the Governor must be confirmed by the Senate. The membership of the board of directors appointed by the Governor must include the following:

- 2 members who are representatives of lending institutions that originate student loans in the state and who have a favorable reputation for skill, knowledge, and experience in the field of higher education loan finance.
- 2 members who are representatives of state universities.
- 2 members who are representatives of community colleges.
- 1 member who represents technical schools that are eligible to receive student loans.
- 1 member who represents independent colleges and universities.
- 2 members who are chosen from a list of five names submitted by the Chief Financial Officer.
- 1 lay citizen who doe not derive a majority of his or her income from education or an education-related field.

Except for the members of the legislature, all members of the board of directors, including the chair, are appointed to serve 3-year terms; however, for the purpose of providing staggered terms, the initial appointments must be made in the following manner: 3 members for 1-year terms, 3 members for 2-year terms, and 5 members for 3-year terms.

The bill provides that the legislative intent is for the corporation to be self-sustaining and that all operational costs, with the exception of reasonable and necessary start-up costs, be paid through income received by the corporation's activities. Any funds received from the state to assist in start-up costs must be repaid by the corporation.

The bill requires the corporation to keep expenses, including salaries and benefits, on par with similarly situated public-private entities, subject to approval by the DOE. The corporation must also annually submit a proposed budget to the DOE for approval.

The bill requires the board of directors to annually elect a chair and vice chair. The bill provides that members of the board of directors may be reimbursed from moneys of the corporation for expenses incurred as members, pursuant to s. 112.061, F.S. Members of the board of directors will not otherwise be compensated for their services.

Each member of the board of directors who is not otherwise required to file financial disclosure pursuant to s. 8, Art. II of the State Constitution or s. 112.3144, F.S., must file disclosure of financial interests pursuant to s. 112.3145, F.S.

Department of Education

The bill provides the board of directors the ability to employ or retain such persons as are necessary to perform the administrative and financial transactions and responsibilities of the corporation and to perform other necessary and proper functions required by law.

The bill requires the corporation to annually prepare and submit a business plan to the Department of Education (DOE) and requires the DOE to monitor the corporation and set performance standards that are consistent with its mission. The corporation must maintain adequate accounting records that comply with all applicable and federal and state laws and must allow the DOE to have access to and conduct audits of all records concerning the contracted and outsourced functions or services.

The corporation must also meet all legal and auditing requirements for record retention and transfer to the state, at no cost to the state, all public records in its possession upon termination or dissolution. All

records stored electronically must be provided to the state in a format that is compatible with state information technology systems.

Taxation
The bill provides that the revenues of the corporation are funds received for providing services as a secondary student loan market and for conducting all other activities of the corporation and must not be considered taxes, fees, licenses, or charges for services imposed by the legislature on individuals, businesses, or agencies outside state government.

Any bonds issued by the corporation, their transfer, and the income therefrom, including any profit made on the sale thereof, must at all times be free from taxation of every kind by the state or any political subdivision, local unit, or other instrumentality thereof. However, this exemption does not apply to any tax imposed by ch. 220, F.S., on interest, income, or profits on debt obligations owned by corporations other than the Educational Loan Marketing Corporation of Florida, Inc.

Bonding Authority
Bonds and other debt obligations issued by or on behalf of the corporation must be payable solely from funds derived directly from sources other than state tax revenues, do not constitute a general obligation or indebtedness of the state or any of its agencies or political subdivisions, and are not a debt of the state or any of its agencies or political subdivisions. In addition, the full faith and credit of the state is not pledged to the payment of the principle of, premium if any on, or interest on such obligations. The issuance of such obligations must not directly, indirectly, or contingently obligate the state to use state funds, to levy or to pledge any form of taxation whatsoever, or to make any appropriation for payment of the principle of, premium if any on, or interest on such obligations.

C. SECTION DIRECTORY:

Section 1: Creates s. 1009.9997, F.S., creating the Educational Loan Marketing Corporation of Florida to provide services as a secondary student loan market; requiring compliance with not-for-profit corporation requirements and public records and public meetings requirements; authorizing the corporation to borrow through public bonds and private financial sources; providing uses of proceeds of the corporation; providing for a board of directors and specifying membership; providing for powers and duties of the board of directors; requiring the corporation to submit a business plan to the Department of Education; providing accounting and audit requirements; requiring revenues of the corporation to be used for providing secondary student loan market services; prohibiting state indebtedness or obligation; exempting from tax, bonds issued by the corporation, their transfer, and the income therefrom; providing intent and requirements relating to costs; and requiring budget approval by the Department of Education.

Section 2: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See FISCAL COMMENTS

2. Expenditures:

   See FISCAL COMMENTS

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

This bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may provide financial benefits to borrowers (former students and their parents), including lower interest rates on their loans and an array of programs to provide financial assistance to students, such as loan forgiveness programs and interest rate reductions for automated and timely payments.

D. FISCAL COMMENTS:

The fiscal impact of the bill is indeterminate.

The Education Loan Marketing Corporation of Florida will require funds from the State in order to meet start-up costs that will benefit a private/public corporation. Although the bill requires that the corporation repay the funds to the State, the bill does not specify a due date.

The bill provides the board of directors the ability to employ or retain such persons as are necessary to perform the administrative and financial transactions and responsibilities of the corporation and to perform other necessary and proper functions required by law. In effect, the bill authorizes the members to hire lawyers, consultants, administrative staff, etc, which may be costly.

In addition to the financial institutions participating in the services offered by the Corporation, the program will also involve the use of financial services organizations involved in the development and issuance of bonds and other financial instruments needed to capitalize the loan purchase programs of the Corporation. Included in the financial services organizations will be legal services, bond-underwriting services and financial forecasting services. Appropriate Florida agencies will also be involved in authorizing the issuance of bonds

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None

2. Other:

None

B. RULE-MAKING AUTHORITY:

The bill requires that the Department of Education monitor the corporation and set performance standards; however, the bill does not include a clear grant of rule-making authority to perform the foregoing function.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

1 A bill to be entitled
2 An act relating to educational loan marketing; creating s.
3 1009.9997, F.S.; creating the Educational Loan Marketing
4 Corporation of Florida, Inc., to provide services as a
5 secondary student loan market; requiring compliance with
6 not-for-profit corporation requirements and public records
7 and public meetings requirements; authorizing the
8 corporation to borrow through public bonds and private
9 financial sources; providing uses of proceeds of the
10 corporation; providing for a board of directors and
11 specifying membership; providing for powers and duties of
12 the board of directors; requiring the corporation to
13 submit a business plan to the Department of Education;
14 providing accounting and audit requirements; requiring
15 revenues of the corporation to be used for providing
16 secondary student loan market services; prohibiting state
17 indebtedness or obligation; exempting bonds issued by the
18 corporation, their transfer, and the income therefrom from
19 taxation; providing intent and requirements relating to
20 costs; requiring budget approval by the department;
21 providing an effective date.
22
23 Be It Enacted by the Legislature of the State of Florida:
24
25 Section 1. Section 1009.9997, Florida Statutes, is created
26 to read:
27 1009.9997 Educational Loan Marketing Corporation of
28 Florida, Inc.--

29 (1) There is created a not-for-profit corporation, to be
30 known as the Educational Loan Marketing Corporation of Florida,
31 Inc., which shall be registered, incorporated, organized, and
32 operated in compliance with chapter 617. The Legislature finds,
33 however, that public policy dictates that the Educational Loan
34 Marketing Corporation of Florida, Inc., operate in the most open
35 and accessible manner consistent with its public purpose. To
36 this end, the Legislature specifically declares that the
37 Educational Loan Marketing Corporation of Florida, Inc., and its
38 boards and advisory committees or similar groups created by the
39 Educational Loan Marketing Corporation of Florida, Inc., are
40 subject to chapter 119, relating to public records, and chapter
41 286, relating to public meetings and records.
42 (2)(a) The corporation shall purchase, service, and
43 otherwise provide access and service as a secondary market for
44 student loans in this state. The corporation is authorized to
45 borrow funds and incur debt, including the issuance of revenue
46 bonds, for the purposes set forth in this section. The
47 corporation may apply for private activity bond allocation in
48 accordance with part VI of chapter 159.
49 (b) Proceeds of the corporation shall be used for the
50 creation of incentive programs serving state residents, such as,
51 but not limited to, interest rate reductions for automated and
52 timely payments and programs for students pursuing a degree in
53 areas of critical need in the state.
54 (3) The corporation shall be administered by a 13-member
55 board of directors composed of 11 members appointed by the
56 Governor, one member appointed by the President of the Senate,

57 and one member appointed by the Speaker of the House of
58 Representatives. The members appointed by the Governor shall be
59 confirmed by the Senate.
60 (a) The 11 members of the board of directors appointed by
61 the Governor shall include:
62 1. Two members who are representatives of lending
63 institutions that originate student loans in the state and who
64 have a favorable reputation for skill, knowledge, and experience
65 in the field of higher education loan finance.
66 2. Two members who are representatives of state
67 universities.
68 3. Two members who are representatives of community
69 colleges.
70 4. One member who represents technical schools that are
71 eligible to receive student loans.
72 5. One member who represents independent colleges and
73 universities.
74 6. Two members who are chosen from a list of five names
75 submitted by the Chief Financial Officer.
76 7. One lay citizen who does not derive a majority of his
77 or her income from education or an education-related field.
78 (b) The remaining two members of the board of directors
79 shall include:
80 1. A member of the Senate, who shall be appointed by the
81 President of the Senate as a nonvoting ex officio member of the
82 board of directors and who shall serve at the pleasure of the
83 President of the Senate.
84 2. A member of the House of Representatives, who shall be

85 appointed by the Speaker of the House of Representatives as a
86 nonvoting ex officio member of the board of directors and who
87 shall serve at the pleasure of the Speaker of the House of
88 Representatives.
89
90 Except for the members of the Legislature, all members of the
91 board of directors, including the chair, shall be appointed to
92 serve 3-year terms. However, for the purpose of providing
93 staggered terms, of the initial appointments, three members
94 shall be appointed to 1-year terms, three members shall be
95 appointed to 2-year terms, and five members shall be appointed
96 to 3-year terms.
97 (4)(a) The board of directors shall annually elect a chair
98 and vice chair.
99 (b) Members of the board of directors are entitled to
100 reimbursement from moneys of the corporation for expenses
101 incurred as members under s. 112.061 but may not otherwise be
102 compensated for their services.
103 (c) Each member of the board of directors who is not
104 otherwise required to file financial disclosure under s. 8, Art.
105 II of the State Constitution or s. 112.3144 shall file
106 disclosure of financial interests under s. 112.3145.
107 (5) The board of directors may employ or retain such
108 persons as are necessary to perform the administrative and
109 financial transactions and responsibilities of the corporation
110 and to perform other necessary and proper functions required by
111 law.
112 (6)(a) The corporation shall annually prepare and submit a

113 business plan to the Department of Education. The department
114 shall monitor the corporation and set performance standards that
115 are consistent with its mission.
116 (b) The corporation must maintain adequate accounting
117 records that comply with all applicable federal and state laws
118 and must authorize the department to have access to and conduct
119 audits of all records concerning the contracted and outsourced
120 functions or services.
121 (c) The corporation must meet all legal and auditing
122 requirements for record retention and transfer to the state, at
123 no cost to the state, of all public records in its possession
124 upon termination or dissolution. All records stored
125 electronically must be provided to the state in a format that is
126 compatible with state information technology systems.
127 (7)(a) It is the intent of the Legislature that the tax
128 exemptions provided in this subsection will augment the
129 financial resources of the corporation to better enable the
130 corporation to fulfill its public purpose.
131 (b) The revenues of the corporation are funds received for
132 providing services as a secondary student loan market as
133 required by this section and for conducting all other activities
134 of the corporation and are not taxes, fees, licenses, or charges
135 for services imposed by the Legislature on individuals,
136 businesses, or agencies outside state government. Bonds and
137 other debt obligations issued by or on behalf of the corporation
138 shall be payable solely from funds derived directly from sources
139 other than state tax revenues, do not constitute a general
140 obligation or indebtedness of the state or any of its agencies

141 or political subdivisions, and shall not be a debt of the state
142 or any of its agencies or political subdivisions, and the full
143 faith and credit of the state is not pledged to the payment of
144 the principal of, premium if any on, or interest on these
145 obligations. The issuance of these obligations does not
146 directly, indirectly, or contingently obligate the state to use
147 state funds, to levy or to pledge any form of taxation
148 whatsoever, or to make any appropriation for payment of the
149 principal of, premium if any on, or interest on such
150 obligations. Any bonds issued by the corporation, their
151 transfer, and the income therefrom, including any profit made on
152 the sale thereof, shall at all times be free from taxation of
153 every kind by the state or any political subdivision, local
154 unit, or other instrumentality thereof. However, this exemption
155 does not apply to any tax imposed by chapter 220 on interest,
156 income, or profits on debt obligations owned by corporations
157 other than the Educational Loan Marketing Corporation of
158 Florida, Inc.
159 (8)(a) It is the intent of the Legislature that the
160 corporation be self-sustaining and that all operational costs,
161 with the exception of reasonable and necessary start-up costs,
162 be paid through income received by the corporation from
163 activities authorized under this section. Any funds received
164 from the state to assist in start-up costs must be repaid by the
165 corporation.
166 (b) In keeping with its public mission, the corporation
167 shall keep expenses, including salaries and benefits, on par
168 with similarly situated public-private entities, subject to

169 approval by the Department of Education. The corporation shall
170 annually submit a proposed budget to the department, which shall
171 approve it consistent with this subsection.
172 Section 2. This act shall take effect upon becoming a law.

Amendment No. (1)

Bill No. **HB 593**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Coley offered the following:
4
5 **Amendment**
6 Remove line(s) 32 and insert:
7 operated in compliance with chapter 617 and s. 501 (c) (3) of
8 the Internal Revenue Code, as amended. The Legislature finds,
9

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Coley offered the following:
4
5 **Amendment**
6 Remove line(s) 58-88 and insert:
7 Representatives. The members appointed by the President of the
8 Senate and the Speaker of the House of Representatives shall
9 serve as nonvoting, ex officio members of the board of directors
10 and shall serve at the pleasure of the appointing officers. The
11 members appointed by the Governor shall be confirmed by the
12 Senate. The 11 members of the board of directors appointed by
13 the Governor shall include:
14 (a) Two members who are representatives of lending
15 institutions that originate student loans in the state and who
16 have a favorable reputation for skill, knowledge, and experience
17 in the field of higher education loan finance.
18 (b) Two members who are representatives of state
19 universities.
20 (c) Two members who are representatives of community
21 colleges.

22 (d) One member who represents technical schools that are
23 eligible to receive student loans.
24 (e) One member who represents independent colleges and
25 universities.
26 (f) Two members who are chosen from a list of five names
27 submitted by the Chief Financial Officer.
28 (g) One lay citizen who does not derive a majority of his
29 or her income from education or an education-related field.
30

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (3)

Bill No. **HB 593**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Coley offered the following:
4
5 **Amendment**
6 On line 171, replace the term
7 "subsection"
8 with
9 "section"

000000

Amendment No. (4)

Bill No. **HB 593**

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Coley offered the following:
4
5 **Amendment (with title amendment)**
6 Between lines 171 and 172 insert:
7 (9) The corporation shall submit an annual report to the
8 President of the Senate, the Speaker of the House of
9 Representatives, and the Department of Education 3 months after
10 the end of each fiscal year of the corporation. The annual
11 report must describe the corporation's efforts in achieving
12 performance standards established by the department and the
13 objectives of the annual business plan, and the status of
14 developing and implementing incentive programs such as, but not
15 limited to, interest-rate reductions for automated and timely
16 payments and programs for students pursuing degrees in areas of
17 critical need in the state. The annual report must also include
18 annual audited financial statements of the corporation for the
19 prior fiscal year.
20
21

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Amendment No. (4)

22 ========== T I T L E A M E N D M E N T ==========

23 Remove line(s) 20 and insert:

24 costs; requiring budget approval by the department; requiring an

25 annual report;

000000

HB 821
Goodlette

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 821 Homeownership Assistance Contribution Tax Credit Program
SPONSOR(S): Goodlette
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Economic Development, Trade & Banking Committee		Olmedillo	Carlson
2) Local Government Council			
3) Finance & Tax Committee			
4) Commerce Council			
5)			

SUMMARY ANALYSIS

The bill separates the Community Contribution Tax Credit Program into two programs: the Community Contribution Tax Credit Program (CCTC) and the Homeownership Assistance Contributions Tax Credit Program (HACTC). The bill sets the annual limitation for homeownership projects at $10 million, and the annual limitation for projects that provide commercial, industrial, or public resources and facilities or improve entrepreneurial and job-development opportunities for low-income persons at $3 million, increasing the total available credits by $1 million. The bill eliminates a requirement that the Office of Tourism, Trade and Economic Development (OTTED), reserve a percentage of funds for each type of project and a provision allowing the transfer of unused funds between housing and non-housing projects.

This bill streamlines the community contribution tax credit program and the homeownership assistance contribution tax credit, simplifies administration of the program, conforms cross references and provides for application and eligibility requirements for the homeownership contribution tax credit program by emulating all corresponding provisions from the community contribution credit tax program.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill grants OTTED rulemaking authority to implement provisions of the homeownership assistance tax credit program.

Ensure lower taxes: The bill will provide increased tax incentives for persons who donate to eligible sponsors for projects that provide homeownership opportunities for certain low income households, and for donations made to eligible sponsors for all other projects that qualify under the CCTC.

B. PRESENT SITUATION:

Under the community contribution tax credit program, corporations, insurance companies, and persons who collect or remit sales or use taxes may be able to receive tax credits for making donations to certain low-income housing and community development projects.

Credits Available - Available tax credits under the program may be taken against sales or use taxes, corporate income taxes, and insurance premium taxes.[1] Tax credits are limited to 50 percent of the amount of a "community contribution" or donation to a maximum of $200,000 annually per donor.[2] The total amount of community contribution tax credits available per year under the program is $12 million.[3] Tax credits against sales or use taxes are granted as a refund against sales and use taxes reported on returns and remitted in the 12 months preceding the application to the Department of Revenue (DOR) for a refund.[4] Tax credits against corporate income taxes and insurance premium taxes are claimed against taxes due.[5]

Form of Contributions - Community contributions or donations must take the following forms: (1) cash or other liquid assets; (2) real property; (3) goods or inventory; or (4) other physical resources.[6] For purposes of credits against insurance premium taxes and corporate income taxes, the Department of Revenue is authorized to identify "other physical resources" that qualify as a community contribution. For purposes of credits against sales or use taxes, OTTED is authorized to identify "other physical resources."

Use of Contributions - Community contributions must be used for projects to provide: low and very low-income housing; commercial, industrial, or public resources and facilities; entrepreneurial and job development opportunities for low-income persons; access to high speed broadband capability for rural enterprise zones; and educational programs and materials that are directly related to any project approved between January 1, 1996, and December 31, 1999, and located in an enterprise zone designated pursuant to s. 290.0065, F.S. (the Florida Holocaust Museum in St. Petersburg).[7]

Project Location - Projects to provide low and very low-income housing may be located anywhere in the state.[8] However, community development projects, such as projects to construct or rehabilitate commercial, industrial, or public facilities, must be located in an enterprise zone or Front Porch Florida Community.[9]

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[1] Sections 212.08(5)(q), 220.183, and 624.5105, F.S.
[2] Sections 212.08(5)(q)1.a. and c., 220.183(1)(a) and (b), and 624.5105(1)(a) and (b), F.S.
[3] Sections 212.08(5)(q)1.e., 220.183(1)(c), and 624.5105(1)(c), F.S.
[4] Section 212.08(5)(q)1.b., F.S.
[5] Sections 220.183(1)(a) and 624.5105(1)(a), F.S.
[6] Sections 212.08(5)(q)2.a., 220.03(1)(d), and 624.5105(5)(a), F.S.
[7] Sections 212.08(5)(q)2.b., 220.03(1)(t), and 624.5105(2)(b) and (5)(e), F.S.
[8] Sections 212.08(5)(q)2.d., 220.183(2)(d), and 624.5105(2)(d), F.S.
[9] *Id.*

Contribution Recipients - Eligible project sponsors under the program include a wide variety of community organizations, housing organizations, historic preservation organizations, units of state and local government, and regional workforce boards.[10] OTTED maintains a list of approved sponsors.

Tax Credit Application and Approval Process - Applications to receive community contribution tax credits must be submitted to OTTED. The application must set forth the name of the sponsor, a description of the project, and the type, value, and purpose of the contribution. For the purposes of credits against corporate income taxes and sales or use taxes, the sponsor must verify in the application for tax credits that the community contribution has been received.[11] For the purposes of credits against insurance premium taxes, the sponsor must state its willingness to receive the contribution in the application for tax credits.[12] After approval for community contribution tax credits is received by an applicant, the applicant must also claim the credit from DOR.[13] Unused credits against corporate income taxes and insurance premium taxes may be carried forward for 5 years.[14] Unused credits against sales taxes may be carried forward for 3 years.[15]

If during the first 10 business days of the state fiscal year, tax credit applications are received for less than 80 percent of $10 million of the available annual tax credits, and 70 percent of credits in excess of $10 million, ***for approved projects that provide homeownership opportunity for low-income or very-low-income households,*** OTTED shall grant tax credits for those applications and shall grant remaining tax credits on a first-come, first-served basis for any subsequent applications for such projects received before the end of the first 6 months of the state fiscal year.[16] If, during the first 10 business days of the state fiscal year, tax credit applications are received for more than 80 percent of $10 million of available annual tax credits, and 70 percent of credits in excess of $10 million, for approved projects that provide homeownership opportunities for low and very-low-income households, OTTED shall grant the tax credits as follows: a) applications that do not exceed $200,000 will be granted in full; and b) thereafter, after subtracting out the amount of tax credits for applications that are for less than $200,000, tax credit applications in excess of $200,000 will be approved on a pro rata basis. If, after the first 6 months of the fiscal year, additional credits become available, OTTED is directed to grant the tax credits by first increasing the credits up to the full amount of those who received a pro rata reduction and, if there are remaining credits, granting credits to those who applied after the 11th business day of the fiscal year on a first-come, first-served basis.[17]

If, during the first 10 business days of the fiscal year, tax credit applications are received for less than 20 percent of $10 million of the available tax credits and 30 percent of credits in excess of $10 million, ***for approved projects other than those that provide homeownership opportunities,*** OTTED shall grant the tax credits for those applications and shall grant remaining tax credits on a first-come, first-served basis for any subsequent applications received before the end of the first 6 months of the state fiscal year.[18] If, during the first 10 business days of the state fiscal year, tax credit applications are received for more than 20 percent of $10 million of the available tax credits and 30 percent of credits in excess of $10 million, OTTED shall grant the tax credits on a pro rata basis.[19] If, after the first 6 months of the fiscal year, additional credits become available for housing-related projects, OTTED shall grant tax credits by first increasing the credit up to the full amount to those entities who received a pro rata reduction and, if there are remaining credits, granting credits to those who applied on or after the 11th business day of the state fiscal year on a first-come, first-served basis.[20]

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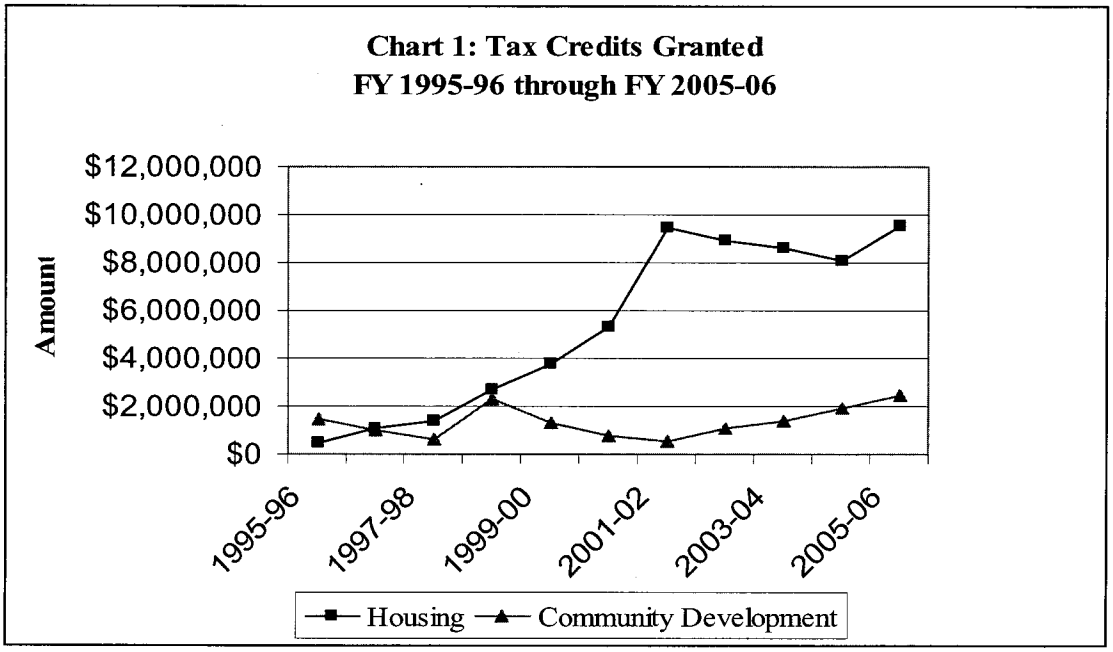
[10] Sections 212.08(5)(q)2.c., 220.183(2)(c), and 624.5105(2)(c), F.S.
[11] Sections 212.08(5)(q)3.b. and 220.183(3)(b), F.S.
[12] Section 624.5105(3)(b), F.S.
[13] Section 212.08(5)(q)3.c., F.S., and Rules 12A-1.107(4), 12B-8.001(3)(d), and 12C-1.0188(3), F.A.C.
[14] Sections 220.183(1)(e) and 624.5105(1)(e), F.S.
[15] Section 212.08(5)(q)1.b. and 5., F.S.
[16] Sections 212.08(5)(q)1.e.(III), 220.183(2)(b)4., and 624.5105(2)(e)3., F.S.
[17] *Id.*
[18] Sections 212.08(5)(q)1.e.(IV), 220.183(2)(b)5., and 624.5105(2)(e)4., F.S.
[19] *Id.*
[20] *Id.*

Program History - The community contributions tax credit was created in 1980[21] as a credit against the corporate income tax or insurance premium tax. From 1980 through 1994 it was capped at $3 million per year. In 1994[22] the program's expiration date was extended from that year until 2005, and the cap was decreased to $2 million. In 1998[23] the Legislature increased the cap to $5 million, and in 1999[24] it was raised again to $10 million. Legislation enacted in 2001[25] allowed the credit to be used against a dealer's sales and use tax liability. In 2005[26] the Legislature extended the program through June 30, 2015, increased from $10 million to $12 million the total annual amount of tax credits that may be granted under the program, and reserved 80 percent of $10 million of the available tax credits for businesses that contribute to home ownership opportunities for low-income and very-low-income households for the first 6 months of each fiscal year. For credits in excess of $10 million, 70 percent is reserved for businesses that contribute to low income housing programs. *Since the cap is now set at $12 million, $9.4 million must be reserved for home ownership projects and $2.6 million is available for all other projects during the first six months of the fiscal year.*

Program Expiration - The statutes creating the community contribution tax credit program are scheduled to expire on June 30, 2015.

Program Statistics – According to OTTED, most of the community contribution tax credits are used against sales taxes. Similarly, the majority of contributions have been to low-income housing projects.

The chart and table below show the tax credits granted for housing projects and for other community development projects during the past ten years. There were significant tax credits unused for the first two years after the cap was increased to $10 million, but since then the entire allocation has been used.



Source: Created from data provided by OTTED.

C. EFFECT OF PROPOSED CHANGES:

The bill separates the Community Contribution Tax Credit Program into two programs: the Community Tax Contribution Tax Credit Program (CCTC) and the Homeownership Assistance Contributions Tax Credit Program (HACTC). The bill sets the annual limitation for homeownership projects at $10 million,

[21] Ch. 80-249, L.O.F.
[22] Ch. 94-136, L.O.F.
[23] Ch. 98-291, L.O.F.
[24] Ch. 99-265, L.O.F.
[25] Ch. 2001-201, L.O.F.
[26] Ch. 2005-282, L.O.F.

and the annual limitation for other projects at $3 million, increasing the total available credits by $1 million.

The bill eliminates a requirement that OTTED reserve a percentage of funds for each type of project and a provision allowing the transfer of unused funds between housing and non-housing projects.

D. SECTION DIRECTORY:

Section 1. Amends s. 14.2015(2), F.S., to make conforming changes.
Section 2. Amends s. 212.08(5), F.S., to reduce availability of tax credits; remove superfluous provisions; renumber sub-paragraphs; establish a new tax credit program; remove availability of remaining credits; conform cross-references; grant the office rulemaking authority; and provide an expiration date.
Section 3. Amends s. 220.02, F.S., to conform cross-references.
Section 4. Amends s. 220.03, F.S., to conform cross-references, remove definitions; and remove expiration date.
Section 5. Amends s. 220.03, F.S., to remove a definition; and remove expiration date.
Section 6. Amends ss. 220.183(1), 220.183(2) F.S., 220.183(3), F.S., 220.183(4), F.S., to provide cross-references, make conforming changes; grant the office rulemaking authority; and remove redundant language.
Section 7. Creates s. 220.1835, F.S., to provide tax credits against corporate income tax; provide an expiration date; grant DOR rulemaking authority; and make cross references.
Section 8. Amends s. 624.5105, F.S., to make conforming changes; provide cross references; and remove redundant language.
Section 9. Creates s. 624.5108, F.S., to provide tax credits against insurance premium tax; provide an expiration date; grant DOR rulemaking authority; and make cross references.
Section 10. Amends s. 212.06, F.S., to make conforming changes.
Section 11. Amends s. 220.02, F.S., to make conforming changes.
Section 12. Amends s. 220.181, F.S., to make conforming changes.
Section 13. Amends s. 220.182, F.S., to make conforming changes.
Section 14. Amends s. 288.1045, F.S., to make conforming changes.
Section 15. Amends s. 288.106, F.S., to make conforming changes.
Section 16. Amends s. 290.00677, F.S., to make conforming changes.
Section 17. Provides an effective date.

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:

The bill increases the amount of tax credits available to persons for homeownership projects from $9.4 million to $10 million and for non-housing projects from $2.6 million to $3 million. This may have a positive but indeterminate impact on the number of low-income homes that are built each year and the

projects sponsored in enterprise zones and Front Porch Florida Communities as they are likely to receive more contributions.

D. FISCAL COMMENTS:

The bill increases the cap by $1 million, resulting in reduction of state revenue.

The table below shows the tax credits granted for housing projects and for other community development projects during the past ten years. There were significant tax credits unused for the first two years after the cap was increased to $10 million, but since then the entire allocation has been used.

Table 1

TAX CREDITS GRANTED - FY 1995-96 through FY 2005-06[1]

Fiscal Year	Annual Allocation	Housing	Community Development	Total Approved Credits	Credits Remaining
1995-96	2,000,000	465,542	1,472,255	1,937,797	62,203
1996-97	2,000,000	1,043,256	1,018,947	2,062,203	(62,203)
1997-98	2,000,000	1,348,500	651,500	2,000,000	0
1998-99	5,000,000	2,720,441	2,279,559	5,000,000	0
1999-00	10,000,000	3,764,283	1,302,178	5,066,461	4,933,539
2000-01	10,000,000	5,320,890	744,365	6,065,255	3,934,745
2001-02	10,000,000	9,484,489	515,464	9,999,953	47
2002-03	10,000,000	8,914,456	1,085,544	10,000,000	0
2003-04	10,000,000	8,622,769	1,377,231	10,000,000	0
2004-05	10,000,000	8,051,618	1,948,382	10,000,000	0
2005-06	12,000,000	9,558,883	2,441,117	12,000,000	0
TOTALS	83,000,000	59,295,127	14,836,542	74,131,669	8,868,331

Source: Created from data provided by OTTED.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require a municipality or county to expend funds or to take any action requiring the expenditure of funds. The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate. The bill does not reduce the percentage of state tax shared with municipalities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill grants OTTED rulemaking authority for a new tax credit program for low income housing, which was formally part of the community contribution tax credit program.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Sections 4 and 5 delete the definition of "project" from s. 220.03, F.S. This appears to be unnecessary.

The Office of Tourism, Trade & Economic Development expressed the following concerns regarding this bill:

- Because of the deletion of the definition of "projects," projects that provide multi-family housing or projects that rehabilitate rental housing for low-income persons will no longer be eligible to participate in any program.
- There are no provisions to re-allocate tax credits that have not been approved after a certain amount of time from one program to another. Currently after 6 months, the tax credits are available to any type of project.
- As proposed, definitions of "project" and "community contribution" are deleted from the corporate tax section, and the insurance premium tax section and referred to the sales tax section.

The Florida Department of Revenue expressed the following concerns regarding this bill:

- Striking the eligibility requirements and the application requirements for the community contribution tax credit from ss. 220.183, F.S. and 220.1835, F.S., and referring to ss. 212.08(5)(q), F.S. and 212.08(5)(r), F.S., for that information respectively, may cause confusion as to what those requirements are.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

1 A bill to be entitled
2 An act relating to a homeownership assistance contribution
3 tax credit program; amending s. 14.2015, F.S.; revising
4 the duties of the Office of Tourism, Trade, and Economic
5 Development to conform; amending s. 212.08, F.S.; reducing
6 the amount of available tax credits for projects under the
7 community contribution tax credit program; removing from
8 the community contribution tax credit program provisions
9 relating to affordable housing for certain low-income
10 households; establishing a tax credit against the sales
11 and use tax for certain homeownership assistance
12 contributions; providing for authorization; providing
13 eligibility, application, and distribution requirements;
14 providing for administration by the office and expiration;
15 providing methods and procedures for computing and
16 granting the credit; providing limitations; specifying a
17 maximum amount available for projects under the
18 homeownership assistance contribution tax credit program;
19 authorizing the office to adopt rules; providing duties of
20 the office; amending s. 220.02, F.S.; revising legislative
21 intent relating to the order of priority of application of
22 credits against the corporate income tax to include
23 homeownership assistance contribution tax credits;
24 amending s. 220.03, F.S.; deleting the definitions of
25 "community contribution" and "project"; conforming cross-
26 references; amending ss. 220.183 and 624.5105, F.S.;
27 reducing the amount of available tax credits against the
28 corporate income tax and the insurance premium tax for

29 projects under the community contribution tax credit
30 program; removing from the community contribution tax
31 credit program provisions relating to affordable housing
32 for certain low-income households; creating ss. 220.1835
33 and 624.5108, F.S.; establishing tax credits against the
34 corporate income tax and the insurance premium tax for
35 certain homeownership assistance contributions; providing
36 for authorization; providing eligibility, application, and
37 distribution requirements; providing for administration by
38 the office and expiration; providing methods and
39 procedures for computing and granting the credit;
40 providing limitations; specifying a maximum amount of tax
41 credits available for projects under the homeownership
42 assistance contribution tax credit program; authorizing
43 the office to adopt rules; providing duties of the office;
44 amending ss. 212.06, 220.02, 220.181, 220.182, 288.1045,
45 288.106, and 290.00677, F.S.; conforming cross-references;
46 providing an effective date.
47
48 Be It Enacted by the Legislature of the State of Florida:
49
50 Section 1. Paragraph (f) of subsection (2) of section
51 14.2015, Florida Statutes, is amended to read:
52 14.2015 Office of Tourism, Trade, and Economic
53 Development; creation; powers and duties.--
54 (2) The purpose of the Office of Tourism, Trade, and
55 Economic Development is to assist the Governor in working with
56 the Legislature, state agencies, business leaders, and economic

57 development professionals to formulate and implement coherent
58 and consistent policies and strategies designed to provide
59 economic opportunities for all Floridians. To accomplish such
60 purposes, the Office of Tourism, Trade, and Economic Development
61 shall:
62 (f)1. Administer the Florida Enterprise Zone Act under ss.
63 290.001-290.016;~~,~~ the community contribution tax credit program
64 under ss. 212.08(5)(q), 220.183, and 624.5105;~~,~~ the
65 homeownership assistance tax credit program under ss.
66 212.08(5)(r), 220.1835, and 624.5108; the tax refund program for
67 qualified target industry businesses under s. 288.106;~~,~~ the tax-
68 refund program for qualified defense contractors under s.
69 288.1045;~~,~~ contracts for transportation projects under s.
70 288.063;~~,~~ the sports franchise facility program under s.
71 288.1162;~~,~~ the professional golf hall of fame facility program
72 under s. 288.1168;~~,~~ the expedited permitting process under s.
73 403.973;~~,~~ the Rural Community Development Revolving Loan Fund
74 under s. 288.065;~~,~~ the Regional Rural Development Grants Program
75 under s. 288.018;~~,~~ the Certified Capital Company Act under s.
76 288.99;~~,~~ the Florida State Rural Development Council;~~,~~ the Rural
77 Economic Development Initiative;~~,~~ and other programs that are
78 specifically assigned to the office by law, by the
79 appropriations process, or by the Governor. Notwithstanding any
80 other provisions of law, the office may expend interest earned
81 from the investment of program funds deposited in the Grants and
82 Donations Trust Fund and the Brownfield Property Ownership
83 Clearance Assistance Revolving Loan Trust Fund to contract for
84 the administration of the programs, or portions of the programs,

85 enumerated in this paragraph or assigned to the office by law,
86 by the appropriations process, or by the Governor. Such
87 expenditures shall be subject to review under chapter 216.
88 2. The office may enter into contracts in connection with
89 the fulfillment of its duties concerning the Florida First
90 Business Bond Pool under chapter 159, tax incentives under
91 chapters 212 and 220, tax incentives under the Certified Capital
92 Company Act in chapter 288, foreign offices under chapter 288,
93 the Enterprise Zone program under chapter 290, the Seaport
94 Employment Training program under chapter 311, the Florida
95 Professional Sports Team License Plates under chapter 320,
96 Spaceport Florida under chapter 331, Expedited Permitting under
97 chapter 403, and in carrying out other functions that are
98 specifically assigned to the office by law, by the
99 appropriations process, or by the Governor.
100 Section 2. Paragraph (q) of subsection (5) of section
101 212.08, Florida Statutes, is amended, and paragraph (r) is added
102 to that subsection, to read:
103 212.08 Sales, rental, use, consumption, distribution, and
104 storage tax; specified exemptions.--The sale at retail, the
105 rental, the use, the consumption, the distribution, and the
106 storage to be used or consumed in this state of the following
107 are hereby specifically exempt from the tax imposed by this
108 chapter.
109 (5) EXEMPTIONS; ACCOUNT OF USE.--
110 (q) Community contribution tax credit for donations.--
111 1. Authorization.--Beginning July 1, 2001, persons who are
112 registered with the department under s. 212.18 to collect or

113 remit sales or use tax and who make donations to eligible
114 sponsors are eligible for tax credits against their state sales
115 and use tax liabilities as provided in this paragraph:
116 a. The credit shall be computed as 50 percent of the
117 person's approved annual community contribution.~~;~~
118 b. The credit shall be granted as a refund against state
119 sales and use taxes reported on returns and remitted in the 12
120 months preceding the date of application to the department for
121 the credit as required in sub-subparagraph 3.c. If the annual
122 credit is not fully used through such refund because of
123 insufficient tax payments during the applicable 12-month period,
124 the unused amount may be included in an application for a refund
125 made pursuant to sub-subparagraph 3.c. in subsequent years
126 against the total tax payments made for such year. Carryover
127 credits may be applied for a 3-year period without regard to any
128 time limitation that would otherwise apply under s. 215.26.~~;~~
129 c. A person may not receive more than $200,000 in annual
130 tax credits for all approved community contributions made in any
131 one year.~~;~~
132 d. All proposals for the granting of the tax credit
133 require the prior approval of the Office of Tourism, Trade, and
134 Economic Development.~~;~~
135 e. The total amount of tax credits which may be granted
136 for all projects ~~programs~~ approved under this paragraph, s.
137 220.183, and s. 624.5105 is $3 ~~$12~~ million annually.~~; and~~
138 f. A person who is eligible to receive the credit provided
139 for in this paragraph, s. 220.183, or s. 624.5105 may receive
140 the credit only under the one section of the person's choice.

141 2. Eligibility requirements.--
142 a. A community contribution by a person must be in the
143 following form:
144 (I) Cash or other liquid assets;
145 (II) Real property;
146 (III) Goods or inventory; or
147 (IV) Other physical resources as identified by the Office
148 of Tourism, Trade, and Economic Development.
149 b. All community contributions must be reserved
150 exclusively for use in a project. As used in this paragraph ~~sub-~~
151 ~~subparagraph~~, the term "project" means any activity undertaken
152 by an eligible sponsor which provides ~~is designed to construct,~~
153 ~~improve, or substantially rehabilitate housing that is~~
154 ~~affordable to low-income or very-low-income households as~~
155 ~~defined in s. 420.9071(19) and (28); designed to provide~~
156 commercial, industrial, or public resources and facilities~~,~~ or
157 improves ~~designed to improve~~ entrepreneurial and job-development
158 opportunities for low-income persons. A project may be the
159 investment necessary to increase access to high-speed broadband
160 capability in rural communities with enterprise zones, including
161 projects that result in improvements to communications assets
162 that are owned by a business. A project may include the
163 provision of museum educational programs and materials that are
164 directly related to any project approved between January 1,
165 1996, and December 31, 1999, and located in an enterprise zone
166 designated pursuant to s. 290.0065. ~~This paragraph does not~~
167 ~~preclude projects that propose to construct or rehabilitate~~
168 ~~housing for low-income or very-low-income households on~~

169 ~~scattered sites. With respect to housing, contributions may be~~
170 ~~used to pay the following eligible low-income and very-low-~~
171 ~~income housing-related activities:~~
172 ~~(I) Project development impact and management fees for~~
173 ~~low-income or very-low-income housing projects;~~
174 ~~(II) Down payment and closing costs for eligible persons,~~
175 ~~as defined in s. 420.9071(19) and (28);~~
176 ~~(III) Administrative costs, including housing counseling~~
177 ~~and marketing fees, not to exceed 10 percent of the community~~
178 ~~contribution, directly related to low-income or very-low-income~~
179 ~~projects; and~~
180 ~~(IV) Removal of liens recorded against residential~~
181 ~~property by municipal, county, or special district local~~
182 ~~governments when satisfaction of the lien is a necessary~~
183 ~~precedent to the transfer of the property to an eligible person,~~
184 ~~as defined in s. 420.9071(19) and (28), for the purpose of~~
185 ~~promoting home ownership. Contributions for lien removal must be~~
186 ~~received from a nonrelated third party.~~
187 c. The project must be undertaken by an "eligible
188 sponsor," which includes:
189 (I) A community action program;
190 (II) A nonprofit community-based development organization
191 the ~~whose~~ mission of which includes ~~is the provision of housing~~
192 ~~for low-income or very-low-income households or~~ increasing
193 entrepreneurial and job-development opportunities for low-income
194 persons;
195 (III) ~~A neighborhood housing services corporation;~~
196 ~~(IV) A local housing authority created under chapter 421;~~

197 ~~(V)~~ A community redevelopment agency created under s.
198 163.356;
199 (IV) ~~(VI)~~ The Florida Industrial Development Corporation;
200 (V) ~~(VII)~~ A historic preservation district agency or
201 organization;
202 (VI) ~~(VIII)~~ A regional workforce board;
203 (VII) ~~(IX)~~ A direct-support organization as provided in s.
204 1009.983;
205 (VIII) ~~(X)~~ An enterprise zone development agency created
206 under s. 290.0056;
207 (IX) ~~(XI)~~ A community-based organization incorporated under
208 chapter 617 which is recognized as educational, charitable, or
209 scientific pursuant to s. 501(c)(3) of the Internal Revenue Code
210 and whose bylaws and articles of incorporation include
211 ~~affordable housing,~~ economic development~~,~~ or community
212 development as the primary mission of the corporation;
213 (X) ~~(XII)~~ Units of local government;
214 (XI) ~~(XIII)~~ Units of state government; or
215 (XII) ~~(XIV)~~ Any other agency that the Office of Tourism,
216 Trade, and Economic Development designates by rule.
217
218 In no event may a contributing person have a financial interest
219 in the eligible sponsor.
220 d. The project must be located in an area designated an
221 enterprise zone or a Front Porch Florida Community pursuant to
222 s. 20.18(6), unless the project increases access to high-speed
223 broadband capability for rural communities with enterprise zones
224 but is physically located outside the designated rural zone

225 boundaries. ~~Any project designed to construct or rehabilitate~~
226 ~~housing for low-income or very-low-income households as defined~~
227 ~~in s. 420.0971(19) and (28) is exempt from the area requirement~~
228 ~~of this sub-subparagraph.~~
229 e.~~(I) For the first 6 months of the fiscal year, the~~
230 ~~Office of Tourism, Trade, and Economic Development shall reserve~~
231 ~~80 percent of the first $10 million in available annual tax~~
232 ~~credits and 70 percent of any available annual tax credits in~~
233 ~~excess of $10 million for donations made to eligible sponsors~~
234 ~~for projects that provide homeownership opportunities for low-~~
235 ~~income or very-low-income households as defined in s.~~
236 ~~420.9071(19) and (28). If any such reserved annual tax credits~~
237 ~~remain after the first 6 months of the fiscal year, the office~~
238 ~~may approve the balance of these available credits for donations~~
239 ~~made to eligible sponsors for projects other than those that~~
240 ~~provide homeownership opportunities for low-income or very-low-~~
241 ~~income households.~~
242 ~~(II) For the first 6 months of the fiscal year, the office~~
243 ~~shall reserve 20 percent of the first $10 million in available~~
244 ~~annual tax credits and 30 percent of any available annual tax~~
245 ~~credits in excess of $10 million for donations made to eligible~~
246 ~~sponsors for projects other than those that provide~~
247 ~~homeownership opportunities for low-income or very-low-income~~
248 ~~households as defined in s. 420.9071(19) and (28). If any~~
249 ~~reserved annual tax credits remain after the first 6 months of~~
250 ~~the fiscal year, the office may approve the balance of these~~
251 ~~available credits for donations made to eligible sponsors for~~

252 ~~projects that provide homeownership opportunities for low-income~~
253 ~~or very-low-income households.~~
254 ~~(III) If, during the first 10 business days of the state~~
255 ~~fiscal year, eligible tax credit applications are received for~~
256 ~~less than the available annual tax credits reserved under sub-~~
257 ~~sub-subparagraph (I), the office shall grant tax credits for~~
258 ~~those applications and shall grant remaining tax credits on a~~
259 ~~first-come, first-served basis for any subsequent eligible~~
260 ~~applications received before the end of the first 6 months of~~
261 ~~the state fiscal year. If, during the first 10 business days of~~
262 ~~the state fiscal year, eligible tax credit applications are~~
263 ~~received for more than the available annual tax credits reserved~~
264 ~~under sub-sub-subparagraph (I), the office shall grant the tax~~
265 ~~credits for the applications as follows:~~
266 ~~(A) If tax credit applications submitted for approved~~
267 ~~projects of an eligible sponsor do not exceed $200,000 in total,~~
268 ~~the credits shall be granted in full if the tax credit~~
269 ~~applications are approved, subject to sub-sub-subparagraph (I).~~
270 ~~(B) If tax credit applications submitted for approved~~
271 ~~projects of an eligible sponsor exceed $200,000 in total, the~~
272 ~~amount of tax credits granted pursuant to sub-sub-sub-~~
273 ~~subparagraph (A) shall be subtracted from the amount of~~
274 ~~available tax credits under sub-sub-subparagraph (I), and the~~
275 ~~remaining credits shall be granted to each approved tax credit~~
276 ~~application on a pro rata basis.~~
277 ~~(C) If, after the first 6 months of the fiscal year,~~
278 ~~additional credits become available under sub-sub-subparagraph~~
279 ~~(II), the office shall grant the tax credits by first granting~~

280 ~~to those who received a pro rata reduction up to the full amount~~
281 ~~of their request and, if there are remaining credits, granting~~
282 ~~credits to those who applied on or after the 11th business day~~
283 ~~of the state fiscal year on a first-come, first-served basis.~~
284 ~~(IV)~~ If, during the first 10 business days of the state
285 fiscal year, eligible tax credit applications are received for
286 less than the available annual tax credits under sub-
287 subparagraph 1.e. ~~reserved under sub-sub-subparagraph (II)~~, the
288 office shall grant tax credits for those applications and shall
289 grant remaining tax credits on a first-come, first-served basis
290 for any subsequent eligible applications received before the end
291 of ~~the first 6 months of~~ the state fiscal year. If, during the
292 first 10 business days of the state fiscal year, eligible tax
293 credit applications are received for more than the available
294 annual tax credits under sub-subparagraph 1.e. ~~reserved under~~
295 ~~sub-sub-subparagraph (II)~~, the office shall grant the tax
296 credits for the applications on a pro rata basis. ~~If, after the~~
297 ~~first 6 months of the fiscal year, additional credits become~~
298 ~~available under sub-sub-subparagraph (I), the office shall grant~~
299 ~~the tax credits by first granting to those who received a pro~~
300 ~~rata reduction up to the full amount of their request and, if~~
301 ~~there are remaining credits, granting credits to those who~~
302 ~~applied on or after the 11th business day of the state fiscal~~
303 ~~year on a first-come, first-served basis.~~
304 3. Application requirements.--
305 a. Any eligible sponsor seeking to participate in this
306 program must submit a proposal to the Office of Tourism, Trade,
307 and Economic Development which sets forth the name of the

308 sponsor, a description of the project, and the area in which the
309 project is located, together with such supporting information as
310 is prescribed by rule. The proposal must also contain a
311 resolution from the local governmental unit in which the project
312 is located certifying that the project is consistent with local
313 plans and regulations.
314 b. Any person seeking to participate in this program must
315 submit an application for tax credit to the office ~~of Tourism,~~
316 ~~Trade, and Economic Development~~ which sets forth the name of the
317 sponsor, a description of the project, and the type, value, and
318 purpose of the contribution. The sponsor shall verify the terms
319 of the application and indicate its receipt of the contribution,
320 which verification must be in writing and accompany the
321 application for tax credit. The person must submit a separate
322 tax credit application to the office for each individual
323 contribution that it makes to each individual project.
324 c. Any person who has received notification from the
325 office ~~of Tourism, Trade, and Economic Development~~ that a tax
326 credit has been approved must apply to the department to receive
327 the refund. Application must be made on the form prescribed for
328 claiming refunds of sales and use taxes and be accompanied by a
329 copy of the notification. A person may submit only one
330 application for refund to the department within any 12-month
331 period.
332 4. Administration.--
333 a. The Office of Tourism, Trade, and Economic Development
334 may adopt rules pursuant to ss. 120.536(1) and 120.54 necessary
335 to administer this paragraph, including rules for the approval

336 or disapproval of proposals and tax credit applications ~~by a~~
337 ~~person~~.
338 b. The decision of the office ~~of Tourism, Trade, and~~
339 ~~Economic Development~~ must be in writing, and, if approved, the
340 notification shall state the maximum credit allowable to the
341 person. Upon approval, the office shall transmit a copy of the
342 decision to the Department of Revenue.
343 c. The office ~~of Tourism, Trade, and Economic Development~~
344 shall periodically monitor all projects in a manner consistent
345 with available resources to ensure that resources are used in
346 accordance with this paragraph; however, each project must be
347 reviewed at least once every 2 years.
348 d. The office ~~of Tourism, Trade, and Economic Development~~
349 shall, in consultation with the Department of Community Affairs~~,~~
350 ~~the Florida Housing Finance Corporation,~~ and the statewide and
351 regional ~~housing and~~ financial intermediaries, market the
352 availability of the community contribution tax credit program to
353 community-based organizations.
354 5. Expiration.--This paragraph expires June 30, 2015;
355 however, any accrued credit carryover that is unused on that
356 date may be used until the expiration of the 3-year carryover
357 period for such credit.
358 (r) Homeownership assistance tax credits.--
359 1. Authorization.--Beginning July 1, 2006, persons who are
360 registered with the department under s. 212.18 to collect or
361 remit sales or use tax and who make contributions to eligible
362 sponsors are eligible for tax credits against their state sales
363 and use tax liabilities as provided in this paragraph:

364 a. The credit shall be computed as 50 percent of the
365 person's approved annual homeownership assistance contribution.
366 b. The credit shall be granted as a refund against state
367 sales and use taxes reported on returns and remitted in the 12
368 months preceding the date of application to the department for
369 the credit as required in sub-subparagraph 3.c. If the annual
370 credit is not fully used through such refund because of
371 insufficient tax payments during the applicable 12-month period,
372 the unused amount may be included in an application for a refund
373 made pursuant to sub-subparagraph 3.c. in subsequent years
374 against the total tax payments made for such year. Carryover
375 credits may be applied for a 3-year period without regard to any
376 time limitation that would otherwise apply under s. 215.26.
377 c. A person may not receive more than $200,000 in annual
378 tax credits for all approved homeownership assistance
379 contributions made in any one year.
380 d. All proposals and applications for the granting of the
381 tax credit require the prior approval of the Office of Tourism,
382 Trade, and Economic Development.
383 e. The total amount of tax credits which may be granted
384 for all projects approved under this paragraph, s. 220.1835, and
385 s. 624.5108 is $10 million annually.
386 f. A person who is eligible to receive the credit provided
387 for in this paragraph, s. 220.1835, or s. 624.5108 may receive
388 the credit only under the one section of the person's choice.
389 2. Eligibility requirements.--
390 a. A homeownership assistance contribution by a person
391 must be in the following form:

392 (I) Cash or other liquid assets;
393 (II) Real property;
394 (III) Goods or inventory; or
395 (IV) Other physical resources as identified by the Office
396 of Tourism, Trade, and Economic Development.
397 b. All homeownership assistance contributions must be
398 reserved exclusively for use in a project. As used in this
399 paragraph, the term "project" means any activity undertaken by
400 an eligible sponsor to construct, improve, or substantially
401 rehabilitate housing that provides affordable homeownership
402 opportunities to low-income or very-low-income households as
403 defined in s. 420.9071(19) and (28). This paragraph does not
404 preclude such projects that propose to construct or rehabilitate
405 housing for low-income or very-low-income households on
406 scattered sites. Contributions may be used for the following
407 housing-related activities:
408 (I) Development impact and management fees for projects.
409 (II) Down payment and closing costs for eligible persons,
410 as defined in s. 420.9071(19) and (28).
411 (III) Administrative costs, including housing counseling
412 and marketing fees, not to exceed 10 percent of the
413 homeownership assistance contribution, directly related to
414 projects.
415 (IV) Removal of liens recorded against residential
416 property by municipal, county, or special district local
417 governments when satisfaction of the lien is a necessary
418 precedent to the transfer of the property to an eligible person,
419 as defined in s. 420.9071(19) and (28), for the purpose of

420 promoting homeownership. Contributions for lien removal must be
421 received from an unrelated third party.
422 c. The project must be undertaken by an "eligible
423 sponsor," which includes:
424 (I) A community action program;
425 (II) A nonprofit community-based development organization
426 the mission of which includes providing affordable homeownership
427 opportunities for low-income or very-low-income households;
428 (III) A neighborhood housing services corporation;
429 (IV) A local housing authority created under chapter 421;
430 (V) A community redevelopment agency created under s.
431 163.356;
432 (VI) A historic preservation district agency or
433 organization;
434 (VII) A direct-support organization as provided in s.
435 1009.983;
436 (VIII) An enterprise zone development agency created under
437 s. 290.0056;
438 (IX) A community-based organization incorporated under
439 chapter 617 which is recognized as educational, charitable, or
440 scientific pursuant to s. 501(c)(3) of the Internal Revenue Code
441 and whose bylaws and articles of incorporation include
442 affordable housing as the primary mission of the corporation;
443 (X) Units of local government;
444 (XI) Units of state government; or
445 (XII) Any other agency that the Office of Tourism, Trade,
446 and Economic Development designates by rule.
447

448 In no event may a contributing person have a financial interest
449 in the eligible sponsor.
450 d. If, during the first 10 business days of the state
451 fiscal year, eligible tax credit applications are received for
452 less than the available annual tax credits under sub-
453 subparagraph 1.e., the office shall grant tax credits for those
454 applications and shall grant remaining tax credits on a first-
455 come, first-served basis for any subsequent eligible
456 applications received before the end of the state fiscal year.
457 If, during the first 10 business days of the state fiscal year,
458 eligible tax credit applications are received for more than the
459 available annual tax credits under sub-subparagraph 1.e., the
460 office shall grant the tax credits for the applications as
461 follows:
462 (I) If tax credit applications submitted for approved
463 projects of an eligible sponsor do not exceed $200,000 in total,
464 the credits shall be granted in full if the tax credit
465 applications are approved.
466 (II) If tax credit applications submitted for approved
467 projects of an eligible sponsor exceed $200,000 in total, the
468 amount of tax credits granted pursuant to sub-sub-subparagraph
469 (I) shall be subtracted from the amount of available tax credits
470 under subparagraph 1.e., and the remaining credits shall be
471 granted to each approved tax credit application on a pro rata
472 basis.
473 3. Application and distribution requirements.--
474 a. Any eligible sponsor seeking to participate in this
475 program must submit a proposal to the Office of Tourism, Trade,

476 and Economic Development which sets forth the name of the
477 sponsor, a description of the project, and the area in which the
478 project is located, together with such supporting information as
479 is prescribed by rule. The proposal must also contain a
480 resolution from the local governmental unit in which the project
481 is located certifying that the project is consistent with local
482 plans and regulations.
483 b. Any person seeking to participate in this program must
484 submit an application for tax credit to the office which sets
485 forth the name of the sponsor, a description of the project, and
486 the type, value, and purpose of the contribution. The sponsor
487 shall verify the terms of the application and indicate its
488 receipt of the contribution, which verification must be in
489 writing and accompany the application for tax credit. The person
490 must submit a separate tax credit application to the office for
491 each individual contribution that it makes to each individual
492 project.
493 c. Any person who has received notification from the
494 office that a tax credit has been approved must apply to the
495 department to receive the refund. Application must be made on
496 the form prescribed for claiming refunds of sales and use taxes
497 and be accompanied by a copy of the notification. A person may
498 submit only one application for refund to the department within
499 any 12-month period.
500 4. Administration.--
501 a. The Office of Tourism, Trade, and Economic Development
502 may adopt rules pursuant to ss. 120.536(1) and 120.54 necessary

503 to administer this paragraph, including rules for the approval
504 or disapproval of proposals and tax credit applications.
505 b. The decision of the office must be in writing, and, if
506 approved, the notification shall state the maximum credit
507 allowable to the person. Upon approval, the office shall
508 transmit a copy of the decision to the Department of Revenue.
509 c. The office shall periodically monitor all projects in a
510 manner consistent with available resources to ensure that
511 resources are used in accordance with this paragraph; however,
512 each project must be reviewed at least once every 2 years.
513 d. The office shall, in consultation with the Department
514 of Community Affairs, the Florida Housing Finance Corporation,
515 and the statewide and regional housing and financial
516 intermediaries, market the availability of the homeownership
517 assistance contribution tax credit program to community-based
518 organizations.
519 5. Expiration.--This paragraph expires June 30, 2015;
520 however, any accrued credit carryover that is unused on that
521 date may be used until the expiration of the 3-year carryover
522 period for such credit.
523 Section 3. Subsection (8) of section 220.02, Florida
524 Statutes, is amended to read:
525 220.02 Legislative intent.--
526 (8) It is the intent of the Legislature that credits
527 against either the corporate income tax or the franchise tax be
528 applied in the following order: those enumerated in s. 631.828,
529 those enumerated in s. 220.191, those enumerated in s. 220.181,
530 those enumerated in s. 220.1835, those enumerated in s. 220.183,

531 those enumerated in s. 220.182, those enumerated in s. 220.1895,
532 those enumerated in s. 221.02, those enumerated in s. 220.184,
533 those enumerated in s. 220.186, those enumerated in s. 220.1845,
534 those enumerated in s. 220.19, those enumerated in s. 220.185,
535 and those enumerated in s. 220.187.
536 Section 4. Paragraphs (c), (d), (i), (k), (p), (t), and
537 (u) of subsection (1) and paragraph (c) of subsection (5) of
538 section 220.03, Florida Statutes, are amended, and present
539 paragraphs (e) through (s) and (u) through (gg) of subsection
540 (1) are redesignated as paragraphs (d) through (ee) of that
541 subsection, respectively, to read:
542 220.03 Definitions.--
543 (1) SPECIFIC TERMS.--When used in this code, and when not
544 otherwise distinctly expressed or manifestly incompatible with
545 the intent thereof, the following terms shall have the following
546 meanings:
547 (c) "Business" or "business firm" means any business
548 entity authorized to do business in this state as defined in
549 paragraph (d) ~~(e)~~, and any bank or savings and loan association
550 as defined in s. 220.62, subject to the tax imposed by the
551 provisions of this chapter. This paragraph expires on the date
552 specified in s. 290.016 for the expiration of the Florida
553 Enterprise Zone Act.
554 ~~(d) "Community contribution" means the grant by a business~~
555 ~~firm of any of the following items:~~
556 ~~1. Cash or other liquid assets.~~
557 ~~2. Real property.~~
558 ~~3. Goods or inventory.~~

559 ~~4. Other physical resources as identified by the~~
560 ~~department.~~
561
562 ~~This paragraph expires on the date specified in s. 290.016 for~~
563 ~~the expiration of the Florida Enterprise Zone Act.~~
564 (h) ~~(i)~~ "Emergency," as used in s. 220.02 and in paragraph
565 (s) ~~(u) of this subsection~~, means occurrence of widespread or
566 severe damage, injury, or loss of life or property proclaimed
567 pursuant to s. 14.022 or declared pursuant to s. 252.36. This
568 paragraph expires on the date specified in s. 290.016 for the
569 expiration of the Florida Enterprise Zone Act.
570 (j) ~~(k)~~ "Expansion of an existing business," for the
571 purposes of the enterprise zone property tax credit, means any
572 business entity authorized to do business in this state as
573 defined in paragraph (d) ~~(e)~~, and any bank or savings and loan
574 association as defined in s. 220.62, subject to the tax imposed
575 by the provisions of this chapter, located in an enterprise
576 zone, which expands by or through additions to real and personal
577 property and which establishes five or more new jobs to employ
578 five or more additional full-time employees at such location.
579 This paragraph expires on the date specified in s. 290.016 for
580 the expiration of the Florida Enterprise Zone Act.
581 (o) ~~(p)~~ "New business," for the purposes of the enterprise
582 zone property tax credit, means any business entity authorized
583 to do business in this state as defined in paragraph (d) ~~(e)~~, or
584 any bank or savings and loan association as defined in s.
585 220.62, subject to the tax imposed by the provisions of this
586 chapter, first beginning operations on a site located in an

587 enterprise zone and clearly separate from any other commercial
588 or industrial operations owned by the same entity, bank, or
589 savings and loan association and which establishes five or more
590 new jobs to employ five or more additional full-time employees
591 at such location. This paragraph expires on the date specified
592 in s. 290.016 for the expiration of the Florida Enterprise Zone
593 Act.
594 ~~(t) "Project" means any activity undertaken by an eligible~~
595 ~~sponsor, as defined in s. 220.183(2)(c), which is designed to~~
596 ~~construct, improve, or substantially rehabilitate housing that~~
597 ~~is affordable to low-income or very-low-income households as~~
598 ~~defined in s. 420.9071(19) and (28); designed to provide~~
599 ~~commercial, industrial, or public resources and facilities; or~~
600 ~~designed to improve entrepreneurial and job-development~~
601 ~~opportunities for low-income persons. A project may be the~~
602 ~~investment necessary to increase access to high-speed broadband~~
603 ~~capability in rural communities with enterprise zones, including~~
604 ~~projects that result in improvements to communications assets~~
605 ~~that are owned by a business. A project may include the~~
606 ~~provision of museum educational programs and materials that are~~
607 ~~directly related to any project approved between January 1,~~
608 ~~1996, and December 31, 1999, and located in an enterprise zone~~
609 ~~designated pursuant to s. 290.0065. This paragraph does not~~
610 ~~preclude projects that propose to construct or rehabilitate low-~~
611 ~~income or very-low-income housing on scattered sites. With~~
612 ~~respect to housing, contributions may be used to pay the~~
613 ~~following eligible project-related activities:~~

614 ~~1. Project development, impact, and management fees for~~
615 ~~low-income or very-low-income housing projects;~~
616 ~~2. Down payment and closing costs for eligible persons, as~~
617 ~~defined in s. 420.9071(19) and (28);~~
618 ~~3. Administrative costs, including housing counseling and~~
619 ~~marketing fees, not to exceed 10 percent of the community~~
620 ~~contribution, directly related to low-income or very-low-income~~
621 ~~projects; and~~
622 ~~4. Removal of liens recorded against residential property~~
623 ~~by municipal, county, or special-district local governments when~~
624 ~~satisfaction of the lien is a necessary precedent to the~~
625 ~~transfer of the property to an eligible person, as defined in s.~~
626 ~~420.9071(19) and (28), for the purpose of promoting home~~
627 ~~ownership. Contributions for lien removal must be received from~~
628 ~~a nonrelated third party.~~
629
630 ~~The provisions of this paragraph shall expire and be void on~~
631 ~~June 30, 2015.~~
632 (s) ~~(u)~~ "Rebuilding of an existing business" means
633 replacement or restoration of real or tangible property
634 destroyed or damaged in an emergency, as defined in paragraph
635 (h) ~~(i)~~, after July 1, 1995, in an enterprise zone, by a business
636 entity authorized to do business in this state as defined in
637 paragraph (d) ~~(e)~~, or a bank or savings and loan association as
638 defined in s. 220.62, subject to the tax imposed by the
639 provisions of this chapter, located in the enterprise zone. This
640 paragraph expires on the date specified in s. 290.016 for the
641 expiration of the Florida Enterprise Zone Act.

642 (5)
643 (c) A taxpayer may make an election, in the manner
644 prescribed by the department, by August 26, 1982, or a taxpayer
645 filing an initial return may make an election upon filing the
646 first return for the tax due under this chapter, whichever is
647 later, to report and pay the tax levied by this chapter as if:
648 1. The Internal Revenue Code of 1954, as amended and in
649 effect on January 1, 1980, is in effect indefinitely thereafter;
650 and
651 2. Solely for the purpose of computing depreciation
652 deductions, the provisions of chapter 220, Florida Statutes,
653 1980 Supplement, are in effect indefinitely thereafter.
654
655 For the purposes of taxation of taxpayers who make the election
656 provided for in this paragraph, the Internal Revenue Code of
657 1954, as amended and in effect on January 1, 1980, shall
658 include, for tax years beginning on or after January 1, 1982,
659 the provisions of the Foreign Investment in Real Property Tax
660 Act of 1980, Subtitle C of Title XI of Pub. L. No. 96-499 and
661 the amendments to those provisions codified in the Internal
662 Revenue Code, as defined in paragraph (1)(m) ~~(n)~~. Taxpayers may
663 one time only revoke an election made pursuant to this
664 paragraph, in accordance with rules formulated by the
665 department. Such revocation shall be prospective in nature, and
666 all transactions and events occurring during the period during
667 which the election provided for in this paragraph is in effect
668 and the continuing tax ramifications of such events and

669 transactions shall be governed by the provisions of this
670 paragraph.
671 Section 5. Paragraph (t) of subsection (1) of section
672 220.03, Florida Statutes, as amended by chapter 2005-287, Laws
673 of Florida, is amended to read:
674 220.03 Definitions.--
675 (1) SPECIFIC TERMS.--When used in this code, and when not
676 otherwise distinctly expressed or manifestly incompatible with
677 the intent thereof, the following terms shall have the following
678 meanings:
679 ~~(t) "Project" means any activity undertaken by an eligible~~
680 ~~sponsor, as defined in s. 220.183(2)(c), which is designed to~~
681 ~~construct, improve, or substantially rehabilitate housing that~~
682 ~~is affordable to low-income or very-low-income households as~~
683 ~~defined in s. 420.9071(19) and (28); designed to provide~~
684 ~~commercial, industrial, or public resources and facilities; or~~
685 ~~designed to improve entrepreneurial and job-development~~
686 ~~opportunities for low-income persons. A project may be the~~
687 ~~investment necessary to increase access to high-speed broadband~~
688 ~~capability in rural communities with enterprise zones, including~~
689 ~~projects that result in improvements to communications assets~~
690 ~~that are owned by a business. A project may include the~~
691 ~~provision of museum educational programs and materials that are~~
692 ~~directly related to any project approved between January 1,~~
693 ~~1996, and December 31, 1999, and located in an enterprise zone~~
694 ~~designated pursuant to s. 290.0065. This paragraph does not~~
695 ~~preclude projects that propose to construct or rehabilitate low-~~
696 ~~income or very-low-income housing on scattered sites. With~~

697 ~~respect to housing, contributions may be used to pay the~~
698 ~~following eligible project-related activities:~~
699 ~~1. Project development, impact, and management fees for~~
700 ~~low-income or very-low-income housing projects;~~
701 ~~2. Down payment and closing costs for eligible persons, as~~
702 ~~defined in s. 420.9071(19) and (28);~~
703 ~~3. Administrative costs, including housing counseling and~~
704 ~~marketing fees, not to exceed 10 percent of the community~~
705 ~~contribution, directly related to low-income or very-low-income~~
706 ~~projects; and~~
707 ~~4. Removal of liens recorded against residential property~~
708 ~~by municipal, county, or special-district local governments when~~
709 ~~satisfaction of the lien is a necessary precedent to the~~
710 ~~transfer of the property to an eligible person, as defined in s.~~
711 ~~420.9071(19) and (28), for the purpose of promoting home~~
712 ~~ownership. Contributions for lien removal must be received from~~
713 ~~a nonrelated third party.~~
714
715 ~~This paragraph expires on the date specified in s. 290.016 for~~
716 ~~the expiration of the Florida Enterprise Zone Act.~~
717 Section 6. Paragraph (c) of subsection (1) and subsections
718 (2) through (4) of section 220.183, Florida Statutes, are
719 amended to read:
720 220.183 Community contribution tax credit.--
721 (1) AUTHORIZATION TO GRANT COMMUNITY CONTRIBUTION TAX
722 CREDITS; LIMITATIONS ON INDIVIDUAL CREDITS AND PROGRAM
723 SPENDING.--

724 (c) The total amount of tax credit which may be granted
725 for all projects ~~programs~~ approved under this section, s.
726 212.08(5)(q), and s. 624.5105 is $3 ~~$12~~ million annually.
727 (2) ELIGIBILITY REQUIREMENTS.--The eligibility of
728 projects, sponsors, and community contributions to qualify for
729 tax credits under this program shall be the same as specified in
730 s. 212.08(5)(q).
731 ~~(a) All community contributions by a business firm shall~~
732 ~~be in the form specified in s. 220.03(1)(d).~~
733 ~~(b)1. All community contributions must be reserved~~
734 ~~exclusively for use in projects as defined in s. 220.03(1)(t).~~
735 ~~2. For the first 6 months of the fiscal year, the Office~~
736 ~~of Tourism, Trade, and Economic Development shall reserve 80~~
737 ~~percent of the first $10 million in available annual tax~~
738 ~~credits, and 70 percent of any available annual tax credits in~~
739 ~~excess of $10 million, for donations made to eligible sponsors~~
740 ~~for projects that provide homeownership opportunities for low-~~
741 ~~income or very-low-income households as defined in s.~~
742 ~~420.9071(19) and (28). If any reserved annual tax credits remain~~
743 ~~after the first 6 months of the fiscal year, the office may~~
744 ~~approve the balance of these available credits for donations~~
745 ~~made to eligible sponsors for projects other than those that~~
746 ~~provide homeownership opportunities for low-income or very-low-~~
747 ~~income households.~~
748 ~~3. For the first 6 months of the fiscal year, the office~~
749 ~~shall reserve 20 percent of the first $10 million in available~~
750 ~~annual tax credits, and 30 percent of any available annual tax~~
751 ~~credits in excess of $10 million, for donations made to eligible~~

752 ~~sponsors for projects other than those that provide~~
753 ~~homeownership opportunities for low-income or very-low-income~~
754 ~~households as defined in s. 420.9071(19) and (28). If any~~
755 ~~reserved annual tax credits remain after the first 6 months of~~
756 ~~the fiscal year, the office may approve the balance of these~~
757 ~~available credits for donations made to eligible sponsors for~~
758 ~~projects that provide homeownership opportunities for low-income~~
759 ~~or very-low-income households.~~
760 ~~4. If, during the first 10 business days of the state~~
761 ~~fiscal year, eligible tax credit applications are received for~~
762 ~~less than the available annual tax credits reserved under~~
763 ~~subparagraph 2., the office shall grant tax credits for those~~
764 ~~applications and shall grant remaining tax credits on a first-~~
765 ~~come, first-served basis for any subsequent eligible~~
766 ~~applications received before the end of the first 6 months of~~
767 ~~the state fiscal year. If, during the first 10 business days of~~
768 ~~the state fiscal year, eligible tax credit applications are~~
769 ~~received for more than the available annual tax credits reserved~~
770 ~~under subparagraph 2., the office shall grant the tax credits~~
771 ~~for such applications as follows:~~
772 ~~a. If tax credit applications submitted for approved~~
773 ~~projects of an eligible sponsor do not exceed $200,000 in total,~~
774 ~~the credit shall be granted in full if the tax credit~~
775 ~~applications are approved, subject to the provisions of~~
776 ~~subparagraph 2.~~
777 ~~b. If tax credit applications submitted for approved~~
778 ~~projects of an eligible sponsor exceed $200,000 in total, the~~
779 ~~amount of tax credits granted under sub-subparagraph a. shall be~~

780 ~~subtracted from the amount of available tax credits under~~
781 ~~subparagraph 2., and the remaining credits shall be granted to~~
782 ~~each approved tax credit application on a pro rata basis.~~
783 ~~c. If, after the first 6 months of the fiscal year,~~
784 ~~additional credits become available pursuant to subparagraph 3.,~~
785 ~~the office shall grant the tax credits by first granting to~~
786 ~~those who received a pro rata reduction up to the full amount of~~
787 ~~their request and, if there are remaining credits, granting~~
788 ~~credits to those who applied on or after the 11th business day~~
789 ~~of the state fiscal year on a first-come, first-served basis.~~
790 ~~5. If, during the first 10 business days of the state~~
791 ~~fiscal year, eligible tax credit applications are received for~~
792 ~~less than the available annual tax credits reserved under~~
793 ~~subparagraph 3., the office shall grant tax credits for those~~
794 ~~applications and shall grant remaining tax credits on a first-~~
795 ~~come, first-served basis for any subsequent eligible~~
796 ~~applications received before the end of the first 6 months of~~
797 ~~the state fiscal year. If, during the first 10 business days of~~
798 ~~the state fiscal year, eligible tax credit applications are~~
799 ~~received for more than the available annual tax credits reserved~~
800 ~~under subparagraph 3., the office shall grant the tax credits~~
801 ~~for such applications on a pro rata basis. If, after the first 6~~
802 ~~months of the fiscal year, additional credits become available~~
803 ~~under subparagraph 2., the office shall grant the tax credits by~~
804 ~~first granting to those who received a pro rata reduction up to~~
805 ~~the full amount of their request and, if there are remaining~~
806 ~~credits, granting credits to those who applied on or after the~~

807 ~~11th business day of the state fiscal year on a first-come,~~
808 ~~first-served basis.~~
809 ~~(c) The project must be undertaken by an "eligible~~
810 ~~sponsor," defined here as:~~
811 ~~1. A community action program;~~
812 ~~2. A nonprofit community-based development organization~~
813 ~~whose mission is the provision of housing for low-income or~~
814 ~~very-low-income households or increasing entrepreneurial and~~
815 ~~job-development opportunities for low-income persons;~~
816 ~~3. A neighborhood housing services corporation;~~
817 ~~4. A local housing authority, created pursuant to chapter~~
818 ~~421;~~
819 ~~5. A community redevelopment agency, created pursuant to~~
820 ~~s. 163.356;~~
821 ~~6. The Florida Industrial Development Corporation;~~
822 ~~7. An historic preservation district agency or~~
823 ~~organization;~~
824 ~~8. A regional workforce board;~~
825 ~~9. A direct-support organization as provided in s.~~
826 ~~1009.983;~~
827 ~~10. An enterprise zone development agency created pursuant~~
828 ~~to s. 290.0056;~~
829 ~~11. A community-based organization incorporated under~~
830 ~~chapter 617 which is recognized as educational, charitable, or~~
831 ~~scientific pursuant to s. 501(c)(3) of the Internal Revenue Code~~
832 ~~and whose bylaws and articles of incorporation include~~
833 ~~affordable housing, economic development, or community~~
834 ~~development as the primary mission of the corporation;~~

835 ~~12. Units of local government;~~
836 ~~13. Units of state government; or~~
837 ~~14. Such other agency as the Office of Tourism, Trade, and~~
838 ~~Economic Development may, from time to time, designate by rule.~~
839
840 ~~In no event shall a contributing business firm have a financial~~
841 ~~interest in the eligible sponsor.~~
842 ~~(d) The project shall be located in an area designated as~~
843 ~~an enterprise zone or a Front Porch Florida Community pursuant~~
844 ~~to s. 20.18(6). Any project designed to construct or~~
845 ~~rehabilitate housing for low-income or very-low-income~~
846 ~~households as defined in s. 420.9071(19) and (28) is exempt from~~
847 ~~the area requirement of this paragraph. This section does not~~
848 ~~preclude projects that propose to construct or rehabilitate~~
849 ~~housing for low-income or very-low-income households on~~
850 ~~scattered sites. Any project designed to provide increased~~
851 ~~access to high-speed broadband capabilities which includes~~
852 ~~coverage of a rural enterprise zone may locate the project's~~
853 ~~infrastructure in any area of a rural county.~~
854 (3) APPLICATION AND DISTRIBUTION REQUIREMENTS.--The
855 proposal and application requirements for sponsors and for
856 business firms wishing to participate in this program, and the
857 method for granting tax credits, shall be the same as specified
858 in s. 212.08(5)(q).
859 ~~(a) Any eligible sponsor wishing to participate in this~~
860 ~~program must submit a proposal to the Office of Tourism, Trade,~~
861 ~~and Economic Development which sets forth the sponsor, the~~
862 ~~project, the area in which the project is located, and such~~

863 ~~supporting information as may be prescribed by rule. The~~
864 ~~proposal shall also contain a resolution from the local~~
865 ~~governmental unit in which it is located certifying that the~~
866 ~~project is consistent with local plans and regulations.~~
867 ~~(b) Any business wishing to participate in this program~~
868 ~~must submit an application for tax credit to the Office of~~
869 ~~Tourism, Trade, and Economic Development, which application sets~~
870 ~~forth the sponsor; the project; and the type, value, and purpose~~
871 ~~of the contribution. The sponsor shall verify the terms of the~~
872 ~~application and indicate its receipt of the contribution, which~~
873 ~~verification must be in writing and accompany the application~~
874 ~~for tax credit.~~
875 ~~(c) The business firm must submit a separate application~~
876 ~~for tax credit for each individual contribution that it makes to~~
877 ~~each individual project.~~
878 (4) ADMINISTRATION.--
879 (a) The Office of Tourism, Trade, and Economic Development
880 may ~~has authority to~~ adopt rules pursuant to ss. 120.536(1) and
881 120.54 to implement the provisions of this section, including
882 rules for the approval or disapproval of proposals and of tax
883 credit applications ~~by business firms~~.
884 (b) The decision of the Office of Tourism, Trade, and
885 Economic Development shall be in writing, and, if approved, the
886 notification must state the maximum credit allowable to the
887 business firm. A copy of the decision shall be transmitted to
888 the executive director of the Department of Revenue, who shall
889 apply such credit to the tax liability of the business firm.

890 (c) The Office of Tourism, Trade, and Economic Development
891 shall periodically monitor all projects in a manner consistent
892 with available resources to ensure that resources are utilized
893 in accordance with this section; however, each project shall be
894 reviewed no less often than once every 2 years.
895 (d) The Department of Revenue may ~~has authority to~~ adopt
896 rules pursuant to ss. 120.536(1) and 120.54 to implement the
897 provisions of this section.
898 (e) The Office of Tourism, Trade, and Economic Development
899 shall, in consultation with the Department of Community Affairs~~,~~
900 ~~the Florida Housing Finance Corporation,~~ and the statewide and
901 regional ~~housing and~~ financial intermediaries, market the
902 availability of the community contribution tax credit program to
903 community-based organizations.
904 Section 7. Section 220.1835, Florida Statutes, is created
905 to read:
906 220.1835 Homeownership assistance tax credits.--
907 (1) AUTHORIZATION TO GRANT HOMEOWNERSHIP ASSISTANCE TAX
908 CREDITS; LIMITATIONS ON INDIVIDUAL CREDITS AND PROGRAM
909 SPENDING.--
910 (a) There shall be allowed a credit of 50 percent of a
911 homeownership assistance contribution against any tax due for a
912 taxable year under this chapter.
913 (b) No business firm shall receive more than $200,000 in
914 annual tax credits for all approved homeownership assistance
915 contributions made in any one year.
916 (c) The total amount of tax credit which may be granted
917 for all projects approved under this section, s. 212.08(5)(r),

918 and s. 624.5108 is $10 million annually.
919 (d) All proposals and applications for the granting of the
920 tax credit shall require the prior approval of the Office of
921 Tourism, Trade, and Economic Development.
922 (e) If the credit granted pursuant to this section is not
923 fully used in any one year because of insufficient tax liability
924 on the part of the business firm, the unused amount may be
925 carried forward for a period not to exceed 5 years. The
926 carryover credit may be used in a subsequent year when the tax
927 imposed by this chapter for such year exceeds the credit for
928 such year under this section after applying the other credits
929 and unused credit carryovers in the order provided in s.
930 220.02(8).
931 (f) A taxpayer who files a Florida consolidated return as
932 a member of an affiliated group pursuant to s. 220.131(1) may be
933 allowed the credit on a consolidated return basis.
934 (g) A taxpayer who is eligible to receive the credit
935 provided for in s. 624.5108 is not eligible to receive the
936 credit provided by this section.
937 (2) ELIGIBILITY REQUIREMENTS.--The eligibility of
938 projects, sponsors, and homeownership assistance contributions
939 to qualify for tax credits under this program shall be the same
940 as specified in s. 212.08(5)(r).
941 (3) APPLICATION AND DISTRIBUTION REQUIREMENTS.--The
942 proposal and application requirements for sponsors and for
943 business firms wishing to participate in this program, and the
944 method for granting tax credits, shall be the same as specified
945 in s. 212.08(5)(r).

946 (4) ADMINISTRATION.--
947 (a) The Office of Tourism, Trade, and Economic Development
948 may adopt rules pursuant to ss. 120.536(1) and 120.54 to
949 implement the provisions of this section, including rules for
950 the approval or disapproval of proposals and of tax credit
951 applications.
952 (b) The decision of the office shall be in writing, and,
953 if approved, the notification must state the maximum credit
954 allowable to the business firm. A copy of the decision shall be
955 transmitted to the executive director of the Department of
956 Revenue, who shall apply such credit to the tax liability of the
957 business firm.
958 (c) The office shall periodically monitor all projects in
959 a manner consistent with available resources to ensure that
960 resources are utilized in accordance with this section; however,
961 each project shall be reviewed no less often than once every 2
962 years.
963 (d) The Department of Revenue may adopt rules pursuant to
964 ss. 120.536(1) and 120.54 to implement the provisions of this
965 section.
966 (e) The office shall, in consultation with the Department
967 of Community Affairs, the Florida Housing Finance Corporation,
968 and the statewide and regional housing and financial
969 intermediaries, market the availability of the homeownership
970 assistance contribution tax credit program to community-based
971 organizations.
972 (5) EXPIRATION.--The provisions of this section, except
973 paragraph (1)(e), shall expire and be void on June 30, 2015.

974 Section 8. Paragraph (c) of subsection (1) and subsections
975 (2) through (6) of section 624.5105, Florida Statutes, are
976 amended to read:
977 624.5105 Community contribution tax credit; authorization;
978 limitations; eligibility and application requirements;
979 administration; definitions; expiration.--
980 (1) AUTHORIZATION TO GRANT TAX CREDITS; LIMITATIONS.--
981 (c) The total amount of tax credit which may be granted
982 for all projects ~~programs~~ approved under this section and ss.
983 212.08(5)(q) and 220.183 is $3 ~~$12~~ million annually.
984 (2) ELIGIBILITY REQUIREMENTS.--The eligibility of
985 projects, sponsors, and community contributions to qualify for
986 tax credits under this program shall be the same as specified in
987 s. 212.08(5)(q).
988 ~~(a) Each community contribution by an insurer must be in a~~
989 ~~form specified in subsection (5).~~
990 ~~(b) Each community contribution must be reserved~~
991 ~~exclusively for use in a project as defined in s. 220.03(1)(t).~~
992 ~~(c) The project must be undertaken by an "eligible~~
993 ~~sponsor," as defined in s. 220.183(2)(c). In no event shall a~~
994 ~~contributing insurer have a financial interest in the eligible~~
995 ~~sponsor.~~
996 ~~(d) The project shall be located in an area designated as~~
997 ~~an enterprise zone or a Front Porch Community pursuant to s.~~
998 ~~20.18(6). Any project designed to construct or rehabilitate~~
999 ~~housing for low-income or very-low-income households as defined~~
1000 ~~in s. 420.9071(19) and (28) is exempt from the area requirement~~
1001 ~~of this paragraph.~~

1002 ~~(e)1. For the first 6 months of the fiscal year, the~~
1003 ~~Office of Tourism, Trade, and Economic Development shall reserve~~
1004 ~~80 percent of the first $10 million in available annual tax~~
1005 ~~credits, and 70 percent of any available annual tax credits in~~
1006 ~~excess of $10 million, for donations made to eligible sponsors~~
1007 ~~for projects that provide homeownership opportunities for low-~~
1008 ~~income or very-low-income households as defined in s.~~
1009 ~~420.9071(19) and (28). If any such reserved annual tax credits~~
1010 ~~remain after the first 6 months of the fiscal year, the office~~
1011 ~~may approve the balance of these available credits for donations~~
1012 ~~made to eligible sponsors for projects other than those that~~
1013 ~~provide homeownership opportunities for low-income or very-low-~~
1014 ~~income households.~~
1015 ~~2. For the first 6 months of the fiscal year, the office~~
1016 ~~shall reserve 20 percent of the first $10 million in available~~
1017 ~~annual tax credits, and 30 percent of any available annual tax~~
1018 ~~credits in excess of $10 million, for donations made to eligible~~
1019 ~~sponsors for projects other than those that provide~~
1020 ~~homeownership opportunities for low-income or very-low-income~~
1021 ~~households as defined in s. 420.9071(19) and (28). If any~~
1022 ~~reserved annual tax credits remain after the first 6 months of~~
1023 ~~the fiscal year, the office may approve the balance of these~~
1024 ~~available credits for donations made to eligible sponsors for~~
1025 ~~projects that provide homeownership opportunities for low-income~~
1026 ~~or very-low-income households.~~
1027 ~~3. If, during the first 10 business days of the state~~
1028 ~~fiscal year, eligible tax credit applications are received for~~
1029 ~~less than the available annual tax credits reserved under~~

1030 ~~subparagraph 1., the office shall grant tax credits for those~~
1031 ~~applications and shall grant remaining tax credits on a first-~~
1032 ~~come, first-served basis for any subsequent eligible~~
1033 ~~applications received before the end of the first 6 months of~~
1034 ~~the state fiscal year. If, during the first 10 business days of~~
1035 ~~the state fiscal year, eligible tax credit applications are~~
1036 ~~received for more than the available annual tax credits reserved~~
1037 ~~under subparagraph 1., the office shall grant the tax credits~~
1038 ~~for the applications as follows:~~
1039 ~~a. If tax credit applications submitted for approved~~
1040 ~~projects of an eligible sponsor do not exceed $200,000 in total,~~
1041 ~~the credits shall be granted in full if the tax credit~~
1042 ~~applications are approved, subject to subparagraph 1.~~
1043 ~~b. If tax credit applications submitted for approved~~
1044 ~~projects of an eligible sponsor exceed $200,000 in total, the~~
1045 ~~amount of tax credits granted under sub-subparagraph a. shall be~~
1046 ~~subtracted from the amount of available tax credits under~~
1047 ~~subparagraph 1., and the remaining credits shall be granted to~~
1048 ~~each approved tax credit application on a pro rata basis.~~
1049 ~~c. If, after the first 6 months of the fiscal year,~~
1050 ~~additional credits become available under subparagraph 2., the~~
1051 ~~office shall grant the tax credits by first granting to those~~
1052 ~~who received a pro rata reduction up to the full amount of their~~
1053 ~~request and, if there are remaining credits, granting credits to~~
1054 ~~those who applied on or after the 11th business day of the state~~
1055 ~~fiscal year on a first-come, first-served basis.~~
1056 ~~4. If, during the first 10 business days of the state~~
1057 ~~fiscal year, eligible tax credit applications are received for~~

1058 ~~less than the available annual tax credits reserved under~~
1059 ~~subparagraph 2., the office shall grant tax credits for those~~
1060 ~~applications and shall grant remaining tax credits on a first-~~
1061 ~~come, first-served basis for any subsequent eligible~~
1062 ~~applications received before the end of the first 6 months of~~
1063 ~~the state fiscal year. If, during the first 10 business days of~~
1064 ~~the state fiscal year, eligible tax credit applications are~~
1065 ~~received for more than the available annual tax credits reserved~~
1066 ~~under subparagraph 2., the office shall grant the tax credits~~
1067 ~~for the applications on a pro rata basis. If, after the first 6~~
1068 ~~months of the fiscal year, additional credits become available~~
1069 ~~under subparagraph 1., the office shall grant the tax credits by~~
1070 ~~first granting to those who received a pro rata reduction up to~~
1071 ~~the full amount of their request and, if there are remaining~~
1072 ~~credits, granting credits to those who applied on or after the~~
1073 ~~11th business day of the state fiscal year on a first-come,~~
1074 ~~first-served basis.~~
1075 (3) APPLICATION AND DISTRIBUTION REQUIREMENTS.--The
1076 proposal and application requirements for sponsors and for
1077 insurers wishing to participate in this program, and the method
1078 for granting tax credits, shall be the same as specified in s.
1079 212.08(5)(q).
1080 ~~(a) Any eligible sponsor wishing to participate in this~~
1081 ~~program must submit a proposal to the Office of Tourism, Trade,~~
1082 ~~and Economic Development which sets forth the sponsor, the~~
1083 ~~project, the area in which the project is located, and such~~
1084 ~~supporting information as may be prescribed by rule. The~~
1085 ~~proposal shall also contain a resolution from the local~~

1086 ~~governmental unit in which the proposed project is located~~
1087 ~~certifying that the project is consistent with local plans and~~
1088 ~~regulations.~~
1089 ~~(b)1. Any insurer wishing to participate in this program~~
1090 ~~must submit an application for tax credit to the office which~~
1091 ~~sets forth the sponsor; the project; and the type, value, and~~
1092 ~~purpose of the contribution. The sponsor must verify, in~~
1093 ~~writing, the terms of the application and indicate its~~
1094 ~~willingness to receive the contribution, which verification must~~
1095 ~~accompany the application for tax credit.~~
1096 ~~2. The insurer must submit a separate application for tax~~
1097 ~~credit for each individual contribution which it proposes to~~
1098 ~~contribute to each individual project.~~
1099 (4) ADMINISTRATION.--
1100 (a)1. The Office of Tourism, Trade, and Economic
1101 Development may ~~is authorized to~~ adopt all rules necessary to
1102 administer this section, including rules for the approval or
1103 disapproval of proposals and of tax credit applications ~~by~~
1104 ~~insurers~~.
1105 2. The decision of the office ~~director~~ shall be in
1106 writing, and, if approved, the proposal shall state the maximum
1107 credit allowable to the insurer. A copy of the decision shall be
1108 transmitted to the executive director of the Department of
1109 Revenue, who shall apply such credit to the tax liability of the
1110 insurer.
1111 3. The office shall monitor all projects periodically, in
1112 a manner consistent with available resources to ensure that
1113 resources are utilized in accordance with this section; however,

1114 each project shall be reviewed no less frequently than once
1115 every 2 years.
1116 4. The office ~~of Tourism, Trade, and Economic Development~~
1117 shall, in consultation with the Department of Community Affairs~~,~~
1118 ~~the Florida Housing Finance Corporation,~~ and the statewide and
1119 regional ~~housing and~~ financial intermediaries, market the
1120 availability of the community contribution tax credit program to
1121 community-based organizations.
1122 (b) The Department of Revenue shall adopt any rules
1123 necessary to ensure the orderly implementation and
1124 administration of this section.
1125 ~~(5) DEFINITIONS.--For the purpose of this section:~~
1126 ~~(a) "Community contribution" means the grant by an insurer~~
1127 ~~of any of the following items:~~
1128 ~~1. Cash or other liquid assets.~~
1129 ~~2. Real property.~~
1130 ~~3. Goods or inventory.~~
1131 ~~4. Other physical resources which are identified by the~~
1132 ~~department.~~
1133 ~~(b) "Director" means the director of the Office of~~
1134 ~~Tourism, Trade, and Economic Development.~~
1135 ~~(c) "Local government" means any county or incorporated~~
1136 ~~municipality in the state.~~
1137 ~~(d) "Office" means the Office of Tourism, Trade, and~~
1138 ~~Economic Development.~~
1139 ~~(e) "Project" means an activity as defined in s.~~
1140 ~~220.03(1)(t).~~

1141 (5) ~~(6)~~ EXPIRATION.--The provisions of this section, except
1142 paragraph (1)(e), shall expire and be void on June 30, 2015.
1143 Section 9. Section 624.5108, Florida Statutes, is created
1144 to read:
1145 624.5108 Homeownership assistance contribution tax
1146 credits.--
1147 (1) AUTHORIZATION TO GRANT HOMEOWNERSHIP ASSISTANCE
1148 CONTRIBUTION TAX CREDITS; LIMITATIONS ON INDIVIDUAL CREDITS AND
1149 PROGRAM SPENDING.--
1150 (a) There shall be allowed a credit of 50 percent of a
1151 homeownership assistance contribution against any tax due for a
1152 calendar year under s. 624.509 or s. 624.510.
1153 (b) No insurer shall receive more than $200,000 in annual
1154 tax credits for all approved homeownership assistance
1155 contributions made in any one year.
1156 (c) The total amount of tax credit which may be granted
1157 for all projects approved under this section and ss.
1158 212.08(5)(r) and 220.1835 is $10 million annually.
1159 (d) All proposals and applications for the granting of the
1160 tax credit shall require the prior approval of the Office of
1161 Tourism, Trade, and Economic Development.
1162 (e) If the credit granted pursuant to this section is not
1163 fully used in any one year because of insufficient tax liability
1164 on the part of the insurer, the unused amount may be carried
1165 forward for a period not to exceed 5 years. The carryover credit
1166 may be used in a subsequent year when the tax imposed by s.
1167 624.509 or s. 624.510 for such year exceeds the credit under
1168 this section for such year.

1169 (2) ELIGIBILITY REQUIREMENTS.--The eligibility of
1170 projects, sponsors, and homeownership assistance contributions
1171 to qualify for tax credits under this program shall be the same
1172 as specified in s. 212.08(5)(r).
1173 (3) APPLICATION AND DISTRIBUTION REQUIREMENTS.--The
1174 proposal and application requirements for sponsors and for
1175 insurers wishing to participate in this program, and the method
1176 of granting tax credits, shall be the same as specified in s.
1177 212.08(5)(r).
1178 (4) ADMINISTRATION.--
1179 (a) The Office of Tourism, Trade, and Economic Development
1180 may adopt rules pursuant to ss. 120.536(1) and 120.54 to
1181 implement the provisions of this section, including rules for
1182 the approval or disapproval of proposals and of tax credit
1183 applications.
1184 (b) The decision of the office shall be in writing, and,
1185 if approved, the notification must state the maximum credit
1186 allowable to the insurer. A copy of the decision shall be
1187 transmitted to the executive director of the Department of
1188 Revenue, who shall apply such credit to the tax liability of the
1189 insurer.
1190 (c) The office shall periodically monitor all projects in
1191 a manner consistent with available resources to ensure that
1192 resources are utilized in accordance with this section; however,
1193 each project shall be reviewed no less often than once every 2
1194 years.

1195 (d) The Department of Revenue may adopt rules pursuant to
1196 ss. 120.536(1) and 120.54 to implement the provisions of this
1197 section.
1198 (e) The office shall, in consultation with the Department
1199 of Community Affairs, the Florida Housing Finance Corporation,
1200 and the statewide and regional housing and financial
1201 intermediaries, market the availability of the homeownership
1202 assistance contribution tax credit program to community-based
1203 organizations.
1204 (5) EXPIRATION.--The provisions of this section, except
1205 paragraph (1)(e), shall expire and be void on June 30, 2015.
1206 Section 10. Paragraph (a) of subsection (15) of section
1207 212.06, Florida Statutes, is amended to read:
1208 212.06 Sales, storage, use tax; collectible from dealers;
1209 "dealer" defined; dealers to collect from purchasers;
1210 legislative intent as to scope of tax.--
1211 (15)(a) When a contractor secures rock, shell, fill dirt,
1212 or similar materials from a location that he or she owns or
1213 leases and uses such materials to fulfill a real property
1214 contract on the property of another person, the contractor is
1215 the ultimate consumer of such materials and is liable for use
1216 tax thereon. This paragraph does not apply to a person or a
1217 corporation or affiliated group as defined by s. 220.03(1)(b) or
1218 (d) ~~(e)~~ that secures such materials from a location that he, she,
1219 or it owns for use on his, her, or its own property. The basis
1220 upon which the contractor shall remit the tax is the fair retail
1221 market value determined by establishing either the price he or
1222 she would have to pay for it on the open market or the price he

1223 or she would regularly charge if he or she sold it to other
1224 contractors or users.
1225 Section 11. Paragraph (b) of subsection (6) and paragraph
1226 (b) of subsection (7) and of section 220.02, Florida Statutes,
1227 are amended to read:
1228 220.02 Legislative intent.--
1229 (6)
1230 (b) Any person charged with any criminal offense arising
1231 from a civil disorder associated with an emergency, as defined
1232 in s. 220.03(1)(h)~~(i)~~, and found guilty, whether or not
1233 adjudication of guilt or imposition of sentence is suspended,
1234 deferred, or withheld, is not eligible to make application for,
1235 receive, or in any other manner enjoy the benefits or any form
1236 of assistance available under chapter 80-247, Laws of Florida.
1237 (7)
1238 (b) Any person charged with any criminal offense arising
1239 from a civil disorder associated with an emergency, as defined
1240 in s. 220.03(1)(h)~~(i)~~, and found guilty, whether or not
1241 adjudication of guilt or imposition of sentence is suspended,
1242 deferred, or withheld, is not eligible to make application for,
1243 receive, or in any other manner enjoy the benefits or any form
1244 of assistance available under chapter 80-248, Laws of Florida.
1245 Section 12. Paragraph (a) of subsection (1) of section
1246 220.181, Florida Statutes, is amended to read:
1247 220.181 Enterprise zone jobs credit.--
1248 (1)(a) There shall be allowed a credit against the tax
1249 imposed by this chapter to any business located in an enterprise
1250 zone which demonstrates to the department that the total number

1251 of full-time jobs has increased from the average of the previous
1252 12 months. The credit shall be computed as 20 percent of the
1253 actual monthly wages paid in this state to each new employee
1254 hired when a new job has been created, as defined under s.
1255 220.03(1)(dd)~~(ff)~~, unless the business is located in a rural
1256 enterprise zone, pursuant to s. 290.004(6), in which case the
1257 credit shall be 30 percent of the actual monthly wages paid. If
1258 no less than 20 percent of the employees of the business are
1259 residents of an enterprise zone, excluding temporary and part-
1260 time employees, the credit shall be computed as 30 percent of
1261 the actual monthly wages paid in this state to each new employee
1262 hired when a new job has been created, unless the business is
1263 located in a rural enterprise zone, in which case the credit
1264 shall be 45 percent of the actual monthly wages paid, for a
1265 period of up to 24 consecutive months. If the new employee hired
1266 when a new job is created is a participant in the welfare
1267 transition program, the following credit shall be a percent of
1268 the actual monthly wages paid: 40 percent for $4 above the
1269 hourly federal minimum wage rate; 41 percent for $5 above the
1270 hourly federal minimum wage rate; 42 percent for $6 above the
1271 hourly federal minimum wage rate; 43 percent for $7 above the
1272 hourly federal minimum wage rate; and 44 percent for $8 above
1273 the hourly federal minimum wage rate.
1274 Section 13. Paragraph (a) of subsection (1) of section
1275 220.182, Florida Statutes, is amended to read:
1276 220.182 Enterprise zone property tax credit.--
1277 (1)(a) Beginning July 1, 1995, there shall be allowed a
1278 credit against the tax imposed by this chapter to any business

1279 which establishes a new business as defined in s.
1280 220.03(1)(o)~~(p)~~, expands an existing business as defined in s.
1281 220.03(1)(j)~~(k)~~, or rebuilds an existing business as defined in
1282 s. 220.03(1)(s)~~(u)~~ in this state. The credit shall be computed
1283 annually as ad valorem taxes paid in this state, in the case of
1284 a new business; the additional ad valorem tax paid in this state
1285 resulting from assessments on additional real or tangible
1286 personal property acquired to facilitate the expansion of an
1287 existing business; or the ad valorem taxes paid in this state
1288 resulting from assessments on property replaced or restored, in
1289 the case of a rebuilt business, including pollution and waste
1290 control facilities, or any part thereof, and including one or
1291 more buildings or other structures, machinery, fixtures, and
1292 equipment.
1293 Section 14. Paragraph (l) of subsection (1) of section
1294 288.1045, Florida Statutes, is amended to read:
1295 288.1045 Qualified defense contractor tax refund
1296 program.--
1297 (1) DEFINITIONS.--As used in this section:
1298 (l) "Taxable year" means the same as in s.
1299 220.03(1)(x)~~(z)~~.
1300 Section 15. Paragraph (p) of subsection (1) of section
1301 288.106, Florida Statutes, is amended to read:
1302 288.106 Tax refund program for qualified target industry
1303 businesses.--
1304 (1) DEFINITIONS.--As used in this section:
1305 (p) "Taxable year" means taxable year as defined in s.
1306 220.03(1)(x)~~(z)~~.

1307 Section 16. Subsection (2) of section 290.00677, Florida
1308 Statutes, is amended to read:
1309 290.00677 Rural enterprise zones; special
1310 qualifications.--
1311 (2) Notwithstanding the enterprise zone residency
1312 requirements set out in s. 220.03(1)(p) ~~(q)~~, businesses as
1313 defined by s. 220.03(1)(c), located in rural enterprise zones as
1314 defined in s. 290.004, may receive the basic minimum credit
1315 provided under s. 220.181 for creating a new job and hiring a
1316 person residing within the jurisdiction of a rural county, as
1317 defined by s. 288.106(1)(r). All other provisions of s. 220.181,
1318 including, but not limited to, those relating to the award of
1319 enhanced credits apply to such businesses.
1320 Section 17. This act shall take effect July 1, 2006.

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

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1 Council/Committee hearing bill: Economic Development, Trade &
2 Banking Committee
3 Representative(s) Goodlette offered the following:
4
5 **Amendment (with title amendment)**
6 Remove everything after the enacting clause and insert:
7
8 Section 1. Paragraph (q) of subsection (5) of section
9 212.08, Florida Statutes, is amended to read:
10 212.08 Sales, rental, use, consumption, distribution, and
11 storage tax; specified exemptions.--The sale at retail, the
12 rental, the use, the consumption, the distribution, and the
13 storage to be used or consumed in this state of the following
14 are hereby specifically exempt from the tax imposed by this
15 chapter.
16 (5) EXEMPTIONS; ACCOUNT OF USE.--
17 (q) Community contribution tax credit for donations.--
18 1. Authorization.--~~Beginning July 1, 2001,~~ Persons who
19 are registered with the department under s. 212.18 to collect or
20 remit sales or use tax and who make donations to eligible
21 sponsors are eligible for tax credits against their state sales
22 and use tax liabilities as provided in this paragraph:

23 a. The credit shall be computed as 50 percent of the
24 person's approved annual community contribution;
25 b. The credit shall be granted as a refund against state
26 sales and use taxes reported on returns and remitted in the 12
27 months preceding the date of application to the department for
28 the credit as required in sub-subparagraph 3.c. If the annual
29 credit is not fully used through such refund because of
30 insufficient tax payments during the applicable 12-month period,
31 the unused amount may be included in an application for a refund
32 made pursuant to sub-subparagraph 3.c. in subsequent years
33 against the total tax payments made for such year. Carryover
34 credits may be applied for a 3-year period without regard to any
35 time limitation that would otherwise apply under s. 215.26;
36 c. A person may not receive more than $200,000 in annual
37 tax credits for all approved community contributions made in any
38 one year;
39 d. All proposals for the granting of the tax credit
40 require the prior approval of the Office of Tourism, Trade, and
41 Economic Development;
42 e. The total amount of tax credits which may be granted
43 for all programs approved under this paragraph, s. 220.183, and
44 s. 624.5105 is $10 ~~$12~~ million annually for projects that
45 provide homeownership opportunities for low-income or very-low-
46 income households as defined in s. 420.9071(19) and (28), and $3
47 million annually for all other projects; and
48 f. A person who is eligible to receive the credit
49 provided for in this paragraph, s. 220.183, or s. 624.5105 may
50 receive the credit only under the one section of the person's
51 choice.
52 2. Eligibility requirements.--

53 a. A community contribution by a person must be in the
54 following form:
55 (I) Cash or other liquid assets;
56 (II) Real property;
57 (III) Goods or inventory; or
58 (IV) Other physical resources as identified by the Office
59 of Tourism, Trade, and Economic Development.
60 b. All community contributions must be reserved
61 exclusively for use in a project. As used in this sub-
62 subparagraph, the term "project" means any activity undertaken
63 by an eligible sponsor which is designed to construct, improve,
64 or substantially rehabilitate housing that is affordable to low-
65 income or very-low-income households as defined in s.
66 420.9071(19) and (28); designed to provide commercial,
67 industrial, or public resources and facilities; or designed to
68 improve entrepreneurial and job-development opportunities for
69 low-income persons. A project may be the investment necessary to
70 increase access to high-speed broadband capability in rural
71 communities with enterprise zones, including projects that
72 result in improvements to communications assets that are owned
73 by a business. A project may include the provision of museum
74 educational programs and materials that are directly related to
75 any project approved between January 1, 1996, and December 31,
76 1999, and located in an enterprise zone designated pursuant to
77 s. 290.0065. This paragraph does not preclude projects that
78 propose to construct or rehabilitate housing for low-income or
79 very-low-income households on scattered sites. With respect to
80 housing, contributions may be used to pay the following eligible
81 low-income and very-low-income housing-related activities:
82 (I) Project development impact and management fees for
83 low-income or very-low-income housing projects;

84 (II) Down payment and closing costs for eligible persons,
85 as defined in s. 420.9071(19) and (28);
86 (III) Administrative costs, including housing counseling
87 and marketing fees, not to exceed 10 percent of the community
88 contribution, directly related to low-income or very-low-income
89 projects; and
90 (IV) Removal of liens recorded against residential
91 property by municipal, county, or special district local
92 governments when satisfaction of the lien is a necessary
93 precedent to the transfer of the property to an eligible person,
94 as defined in s. 420.9071(19) and (28), for the purpose of
95 promoting home ownership. Contributions for lien removal must be
96 received from a nonrelated third party.
97 c. The project must be undertaken by an "eligible
98 sponsor," which includes:
99 (I) A community action program;
100 (II) A nonprofit community-based development organization
101 whose mission is the provision of housing for low-income or
102 very-low-income households or increasing entrepreneurial and
103 job-development opportunities for low-income persons;
104 (III) A neighborhood housing services corporation;
105 (IV) A local housing authority created under chapter 421;
106 (V) A community redevelopment agency created under s.
107 163.356;
108 (VI) The Florida Industrial Development Corporation;
109 (VII) A historic preservation district agency or
110 organization;
111 (VIII) A regional workforce board;
112 (IX) A direct-support organization as provided in s.
113 1009.983;

114 (X) An enterprise zone development agency created under
115 s. 290.0056;
116 (XI) A community-based organization incorporated under
117 chapter 617 which is recognized as educational, charitable, or
118 scientific pursuant to s. 501(c)(3) of the Internal Revenue Code
119 and whose bylaws and articles of incorporation include
120 affordable housing, economic development, or community
121 development as the primary mission of the corporation;
122 (XII) Units of local government;
123 (XIII) Units of state government; or
124 (XIV) Any other agency that the Office of Tourism, Trade,
125 and Economic Development designates by rule.
126
127 In no event may a contributing person have a financial interest
128 in the eligible sponsor.
129 d. The project must be located in an area designated an
130 enterprise zone or a Front Porch Florida Community pursuant to
131 s. 20.18(6), unless the project increases access to high-speed
132 broadband capability for rural communities with enterprise zones
133 but is physically located outside the designated rural zone
134 boundaries. Any project designed to construct or rehabilitate
135 housing for low-income or very-low-income households as defined
136 in s. 420.0971(19) and (28) is exempt from the area requirement
137 of this sub-subparagraph.
138 e.~~(I) For the first 6 months of the fiscal year, the~~
139 ~~Office of Tourism, Trade, and Economic Development shall reserve~~
140 ~~80 percent of the first $10 million in available annual tax~~
141 ~~credits and 70 percent of any available annual tax credits in~~
142 ~~excess of $10 million for donations made to eligible sponsors~~
143 ~~for projects that provide homeownership opportunities for low-~~
144 ~~income or very-low-income households as defined in s.~~

145 ~~420.9071(19) and (28). If any such reserved annual tax credits~~
146 ~~remain after the first 6 months of the fiscal year, the office~~
147 ~~may approve the balance of these available credits for donations~~
148 ~~made to eligible sponsors for projects other than those that~~
149 ~~provide homeownership opportunities for low-income or very-low-~~
150 ~~income households.~~
151 ~~(II) For the first 6 months of the fiscal year, the~~
152 ~~office shall reserve 20 percent of the first $10 million in~~
153 ~~available annual tax credits and 30 percent of any available~~
154 ~~annual tax credits in excess of $10 million for donations made~~
155 ~~to eligible sponsors for projects other than those that provide~~
156 ~~homeownership opportunities for low-income or very-low-income~~
157 ~~households as defined in s. 420.9071(19) and (28). If any~~
158 ~~reserved annual tax credits remain after the first 6 months of~~
159 ~~the fiscal year, the office may approve the balance of these~~
160 ~~available credits for donations made to eligible sponsors for~~
161 ~~projects that provide homeownership opportunities for low-income~~
162 ~~or very-low-income households.~~
163 (I) ~~(III)~~ If, during the first 10 business days of the
164 state fiscal year, eligible tax credit applications for projects
165 that provide homeownership opportunities for low-income or very-
166 low-income households as defined in s. 420.9071(19) and (28) are
167 received for less than the ~~available~~ annual tax credits
168 available for those projects ~~reserved under sub-sub-subparagraph~~
169 ~~(I)~~, the Office of Tourism, Trade, and Economic Development
170 shall grant tax credits for those applications and shall grant
171 remaining tax credits on a first-come, first-served basis for
172 any subsequent eligible applications received before the end of
173 the ~~first 6 months of the~~ state fiscal year. If, during the
174 first 10 business days of the state fiscal year, eligible tax
175 credit applications for projects that provide homeownership

176 opportunities for low-income or very-low-income households as
177 defined in s. 420.9071(19) and (28) are received for more than
178 the ~~available~~ annual tax credits available for those projects
179 ~~reserved under sub-sub-subparagraph (I)~~, the office shall grant
180 the tax credits for those ~~the~~ applications as follows:
181 (A) If tax credit applications submitted for approved
182 projects of an eligible sponsor do not exceed $200,000 in total,
183 the credits shall be granted in full if the tax credit
184 applications are approved~~, subject to sub-sub-subparagraph (I)~~.
185 (B) If tax credit applications submitted for approved
186 projects of an eligible sponsor exceed $200,000 in total, the
187 amount of tax credits granted pursuant to sub-sub-sub-
188 subparagraph (A) shall be subtracted from the amount of
189 available tax credits ~~under sub-sub-subparagraph (I)~~, and the
190 remaining credits shall be granted to each approved tax credit
191 application on a pro rata basis.
192 ~~(C) If, after the first 6 months of the fiscal year,~~
193 ~~additional credits become available under sub-sub-subparagraph~~
194 ~~(II), the office shall grant the tax credits by first granting~~
195 ~~to those who received a pro rata reduction up to the full amount~~
196 ~~of their request and, if there are remaining credits, granting~~
197 ~~credits to those who applied on or after the 11th business day~~
198 ~~of the state fiscal year on a first-come, first-served basis.~~
199 (II)~~(IV)~~ If, during the first 10 business days of the
200 state fiscal year, eligible tax credit applications for projects
201 other than those that provide homeownership opportunities for
202 low-income or very-low-income households as defined in s.
203 420.9071(19) and (28) are received for less than the ~~available~~
204 annual tax credits available for those projects ~~reserved under~~
205 ~~sub-sub-subparagraph (II)~~, the Office of Tourism, Trade, and
206 Economic Development shall grant tax credits for those

207 applications and shall grant remaining tax credits on a first-
208 come, first-served basis for any subsequent eligible
209 applications received before the end of the ~~first 6 months of~~
210 ~~the~~ state fiscal year. If, during the first 10 business days of
211 the state fiscal year, eligible tax credit applications for
212 projects other than those that provide homeownership
213 opportunities for low-income or very-low-income households as
214 defined in s. 420.9071(19) and (28) are received for more than
215 the ~~available~~ annual tax credits available for those projects
216 ~~reserved under sub-sub-subparagraph (II)~~, the office shall grant
217 the tax credits for the applications on a pro rata basis. ~~If,~~
218 ~~after the first 6 months of the fiscal year, additional credits~~
219 ~~become available under sub-sub-subparagraph (I), the office~~
220 ~~shall grant the tax credits by first granting to those who~~
221 ~~received a pro rata reduction up to the full amount of their~~
222 ~~request and, if there are remaining credits, granting credits to~~
223 ~~those who applied on or after the 11th business day of the state~~
224 ~~fiscal year on a first-come, first-served basis.~~
225 3. Application requirements.--
226 a. Any eligible sponsor seeking to participate in this
227 program must submit a proposal to the Office of Tourism, Trade,
228 and Economic Development which sets forth the name of the
229 sponsor, a description of the project, and the area in which the
230 project is located, together with such supporting information as
231 is prescribed by rule. The proposal must also contain a
232 resolution from the local governmental unit in which the project
233 is located certifying that the project is consistent with local
234 plans and regulations.
235 b. Any person seeking to participate in this program must
236 submit an application for tax credit to the Office of Tourism,
237 Trade, and Economic Development which sets forth the name of the

238 sponsor, a description of the project, and the type, value, and
239 purpose of the contribution. The sponsor shall verify the terms
240 of the application and indicate its receipt of the contribution,
241 which verification must be in writing and accompany the
242 application for tax credit. The person must submit a separate
243 tax credit application to the office for each individual
244 contribution that it makes to each individual project.
245 c. Any person who has received notification from the
246 Office of Tourism, Trade, and Economic Development that a tax
247 credit has been approved must apply to the department to receive
248 the refund. Application must be made on the form prescribed for
249 claiming refunds of sales and use taxes and be accompanied by a
250 copy of the notification. A person may submit only one
251 application for refund to the department within any 12-month
252 period.
253 4. Administration.--
254 a. The Office of Tourism, Trade, and Economic Development
255 may adopt rules pursuant to ss. 120.536(1) and 120.54 necessary
256 to administer this paragraph, including rules for the approval
257 or disapproval of proposals by a person.
258 b. The decision of the Office of Tourism, Trade, and
259 Economic Development must be in writing, and, if approved, the
260 notification shall state the maximum credit allowable to the
261 person. Upon approval, the office shall transmit a copy of the
262 decision to the Department of Revenue.
263 c. The Office of Tourism, Trade, and Economic Development
264 shall periodically monitor all projects in a manner consistent
265 with available resources to ensure that resources are used in
266 accordance with this paragraph; however, each project must be
267 reviewed at least once every 2 years.

268 d. The Office of Tourism, Trade, and Economic Development
269 shall, in consultation with the Department of Community Affairs,
270 the Florida Housing Finance Corporation, and the statewide and
271 regional housing and financial intermediaries, market the
272 availability of the community contribution tax credit program to
273 community-based organizations.
274 5. Expiration.--This paragraph expires June 30, 2015;
275 however, any accrued credit carryover that is unused on that
276 date may be used until the expiration of the 3-year carryover
277 period for such credit.
278 Section 2. Subsections (1) and (2) of section 220.183,
279 Florida Statutes, are amended to read:
280 220.183 Community contribution tax credit.--
281 (1) AUTHORIZATION TO GRANT COMMUNITY CONTRIBUTION TAX
282 CREDITS; LIMITATIONS ON INDIVIDUAL CREDITS AND PROGRAM
283 SPENDING.--
284 (a) There shall be allowed a credit of 50 percent of a
285 community contribution against any tax due for a taxable year
286 under this chapter.
287 (b) No business firm shall receive more than $200,000 in
288 annual tax credits for all approved community contributions made
289 in any one year.
290 (c) The total amount of tax credit which may be granted
291 for all programs approved under this section, s. 212.08(5)(q),
292 and s. 624.5105 is $10 ~~$12~~ million annually for projects that
293 provide homeownership opportunities for low-income or very-low-
294 income households as defined in s. 420.9071(19) and (28), and $3
295 million annually for all other projects.
296 (d) All proposals for the granting of the tax credit
297 shall require the prior approval of the Office of Tourism,
298 Trade, and Economic Development.

299 (e) If the credit granted pursuant to this section is not
300 fully used in any one year because of insufficient tax liability
301 on the part of the business firm, the unused amount may be
302 carried forward for a period not to exceed 5 years. The
303 carryover credit may be used in a subsequent year when the tax
304 imposed by this chapter for such year exceeds the credit for
305 such year under this section after applying the other credits
306 and unused credit carryovers in the order provided in s.
307 220.02(8).
308 (f) A taxpayer who files a Florida consolidated return as
309 a member of an affiliated group pursuant to s. 220.131(1) may be
310 allowed the credit on a consolidated return basis.
311 (g) A taxpayer who is eligible to receive the credit
312 provided for in s. 624.5105 is not eligible to receive the
313 credit provided by this section.
314 (2) ELIGIBILITY REQUIREMENTS.--
315 (a) All community contributions by a business firm shall
316 be in the form specified in s. 220.03(1)(d).
317 (b)1. All community contributions must be reserved
318 exclusively for use in projects as defined in s. 220.03(1)(t).
319 ~~2. For the first 6 months of the fiscal year, the Office~~
320 ~~of Tourism, Trade, and Economic Development shall reserve 80~~
321 ~~percent of the first $10 million in available annual tax~~
322 ~~credits, and 70 percent of any available annual tax credits in~~
323 ~~excess of $10 million, for donations made to eligible sponsors~~
324 ~~for projects that provide homeownership opportunities for low-~~
325 ~~income or very-low-income households as defined in s.~~
326 ~~420.9071(19) and (28). If any reserved annual tax credits remain~~
327 ~~after the first 6 months of the fiscal year, the office may~~
328 ~~approve the balance of these available credits for donations~~
329 ~~made to eligible sponsors for projects other than those that~~

330 ~~provide homeownership opportunities for low-income or very-low-~~
331 ~~income households.~~
332 ~~3. For the first 6 months of the fiscal year, the office~~
333 ~~shall reserve 20 percent of the first $10 million in available~~
334 ~~annual tax credits, and 30 percent of any available annual tax~~
335 ~~credits in excess of $10 million, for donations made to eligible~~
336 ~~sponsors for projects other than those that provide~~
337 ~~homeownership opportunities for low-income or very-low-income~~
338 ~~households as defined in s. 420.9071(19) and (28). If any~~
339 ~~reserved annual tax credits remain after the first 6 months of~~
340 ~~the fiscal year, the office may approve the balance of these~~
341 ~~available credits for donations made to eligible sponsors for~~
342 ~~projects that provide homeownership opportunities for low-income~~
343 ~~or very-low-income households.~~
344 2.~~4.~~ If, during the first 10 business days of the state
345 fiscal year, eligible tax credit applications for projects that
346 provide homeownership opportunities for low-income or very-low-
347 income households as defined in s. 420.9071(19) and (28) are
348 received for less than the ~~available~~ annual tax credits
349 available for those projects ~~reserved under subparagraph 2.~~, the
350 Office of Tourism, Trade, and Economic Development shall grant
351 tax credits for those applications and shall grant remaining tax
352 credits on a first-come, first-served basis for any subsequent
353 eligible applications received before the end of the ~~first 6~~
354 ~~months of the~~ state fiscal year. If, during the first 10
355 business days of the state fiscal year, eligible tax credit
356 applications for projects that provide homeownership
357 opportunities for low-income or very-low-income households as
358 defined in s. 420.9071(19) and (28) are received for more than
359 the ~~available~~ annual tax credits available for those projects

360 ~~reserved under subparagraph 2.~~, the office shall grant the tax
361 credits for such applications as follows:
362 a. If tax credit applications submitted for approved
363 projects of an eligible sponsor do not exceed $200,000 in total,
364 the credit shall be granted in full if the tax credit
365 applications are approved~~, subject to the provisions of~~
366 ~~subparagraph 2~~.
367 b. If tax credit applications submitted for approved
368 projects of an eligible sponsor exceed $200,000 in total, the
369 amount of tax credits granted under sub-subparagraph a. shall be
370 subtracted from the amount of available tax credits ~~under~~
371 ~~subparagraph 2.~~, and the remaining credits shall be granted to
372 each approved tax credit application on a pro rata basis.
373 ~~c. If, after the first 6 months of the fiscal year,~~
374 ~~additional credits become available pursuant to subparagraph 3.,~~
375 ~~the office shall grant the tax credits by first granting to~~
376 ~~those who received a pro rata reduction up to the full amount of~~
377 ~~their request and, if there are remaining credits, granting~~
378 ~~credits to those who applied on or after the 11th business day~~
379 ~~of the state fiscal year on a first-come, first-served basis.~~
380 3.~~5.~~ If, during the first 10 business days of the state
381 fiscal year, eligible tax credit applications for projects other
382 than those that provide homeownership opportunities for low-
383 income or very-low-income households as defined in s.
384 420.9071(19) and (28) are received for less than the ~~available~~
385 annual tax credits available for those projects ~~reserved under~~
386 ~~subparagraph 3.~~, the Office of Tourism, Trade, and Economic
387 Development shall grant tax credits for those applications and
388 shall grant remaining tax credits on a first-come, first-served
389 basis for any subsequent eligible applications received before
390 the end of the ~~first 6 months of the~~ state fiscal year. If,

391 during the first 10 business days of the state fiscal year,
392 eligible tax credit applications for projects other than those
393 that provide homeownership opportunities for low-income or very-
394 low-income households as defined in s. 420.9071(19) and (28) are
395 received for more than the ~~available~~ annual tax credits
396 available for those projects ~~reserved under subparagraph 3.~~, the
397 office shall grant the tax credits for such applications on a
398 pro rata basis. ~~If, after the first 6 months of the fiscal year,~~
399 ~~additional credits become available under subparagraph 2., the~~
400 ~~office shall grant the tax credits by first granting to those~~
401 ~~who received a pro rata reduction up to the full amount of their~~
402 ~~request and, if there are remaining credits, granting credits to~~
403 ~~those who applied on or after the 11th business day of the state~~
404 ~~fiscal year on a first-come, first-served basis.~~
405 (c) The project must be undertaken by an "eligible
406 sponsor," defined here as:
407 1. A community action program;
408 2. A nonprofit community-based development organization
409 whose mission is the provision of housing for low-income or
410 very-low-income households or increasing entrepreneurial and
411 job-development opportunities for low-income persons;
412 3. A neighborhood housing services corporation;
413 4. A local housing authority, created pursuant to chapter
414 421;
415 5. A community redevelopment agency, created pursuant to
416 s. 163.356;
417 6. The Florida Industrial Development Corporation;
418 7. An historic preservation district agency or
419 organization;
420 8. A regional workforce board;

421 9. A direct-support organization as provided in s.
422 1009.983;
423 10. An enterprise zone development agency created
424 pursuant to s. 290.0056;
425 11. A community-based organization incorporated under
426 chapter 617 which is recognized as educational, charitable, or
427 scientific pursuant to s. 501(c)(3) of the Internal Revenue Code
428 and whose bylaws and articles of incorporation include
429 affordable housing, economic development, or community
430 development as the primary mission of the corporation;
431 12. Units of local government;
432 13. Units of state government; or
433 14. Such other agency as the Office of Tourism, Trade,
434 and Economic Development may, from time to time, designate by
435 rule.
436
437 In no event shall a contributing business firm have a financial
438 interest in the eligible sponsor.
439 (d) The project shall be located in an area designated as
440 an enterprise zone or a Front Porch Florida Community pursuant
441 to s. 20.18(6). Any project designed to construct or
442 rehabilitate housing for low-income or very-low-income
443 households as defined in s. 420.9071(19) and (28) is exempt from
444 the area requirement of this paragraph. This section does not
445 preclude projects that propose to construct or rehabilitate
446 housing for low-income or very-low-income households on
447 scattered sites. Any project designed to provide increased
448 access to high-speed broadband capabilities which includes
449 coverage of a rural enterprise zone may locate the project's
450 infrastructure in any area of a rural county.

451 Section 3. Subsections (1) and (2) of section 624.5105,
452 Florida Statutes, are amended to read:
453 624.5105 Community contribution tax credit;
454 authorization; limitations; eligibility and application
455 requirements; administration; definitions; expiration.--
456 (1) AUTHORIZATION TO GRANT TAX CREDITS; LIMITATIONS.--
457 (a) There shall be allowed a credit of 50 percent of a
458 community contribution against any tax due for a calendar year
459 under s. 624.509 or s. 624.510.
460 (b) No insurer shall receive more than $200,000 in annual
461 tax credits for all approved community contributions made in any
462 one year.
463 (c) The total amount of tax credit which may be granted
464 for all programs approved under this section and ss.
465 212.08(5)(q) and 220.183 is $10 ~~$12~~ million annually for
466 projects that provide homeownership opportunities for low-income
467 or very-low-income households as defined in s. 420.9071(19) and
468 (28), and $3 million annually for all other projects.
469 (d) Each proposal for the granting of such tax credit
470 requires the prior approval of the director.
471 (e) If the credit granted pursuant to this section is not
472 fully used in any one year because of insufficient tax liability
473 on the part of the insurer, the unused amount may be carried
474 forward for a period not to exceed 5 years. The carryover credit
475 may be used in a subsequent year when the tax imposed by s.
476 624.509 or s. 624.510 for such year exceeds the credit under
477 this section for such year.
478 (f) An insurer that claims a credit against premium-tax
479 liability earned by making a community contribution under this
480 section need not pay any additional retaliatory tax levied under

481 s. 624.5091 as a result of claiming such a credit. Section
482 624.5091 does not limit such a credit in any manner.
483 (2) ELIGIBILITY REQUIREMENTS.--
484 (a) Each community contribution by an insurer must be in
485 a form specified in subsection (5).
486 (b) Each community contribution must be reserved
487 exclusively for use in a project as defined in s. 220.03(1)(t).
488 (c) The project must be undertaken by an "eligible
489 sponsor," as defined in s. 220.183(2)(c). In no event shall a
490 contributing insurer have a financial interest in the eligible
491 sponsor.
492 (d) The project shall be located in an area designated as
493 an enterprise zone or a Front Porch Community pursuant to s.
494 20.18(6). Any project designed to construct or rehabilitate
495 housing for low-income or very-low-income households as defined
496 in s. 420.9071(19) and (28) is exempt from the area requirement
497 of this paragraph.
498 (e)~~1. For the first 6 months of the fiscal year, the~~
499 ~~Office of Tourism, Trade, and Economic Development shall reserve~~
500 ~~80 percent of the first $10 million in available annual tax~~
501 ~~credits, and 70 percent of any available annual tax credits in~~
502 ~~excess of $10 million, for donations made to eligible sponsors~~
503 ~~for projects that provide homeownership opportunities for low-~~
504 ~~income or very-low-income households as defined in s.~~
505 ~~420.9071(19) and (28). If any such reserved annual tax credits~~
506 ~~remain after the first 6 months of the fiscal year, the office~~
507 ~~may approve the balance of these available credits for donations~~
508 ~~made to eligible sponsors for projects other than those that~~
509 ~~provide homeownership opportunities for low-income or very-low-~~
510 ~~income households.~~

511 ~~2. For the first 6 months of the fiscal year, the office~~
512 ~~shall reserve 20 percent of the first $10 million in available~~
513 ~~annual tax credits, and 30 percent of any available annual tax~~
514 ~~credits in excess of $10 million, for donations made to eligible~~
515 ~~sponsors for projects other than those that provide~~
516 ~~homeownership opportunities for low-income or very-low-income~~
517 ~~households as defined in s. 420.9071(19) and (28). If any~~
518 ~~reserved annual tax credits remain after the first 6 months of~~
519 ~~the fiscal year, the office may approve the balance of these~~
520 ~~available credits for donations made to eligible sponsors for~~
521 ~~projects that provide homeownership opportunities for low-income~~
522 ~~or very-low-income households.~~
523 1.~~3.~~ If, during the first 10 business days of the state
524 fiscal year, eligible tax credit applications for projects that
525 provide homeownership opportunities for low-income or very-low-
526 income households as defined in s. 420.9071(19) and (28) are
527 received for less than the ~~available~~ annual tax credits
528 available for those projects ~~reserved under subparagraph 1.~~, the
529 Office of Tourism, Trade, and Economic Development shall grant
530 tax credits for those applications and shall grant remaining tax
531 credits on a first-come, first-served basis for any subsequent
532 eligible applications received before the end of the ~~first 6~~
533 ~~months of the~~ state fiscal year. If, during the first 10
534 business days of the state fiscal year, eligible tax credit
535 applications for projects that provide homeownership
536 opportunities for low-income or very-low-income households as
537 defined in s. 420.9071(19) and (28) are received for more than
538 the ~~available~~ annual tax credits available for those projects
539 ~~reserved under subparagraph 1.~~, the office shall grant the tax
540 credits for the applications as follows:

541 a. If tax credit applications submitted for approved
542 projects of an eligible sponsor do not exceed $200,000 in total,
543 the credits shall be granted in full if the tax credit
544 applications are approved~~, subject to subparagraph 1~~.
545 b. If tax credit applications submitted for approved
546 projects of an eligible sponsor exceed $200,000 in total, the
547 amount of tax credits granted under sub-subparagraph a. shall be
548 subtracted from the amount of available tax credits ~~under~~
549 ~~subparagraph 1.~~, and the remaining credits shall be granted to
550 each approved tax credit application on a pro rata basis.
551 ~~c. If, after the first 6 months of the fiscal year,~~
552 ~~additional credits become available under subparagraph 2., the~~
553 ~~office shall grant the tax credits by first granting to those~~
554 ~~who received a pro rata reduction up to the full amount of their~~
555 ~~request and, if there are remaining credits, granting credits to~~
556 ~~those who applied on or after the 11th business day of the state~~
557 ~~fiscal year on a first-come, first-served basis.~~
558 2.~~4.~~ If, during the first 10 business days of the state
559 fiscal year, eligible tax credit applications for projects other
560 than those that provide homeownership opportunities for low-
561 income or very-low-income households as defined in s.
562 420.9071(19) and (28) are received for less than the ~~available~~
563 annual tax credits available for those projects ~~reserved under~~
564 ~~subparagraph 2.~~, the Office of Tourism, Trade, and Economic
565 Development shall grant tax credits for those applications and
566 shall grant remaining tax credits on a first-come, first-served
567 basis for any subsequent eligible applications received before
568 the end of the ~~first 6 months of the~~ state fiscal year. If,
569 during the first 10 business days of the state fiscal year,
570 eligible tax credit applications for projects other than those
571 that provide homeownership opportunities for low-income or very-

572 low-income households as defined in s. 420.9071(19) and (28) are
573 received for more than the ~~available~~ annual tax credits
574 available for those projects ~~reserved under subparagraph 2.~~, the
575 office shall grant the tax credits for those ~~the~~ applications on
576 a pro rata basis. ~~If, after the first 6 months of the fiscal~~
577 ~~year, additional credits become available under subparagraph 1.,~~
578 ~~the office shall grant the tax credits by first granting to~~
579 ~~those who received a pro rata reduction up to the full amount of~~
580 ~~their request and, if there are remaining credits, granting~~
581 ~~credits to those who applied on or after the 11th business day~~
582 ~~of the state fiscal year on a first-come, first-served basis.~~
583 Section 4. This act shall take effect July 1, 2006.
584
585
586 ========== T I T L E A M E N D M E N T ==========
587 Remove the entire title and insert:
588 A bill to be entitled
589 An act relating to the community contribution tax credit
590 program; amending s. 212.08, F.S.; providing separate
591 annual limitations for tax credits against the sales and
592 use tax for donations made to eligible sponsors for
593 projects that provides homeownership opportunities for
594 certain households and for donations made to eligible
595 sponsors for all other projects; eliminating the
596 requirement that the Office of Tourism, Trade, and
597 Economic Development reserve portions of certain annual
598 tax credits for donations made to eligible sponsors for
599 projects that provide homeownership opportunities for
600 certain households; amending s. 220.183, F.S.; providing
601 separate annual limitations for tax credits against the
602 corporate income tax for donations made to eligible

603 sponsors for projects that provide homeownership
604 opportunities for certain households and for donations
605 made to eligible sponsors for all other projects;
606 eliminating the requirement that the Office of Tourism,
607 Trade, and Economic Development reserve portions of
608 certain annual tax credits for donations made to eligible
609 sponsors for projects that provide homeownership
610 opportunities for certain households; amending s.
611 624.5105, F.S.; providing separate annual limitations for
612 tax credits against the insurance premium tax for
613 donations made to eligible sponsors for projects that
614 provide homeownership opportunities for certain households
615 and for donations made to eligible sponsors for all other
616 projects; eliminating the requirement that the Office of
617 Tourism, Trade, and Economic Development reserve portions
618 of certain annual tax credits for donations made to
619 eligible sponsors for projects that provide homeownership
620 opportunities for certain households; providing an
621 effective date.
622

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB EDTB 06-02 Financial Entities Licensing
SPONSOR(S): Economic Development, Trade & Banking Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Economic Development, Trade & Banking Committee		Olmedillo	Carlson
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Financial Services Commission (the Commission) and its Office of Financial Regulations (the Office) administer the regulation of mortgage brokers and lenders, consumer finance companies, retail installment sellers, money transmitters and title loan and securities businesses. A number of provisions under each of these program areas have been identified by the Office for clarification and revision to achieve more efficient governance.

The bill makes editorial changes, adjusts cross-references, reorganizes certain sections and removes superfluous language to achieve uniformity, clarification and streamline the processes.

This bill revises a number of regulatory provisions governing mortgage brokers and lenders. The bill provides for:

- Mandated electronic filing of required forms, documents, or files with a provision for hardship situations;
- Clarification that receipt of the appropriate fee is a condition of new and renewal license application completion and that grounds for disciplinary action exists if payment of the fee fails to clear;
- Revision of fingerprint card processing;
- Clarification of when a change in licensee control will trigger the need for a new license;
- Requirements for financial institutions to qualify for an exemption;
- Revision of testing procedures and fees;
- Increase in the fee for a credit check of a loan applicant from $10 to $25;
- Approval for branch application license;
- Revised accounting standards;
- A reconciliation of conflicts between the 2002 amendments to the Probate Code and provisions of the Banking Code relating to safe-deposit boxes; and
- An award of attorney's fees and costs if as the result of neglect a mortgage lender fails to pay any tax or insurance premium and subsequently refuses to pay the difference between a lapsed insurance policy and a new policy required by law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government - The bill gives the Commission rulemaking authority to prescribe requirements and procedures for obtaining a technological or financial hardship exception relating to electronic filing of forms; rulemaking authority to include guidelines for the destruction, as well as, retention of certain records; the authority to charge for the processing of fingerprint cards; and authority to utilize a third party for the submission of fingerprint cards and fees by electronic means.

Ensure Lower Taxes - The bill allows for an increase in the fee for a credit check of a loan applicant from $10 to $25. In addition, it grants the Office rulemaking authority to charge a fee, not to exceed $100 for electronic testing.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

The Financial Services Commission (Commission) consists of the Governor, the Chief Financial Officer, the Attorney General, and the Commissioner of Agriculture. The Commission is an independent entity housed within the Department of Financial Services. The Office of Insurance Regulation and the Office of Financial Regulation are under the Commission.[1] The Office of Financial Regulation (Office) is responsible for all activities of the Commission relating to the regulation of financial institutions, finance companies, securities industries, and money transmitters.[2]

Mortgage brokers and mortgage lenders are regulated under the provisions of ch. 494, F.S. Chapter 516, F.S., regulates consumer finance loans, which are loans of $25,000 or less and for which the lender charges an interest rate of 18 percent or greater. Securities transactions are regulated under ch. 517, F.S., which also includes the administration of the Securities Guaranty Fund (fund). This fund provides compensation to persons who have suffered monetary damages due to acts committed by a dealer or investment advisor and who meet the statutory requirements for compensation. The Office also has regulatory authority over the following types of retail installment sales covered by ch. 520, F.S.: motor vehicle sales financing, retail installment sales (the purchase of retail goods via installment payments), sales finance companies (companies that acquire home improvement contracts), and home improvement contracts (financing for home improvement through home improvement contracts). Presently, if a mortgage lender fails to timely pay an insurance premium of a property owner, and the payment is not more than 90 days overdue, the insurer must reinstate the insurance policy retroactive to the date of cancellation under the provisions of s. 501.137, F.S. The lender must reimburse the property owner for any penalty or fees imposed by the insurer and paid by the property owner to reinstate the policy. If the premium payment is more than 90 days overdue, or if the insurer refuses to reinstate the policy, the lender must pay the difference between the cost of the previous insurance policy and a new, comparable policy for 2 years. There is no provision for the recovery of attorney's fees and costs by the property owner.

Chapter 537, F.S., the Florida Title Loan Act, regulates loans secured by the title to a motor vehicle. Chapter 560, F.S., the Money Transmitters' Code, regulates various money transmitters including payment instrument (check) sellers, foreign currency exchangers, check cashing, funds transmissions (via wire, electronic transfer, etc.), and deferred presentment (providing money in exchange for a person's check, which is to be held for a certain period of time).

The Office currently licenses over 380,000 individuals and businesses in the areas of securities and finance.

Over the past five years, the number of persons seeking licensure through the Office has significantly increased. The number of staff to process applications and renewals, however, has remained constant.

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[1] The Office of Insurance Regulation is responsible for the licensure and regulation of insurers and other risk bearing entities. s. 20.121(3), F.S.

[2] See s. 20.121(3), F.S.

The most significant increases have been in the finance area.

For example:

	FY 00/01	FY 04/05	Increase
Mortgage Broker Applications	4,960	19,710	297%
Active Mortgage Broker Licenses	34,128	71,729	110%
Active Finance Licenses (All types)	52,281	90,256	73%

To keep pace with demand, the Office's licensing functions need to be streamlined and technology needs to be used to a greater extent. This bill will fulfill both of these goals.

Effects of proposed changes

GENERAL LICENSING PROVISIONS APPLICABLE TO MULTIPLE CHAPTERS

1) Electronic Filing of Forms and Fees. The bill grants the Office rulemaking authority to require electronic filing of forms, documents, and fees. However, it provides that the Commission must reasonably accommodate technological or financial hardship and requirements and procedures for obtaining a technological or financial hardship exemption. Without requiring the industries to use the technology the Office must maintain dual processes, one for paper filings and another for electronic filings.

2) Fee. Provides that applications are not deemed received until all required fees are received. Authorizes disciplinary action if fees paid with bad check.

   The application fees are as follows:
   - Mortgage business schools: $500 app. (current)
   - Mortgage business $425 (current)
   - Mortgage brokers $200 (current)
   - Mortgage business branch Offices $225 (current)
   - Mortgage lenders $575 (current)
   - Correspondent mortgage lenders $500 (current)
   - Mortgage lenders' branch Offices $325 (current)
   - Transfer of lender's license $500 (current)
   - Consumer finance loans $625 (current)
   - Motor vehicle retail installment seller or operator, retail installment transactions, sales finance company, home improvement finance seller, branch of such businesses $175 (current)
   - Money transmitters: fee not to exceed $1,000 (current). Renewal fee, not to exceed $500 (current)

3) Required documents and destruction of records. Authorizes the Commission to prescribe rules for the destruction of records maintained by licensees. There has been at least one instance of a licensee disposing of intact records by placing them in a dumpster. The Office seeks to prescribe the proper method of disposing of records to protect sensitive consumer information.

   All documents required by Commission rule, including training curriculum and materials from mortgage business schools, must be submitted at the time the applicant submits the application or recertification.

4) Paper Permits. Eliminates requirement that licensed businesses display their permits. License information is available via the Office's website. (Chapters 494, 516, and 520.)

5) "Control person and controlling interest". Provides a definition of "control person" and "controlling interest" as follows:

   "Control person" means an individual, partnership, corporation, trust, or other organization that possesses the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. A person is presumed to control a company if, with respect to a particular company, that person:

(a) Is a director, general partner, or officer exercising executive responsibility or having similar status or functions;

(b) Directly or indirectly has the right to vote 10 percent or more of a class of a voting security or has the power to sell or direct the sale of 10 percent or more of a class of voting securities; or

(c) In the case of a partnership, has the right to receive upon dissolution, or has contributed, 10 percent or more of the capital.

"Controlling interest" means possession of the power to direct or cause the direction of the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who directly or indirectly has the right to vote 25 percent or more of the voting securities of a company or is entitled to 25 percent or more of its profits is presumed to possess a controlling interest.

6) Current Information about Licensees. Requires licensees to keep the application information current. (Chapters 494, 516, 520, and 560)

7) Background checks. Provides authority to inquire into the backgrounds of applicants, officers, directors, and other persons with the power to direct the management of the licensee. (Chapters 494, 516, and 520)

8) Fingerprinting. This bill clarifies that the Commission is authorized to prescribe, by rule, that fingerprint cards are required from each officer, director, control person, member, partner, or joint venturer of the applicant and each ultimate equitable owner of 10% or greater interest in the business. The fingerprint cards are required to be taken by an authorized law enforcement agency, not an officer. Presently, the law does not specifically authorize the Commission to prescribe by rule the fingerprint submission process. The bill provides a procedure for fingerprint card processing by the Office. It provides that fingerprint processing costs may be borne by the Office, the employer, or the person subject to the background check. It authorizes the Department of Law Enforcement to submit monthly invoices for fingerprint processing.

9) Change in Control. The bill clarifies the procedures with regard to change in control of a business. Currently, a licensee must notify the Office of any change in the form of business or any change in the Officers or directors. The bill authorizes the Office to obtain background information from persons who have not previously undergone review by the Office. The bill also requires any person who intends to obtain a controlling interest in a licensed entity must file a new application. The Commission may prescribe by rule provisions to waive this requirement for individuals who are already licensed or have undergone review by Office. (Chapters 494, 516, 520, and 560).

10) Exemptions.
The bill provides that in order to be exempt from the chapter requirements, a state or federal chartered bank, trust company, savings and loan, savings bank, credit union or bank holding company must be regulated under the laws of any state or the federal government of the United States. Banks, bank holding companies, and their subsidiaries that are not regulated by the federal or state government of the United States will no longer qualify for exemptions.

The bill also clarifies that there is no licensing requirement for wholly-owned subsidiaries of state or federal chartered banks or savings and loans whose sole activity is to distribute the lending programs of state or federal chartered banks.

11) Licensing requirements:
The bill requires permit and licensing from the Office, unless specifically exempt, for the following:

- Mortgage business schools that offer or conduct mortgage business training for the purpose of meeting professional continuing education requirements.
- Persons who act as a mortgage brokerage businesses.
- Natural person who acts as an associate for a mortgage lender or correspondent mortgage lender.
- Mortgage lender.
- Correspondent mortgage lender.

- Mortgage lender's branch Offices.
- Motor vehicle retail installment seller or operator, retail installment transactions, sales finance company, home improvement finance seller, branch of such businesses
- Money transmitters.

OVERVIEW OF FEES

1. Mortgage Brokerage Test. Authorizes the Office to outsource the mortgage broker test at a cost to the applicant not to exceed **$100**. Currently, the cost of the test is included in the application fee and Office staff administers the test once a month at limited locations. The fee will be used to contract with a vendor to develop an electronic version of the test to be given at testing centers located throughout the state.

   In 2004, the Office participated in a competitive procurement with the Department of Financial Services to secure a vendor for this test in anticipation of last year's bill passing. The three responses for the mortgage broker test were $42, $43 and $53. The State of North Carolina recently entered into a contract with a vendor to provide a similar test at a cost of $100. It is estimated the cost of the computerized test will be $60-75 per test based on the previous bids and the experience of North Carolina.

2. Investigation Fee – Consumer Finance. Increases the investigation fee that consumer finance companies can charge their customers from **$10 to $25**. This fee has not been increased since it took effect on 7-1-1994.

3. Registration Fee - Canadian Securities Agents. Eliminates the registration fee **($30)** for Canadian agents if the Canadian Dealer is registered. Florida is following the national trend, which is not to require registration of Canadian agents. Other states:

   - 19 states: no filing required/exemption self-executing/no fees collected by state
   - 19 states: notice filing required for the dealer only/no fees collected by state
   - 7 states: require registration of both dealer and agents/initial application and renewal fees apply
   - 5 states: exemption under consideration

4. Investment Adviser Registration through IARD. State-registered investment advisers will be required to register via the Investment Adviser Registration Depository (IARD), a nationwide electronic filing system operated by the National Association of Securities Dealers (NASD). Since the IARD system came online in 2001, forty-seven (47) states have mandated electronic filing through the system. Applicants will pay the NASD an initial system fee of **$150** and an annual fee of **$70**, which is collected to operate and maintain the IARD system, in addition to the annual state application fee of $200. Revenues to the State will be unchanged. Florida currently has 1,100 state-registered Investment Advisers. Six hundred and eighty (680) of these advisers have already voluntarily converted their information to the IARD and paid the initial fee. Therefore, there are only 420 licensees that will need to register with the IARD. See attached detailed fiscal analysis for more detail.

5. Fingerprinting. Currently the Office may require each Officer, director or ultimate equitable owner to submit a fingerprint card. The bill expands this requirement to include a control person, member, partner or joint venturer of the applicant. It is not possible to estimate the number of individuals that would be impacted by the requirement. The cost per person would be established at the cost charged by FDLE, which is currently $47 each for processing criminal history checks.

INDUSTRY SPECIFIC ISSUES

Chapter 494 - Mortgage Brokerage and Lending

1. Uniform Forms. Authorizes the Commission to adopt by rule uniform license application and renewal forms for mortgage brokerage businesses, lenders, and individuals.

2. Disciplinary Action. Provides grounds for disciplinary action in the event of a final judgment in a civil action for fraud, embezzlement, misrepresentation, or deceit. The bill also provides grounds for disciplinary action in the event of any adverse finding or decision as the result of any administrative or civil action against the

applicant or licensee that relates to the financial services industry. These provisions are necessary in order to adopt the uniform forms.

3. Continuing Education. Waives continuing education requirements for the first renewal cycle immediately following licensure for mortgage brokers and principal representatives. The bill clarifies that the educational requirements contained in this section for mortgage lenders, correspondent mortgage lenders, and mortgage lenders pursuant to a savings clause are for "continuing" education and must occur before the renewal of their respective licenses.

4. Principal Representative. Allows a newly designated principal representative 90 days in which to complete classroom and testing requirements. The continuing education requirements for a principal representative are waived for the license renewal of a correspondent mortgage lender, mortgage lender, or mortgage lender pursuant to a savings clause for the biennial license period immediately following the period in which the principal representative completed the 24 hours of classroom education and passed a written test in order to qualify to be a principal representative.

5. Application for waiver. The bill provides the Commission with rulemaking authority to adopt rules for the waiver of the application required by the relevant chapters if the person or group of persons proposing to purchase or acquire a controlling interest in a licensee has previously complied with the provisions of the applicable chapters with respect to the same legal entity or is currently licensed by the Office under this chapter.

6. Mortgage Business Schools. Requires permitted mortgage business schools to electronically report the names of student who have successfully completed required training courses. Clarifies the renewal process by specifying the renewal cycle. Permits expire on September 30th of each year. The bill requires that the license for a branch Office be renewed in conjunction with a mortgage brokerage business license and authorizes the Commission to adopt certain renewal forms by rule and require that the renewal forms be submitted to the Office or organization designated by the Commission, in a compatible computer-readable, form and must comply with the requirements of the chapter.

7. Transfer applications. As of October 1, 2006, new requirements are mandated for transfer applications on or after that date. The requirements are as follows: 1) To provide proof that the applicant's principal representative qualifies for waiver; and 2) An applicant's principal representative must pass all testing requirements for lenders.

Chapter 516 – Consumer Finance

1. Liquid Assets. Clarifies that applicants must provide evidence of liquid assets of at least $25,000. (See amendments to s. 516.03, F.S.) The failure to meet this requirement is currently grounds for denial of licensure and disciplinary action under s. 516.07(1)(b).

Chapter 517 – Securities

1. Branch Office. Amends the definition of "branch office" to conform to uniform federal standard recently adopted by the Securities and Exchange Commission.

2. Registration. Amends s. 517.12, F.S., to remove the requirement that the registration form be verified under oath.

3. Securities Guaranty Fund. Amends ch. 517, F.S., to authorize the Office to prescribe rules for the procedures, form of submissions and guidelines of notices and claims.

4. Payment from the Fund. Requires a claimant who satisfies a judgment described in s. 517.131(3)(a), F.S., to reimburse the fund all amounts paid to the claimant on the claim and gives the Commission rulemaking authority to specify the procedures for complying with this section.

5. Branch Offices - Renewal Cycle. Changes renewal deadline for branch Offices from March 31st to December 31st to allow renewal fees to be submitted through NASD.

6. Uniform Forms. Authorizes the Commission to adopt by rule uniform forms that have been approved by the Securities and Exchange Commission. A list of uniform forms is provided in the bill (e.g., Uniform Branch Office Form). These provisions are needed to address recent concerns by the Joint Administrative Procedures Committee.

7. Canadian Dealers. Revises registration process for Canadian Dealers and eliminates the registration requirements for Canadian agents under certain conditions.

8. Investment Advisers. Requires filings through Investment Adviser Registration Depository (IARD) for state registered Investment Advisers.

Chapter 560 – Money Transmitters

1. Control of money transmitter. Provides that a person has control over a money transmitter if the individual, partnership, corporation, trust, or other organization: 1) possesses the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. It also creates a presumption that a person has control of a company under certain circumstances; 2) The Office determines, after notice and opportunity for hearing, that the person directly or indirectly exercises a controlling influence over the activities of the money transmitter.

2. Permissible investments. Clarifies that the permissible investments mandated by the section must be calculated in accordance with accounting principles generally accepted in the United States.

3. Registration terms. Provides for a 24 month renewal of a registration by furnishing information and fees required by Commission rule. Currently, the section requires the Office to renew registration upon the receipt of a completed renewal form and payment of the nonrefundable fee.

Miscellaneous

1. Safe Deposit Boxes. Reconciles conflicts between the 2002 amendments to the Probate Code and provisions of the Banking Code relating to safe-deposit boxes.

2. Escrow Accounts. Provides an award of attorney's fees and costs if, as the result of neglect, a mortgage lender fails to pay taxes or insurance premiums from an escrow account, and subsequently refuses to pay the difference between a lapsed insurance policy and a new one.

3. Appropriation. Provide an appropriation amount for the fiscal year 2006-2007 from the Regulatory Trust Fund to the Office of Financial Regulation for the purpose of implementing the provisions of s. 494.033(2)(d), F.S., for third party administration of the mortgage broker test.

C. SECTION DIRECTORY:

Section 1: Amends s. 494.001, F.S., to create a definition for "control person."
Section 2: Amends s. 494.0011, F.S., providing the ability for the Commission of Financial Services to mandate electronic filings; allowing alternate means for hardships; and providing that the granting of a license must be pursuant to s. 120.60, F.S.
Section 3: Amends s. 494.0016, F.S., prescribing rules for the destruction of records.
Section 4: Amends s. 494.0029, F.S., establishing provisions for received applications and permits.
Section 5: Amends s. 494.00295, F.S., providing clarification and waiver relating to continuing education programs.
Section 6: Amends s. 494.003, F.S., providing exemptions from mortgage broker provisions for certain institutions.
Section 7: Amends s. 494.0031, F.S., relating to licensure as a mortgage brokerage business.

Section 8: Amends s. 494.0032, F.S., relating to renewal of mortgage business license or branch Office license.
Section 9: Amends s. 494.0033, F.S., relating to mortgage broker's license.
Section 10: Amends s. 494.0036, F.S., relating to mortgage brokerage business branch offices.
Section 11: Amends s. 494.0039, F.S., relating to principal place of business requirement.
Section 12: Amends s. 494.004, F.S., relating to requirements of licensees.
Section 13: Amends s. 494.0041, F.S., relating to administrative penalties and fines for licenses and permits.
Section 14: Amends s. 494.006, F.S., providing exemptions relating to mortgage lenders.
Section 15: Amends s. 494.0061, F.S., to provide licensing, exemptions, fingerprinting, and testing requirements for mortgage lenders.
Section 16: Amends s. 494.0062, F.S., relating to license requirements for correspondent mortgage lenders.
Section 17: Amends s. 494.0064, F.S., relating to renewal of mortgage lender's license.
Section 18: Amends s. 494.0065 F.S., relating to transfer applications.
Section 19: Amends s. 494.0066, F.S., relating to mortgage brokerage branch office licensing.
Section 20: Amends s. 494.0067, F.S., relating to continuing education requirements for licensees.
Section 21: Amends s. 494.0072, F.S., relating to disciplinary action for transmission of funds which fail to clear.
Section 22: Amends s. 494.00721, F.S., relating to mortgage lender net worth.
Section 23: Amends s. 501.137, F.S., relating to mortgage lender's payment of insurance premiums from escrow funds.
Section 24: Amends s. 516.01, F.S., to create a definition of "control person".
Section 25: Amends s. 516.03, F.S., relating to consumer finance loan applications.
Section 26: Amends s. 516.031, F.S., increasing the fee for a credit check for a loan applicant.
Section 27: Amends s. 516.05, F.S., relating to consumer finance loan licensing, removing a requirement for the Office to return fees under certain circumstances.
Section 28: Amends s. 516.07, F.S., providing violations for consumer finance loan permit funds failing to clear the applicant's financial institution.
Section 29: Repeals s. 516.08, F.S., relating to posting licenses.
Section 30: Amends s. 516.12, F.S., relating to the mandated destruction of accounts and records by consumer finance loaners.
Section 31: Amends s. 517.021, F.S., to provide a new definition of "branch office."
Section 32: Amends s. 517.051, F.S., relating to accounting principles for securities transactions.
Section 33: Amends s. 517.061, F.S., relating to exempt securities transactions.
Section 34: Amends s. 517.081, F.S., relating to accounting principles within registration procedure for securities transactions.
Section 35: Amends s. 517.12, F.S., relating to fingerprinting provisions and renewing branch Office registrations.
Section 36: Amends s. 517.131, F.S., relating to submissions, notices, and claims from the Securities Guaranty Fund.
Section 37: Amends s. 517.141, F.S., relating to payment from the Securities Guaranty Fund; providing the Commission with rule making authority for compliance.
Section 38: Amends s. 517.161, F.S., relating to suspension of registration for a securities transactions dealer.
Section 39: Amends s. 520.02, F.S., to provide a definition for "control person".
Section 40: Amends s. 520.03, F.S., relating to applications for motor vehicle retailer licenses.
Section 41: Amends s. 520.31, F.S., to provide a definition for "control person".
Section 42: Amends s. 520.32, F.S., relating to applications for retail installment sales licenses.
Section 43: Amends s. 520.52, F.S., relating to applications for installment sales finance licenses.
Section 44: Amends s. 520.61, F.S., to provide a definition for "control person."
Section 45: Amends s. 520.63, F.S., relating to installment sales finance licensees.

Section 46: Amends s. 520.994, F.S., providing exemptions for financial hardship for applications for retail installment sales.
Section 47: Amends s. 520.995, F.S., relating to disciplinary action for funds that fail to clear an applicants financial institution.
Section 48: Amends s. 520.997, F.S., relating to destruction of books, accounts and records retained by a retail installment sales licensee.
Section 49: Amends s. 520.999, F.S., relating to requirements of licensees, waivers, and providing a definition for "control interest."
Section 50: Amends s. 537.009, F.S., relating to destruction of books, accounts, and records retained by title loan companies.
Section 51: Amends s. 560.105, F.S., relating to electronic forms for money transmitters.
Section 52: Amends s. 560.114, F.S., relating to disciplinary actions for money transmitters whose application fee fails to clear the financial institution.
Section 53: Amends s. 560.121, F.S., relating to destruction of books, accounts, and records retained by title money transmitters.
Section 54: Amends s. 560.126, F.S., relating to significant events and notice required for money transmitters.
Section 55: Amends s. 560.127, F.S., relating to control of money transmitters.
Section 56: Amends s. 560.205, F.S., relating to fingerprinting for money transmitters.
Section 57: Amends s. 560.207, F.S., relating to renewal of registration for money transmitters.
Section 58: Amends s. 560.210, F.S., relating to permissible investments.
Section 59: Amends s. 560.211, F.S., relating to money transmitters' records.
Section 60: Amends s. 560.305, F.S., gives Commission rulemaking authority to require certain information from applicant.
Section 61: Amends s. 560.306, F.S., relating to fingerprinting for check cashers.
Section 62: Amends s.560.308, F.S., relating to registration renewal for check cashers.
Section 63: Amends s. 560.310, F.S., relating to providing rule making for Commission for records of check cashers.
Section 64: Amends s. 560.403, F.S., relating to reinstatement of application for deferred presentment providers.
Section 65: Amends s. 655.935, F.S., relating to the initial opening of a safe deposit box.
Section 66: Amends s. 655.936, F.S., relating to delivery of safe deposit box contents.
Section 67: Amends s. 655.937, F.S., relating to access to a safe deposit box leased or rented in two or more names.
Section 68: Amends s. 733.6065, F.S., relating to opening of a safe deposit box.
Section 69: Appropriates $700,515 to the Office.
Section 70: Provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

	(FY 06-07) Amount / FTE	(FY 07-08) Amount / FTE	(FY 08-09) Amount / FTE
1. Revenues:			
Recurring			
Regulatory Trust Fund (RTF)			
Mortgage Broker Test	$ 700,515	$1,401,030	$1,401,030
General Revenue (GR)	($ 53,250)	($ 53,250)	($ 53,250)
(Canadian Securities agents will no longer be required to register – 1775 x $30 annually)			
Non-Recurring	None		

2. Expenditures:

Recurring

	(FY 06-07)	(FY 07-08)	(FY 08-09)
RTF-Mortgage Broker Test	$ 700,515	$1,401,030	$1,401,030

(Should be directly offset by revenues established to cover actual costs)

Non-Recurring None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Mortgage Broker Testing (cost to applicants if transferred to a third party vendor for administration)

(FY 06-07)	(FY 07-08)	(FY 08-09)
$ 700,515	$1,401,030	$1,401,030

It is not possible to predict the offsetting benefit to the private sector of allowing quicker entry into business due to more frequent testing and immediate scoring. However, It is estimated that each additional day to get registered costs the individual $98.63 in income (average salary of $36,000 divided by 365 days = $98.63). During first quarter of fiscal year 05-06, an average of 2,339 applicants took the test each month, so each 1-day delay costs a total of $230,696 in lost wages, or $6,920,867 for the 30-day delay currently between tests. It is also anticipated more test sites would be available than currently, reducing the applicants' travel expense to take the test.

IARD Registration

The proposed language will require all state-registered investment advisers (IAs) to register via the Investment Adviser Registration Depository (IARD), a nationwide electronic filing system operated by the National Association of Securities Dealers (NASD). Applicants will pay the NASD an initial system fee of **$150** and an annual fee of **$70** which is collected to operate and maintain the IARD system, in addition to the state application fee of $200 annually. Revenues to the State will be unchanged. Florida currently has 1100 state-registered IAs, of which 680 have already converted their information to IARD and paid the initial fee. The remaining 420 will be required to file (total cost $63,000) and all 1100 will be required to pay $70 annually, a total of $77,000. Additionally, the Office received 182 new applications for state-registered IAs last year, of which 150 were approved. This represents an additional cost to the industry of $27,300 (182 x $150) in their first year and $10,500 (150 x $70) on an on-going basis. Filing the information with IARD allows the Office to share registration information with other states and federal authorities related to state-registered IAs, and allows faster processing of applications and "one-stop" filing for the industry.

Canadian Dealers and Agents

The fees will remain unchanged for Canadian dealers, although the registration process will change. However, the Canadian agents currently registered with the State, will no longer be required to register. Currently there are 1775 Canadian agents registered. This will represent a savings to them of $30 each, or $53,250, with a resulting loss to the State General Revenue Fund.

Increase in Maximum Fee Permitted to Be Charged by Lender

Language is being proposed to allow an increase in the fee that a lender may charge the customer as an investigative fee for a consumer finance loan from the current $10 to $25 (ss. 516.03(3), FS). Potential volume of customers affected is not known.

Fee Increase for Credit Check of a Loan Applicant
The bill authorizes an increase in the fee for a credit check of a loan applicant **from $10 to $25**. The Office has not evaluated the effects of this increase.

D. FISCAL COMMENTS:

Under current statute, the Office only administers the Mortgage Broker test once a month. Under the proposed language, the Office may promulgate a rule to allow a third party to administer the test via computer. This would allow applicants to schedule a date, time and location more convenient to them. The applicant would immediately receive their score to know whether they need to retake the test. Under the proposal, the applicant could reschedule an immediate retake if necessary, rather than waiting until the following month to retake the test. This would allow them to obtain their mortgage broker license more quickly and enter business without unnecessary delays.

The bill allows the Office to establish a rule to charge a fee not to exceed $100. In 2004, OFR participated in a competitive procurement with the Department of Financial Services to secure a vendor for this test. The three responses for the mortgage broker test were $42, $43 and $53. The State of North Carolina recently entered into a contract with a vendor to provide a similar test at a cost of $100. It is estimated the cost of the computerized test will be $60-75 per test based on the previous bids and the experience of North Carolina. The applicant will pay the cost.

During FY 2004-05, a total of 20,756 applicants took the test. The possible range based on $60 to $75 per test is $1,245,360 to $1,556700, with an average cost of $67.50 x 20,756 equal to $1,401,030 (reduced to $700,515 in the first year based on a January 1 effective date). It is anticipated the fee will be established equal to the cost charged by the vendor for the test. Thus, the anticipated revenue and expenditures should offset each other. The issue will be self-funding and not produce any excess revenue.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenues.

2. Other:

   None.

B. RULEMAKING AUTHORITY:

The bill gives the Commission rulemaking authority to prescribe requirements and procedures for obtaining a technological or financial hardship exception relating to electronic filing of forms; rulemaking authority to include guidelines for the destruction, as well as, retention of certain records; the authority to charge for the processing of fingerprint cards; and authority to utilize a third party for the submission of fingerprint cards and fees by electronic means.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

1 A bill to be entitled
2 An act relating to financial entities and transactions;
3 amending s. 494.001, F.S.; defining the term "control
4 person" for purposes of provisions governing mortgage
5 brokerage and mortgage lending; amending s. 494.0011,
6 F.S.; authorizing the Financial Services Commission to
7 require electronic submission of forms, documents, or
8 fees; providing for accommodating a technological or
9 financial hardship; authorizing the commission to adopt
10 rules governing such an accommodation; requiring that the
11 commission grant or deny a license in accordance with ch.
12 120, F.S.; amending s. 494.0016, F.S.; authorizing the
13 commission to prescribe requirements for destroying books,
14 accounts, records, and documents; amending s. 494.0029,
15 F.S.; requiring that certain persons who offer or conduct
16 mortgage business training obtain a permit from the
17 commission; authorizing the commission to require certain
18 information from applicants seeking such a permit;
19 specifying criteria for receipt of certain applications;
20 specifying that certain permits are not transferable or
21 assignable; requiring mortgage business schools to notify
22 the Office of Financial Regulation of changes in
23 information contained in the initial application or any
24 amendments thereto; providing for expiration and
25 recertification of permits; authorizing permit fees;
26 requiring that curriculum, training, and training
27 materials be available for inspection; requiring permitted
28 persons providing mortgage business training to
29 electronically notify the office of certain information;

30 requiring that the commission adopt rules for
31 administering notification requirements; amending s.
32 494.00295, F.S.; revising provisions that require
33 continuing education for certain professions; providing
34 for a waiver of the requirement for continuing education
35 under certain circumstances; amending s. 494.003, F.S.;
36 clarifying the entities that are exempt from certain
37 requirements for obtaining a mortgage broker licensure;
38 amending s. 494.0031, F.S.; requiring licensure of
39 mortgage brokerage businesses; authorizing the commission
40 to adopt application forms; authorizing the commission or
41 the office to require specified information from
42 applicants; specifying criteria for receipt of
43 applications; revising certain fingerprinting
44 requirements; prescribing procedures for processing
45 fingerprints; specifying that certain licenses are not
46 transferable or assignable; authorizing the commission to
47 require an applicant to provide information concerning
48 certain persons; revising the grounds on which a license
49 may be denied; deleting certain provisions relating to
50 cancellation and reinstatement of licenses; amending s.
51 494.0032, F.S.; requiring that the license for a branch
52 office be renewed in conjunction with a mortgage brokerage
53 business license; amending s. 494.0033, F.S.; clarifying
54 the requirements for obtaining a license as a mortgage
55 broker; authorizing the commission to prescribe additional
56 testing fees; authorizing the commission to waive certain
57 examination requirements under specified circumstances;
58 specifying criteria for receipt of applications; revising

59 fingerprinting requirements; prescribing procedures for
60 processing fingerprints; authorizing the commission to
61 adopt rules to require certain information from
62 applicants; deleting provisions relating to cancellation
63 and reinstatement of licenses; amending s. 494.0036, F.S.;
64 clarifying provisions governing the issuance of licenses
65 to branch offices of a mortgage brokerage business;
66 authorizing the commission to adopt certain application
67 forms by rule; specifying criteria for receipt of certain
68 applications; deleting a requirement for displaying
69 licenses; amending s. 494.0039, F.S.; deleting a
70 requirement for a mortgage brokerage business to report a
71 change of address; deleting a requirement for displaying
72 licenses; amending s. 494.004, F.S.; conforming cross-
73 references; requiring licensees to report changes in
74 information contained in the initial application or any
75 amendments thereto; requiring licensees to report changes
76 in persons associated with the licensee and changes in the
77 licensee's form of business organization; requiring the
78 submission of an initial application before a person may
79 acquire a controlling interest in a licensee; authorizing
80 the commission to waive the requirement for an initial
81 application under certain circumstances; authorizing the
82 commission to require licensees to provide information
83 concerning persons who have not previously complied with
84 certain provisions; authorizing the office to bring an
85 administrative action if it determines a licensee no
86 longer meets licensure requirements; amending s. 494.0041,
87 F.S.; specifying additional grounds for disciplinary

88 action; amending s. 494.006, F.S.; clarifying that certain
89 entities are exempt from the licensure requirements for
90 mortgage lenders; amending s. 494.0061, F.S.; requiring
91 the licensure of mortgage lenders; authorizing the
92 commission to adopt application forms by rule; specifying
93 criteria for receipt of applications; clarifying
94 provisions concerning audited financial statements;
95 clarifying provisions relating to the principal
96 representatives; revising fingerprint requirements;
97 authorizing the commission to require the applicant to
98 provide fingerprints from certain persons; prescribing
99 procedures for processing fingerprints; authorizing the
100 commission to require the applicant to provide information
101 concerning certain persons; revising provisions governing
102 grounds for imposing discipline; deleting certain
103 provisions relating to cancellation and reinstatement of
104 licenses; authorizing the commission to waive specified
105 examination requirements under certain circumstances;
106 authorizing the commission to prescribe additional testing
107 fees; revising provisions governing principal
108 representatives; amending s. 494.0062, F.S.; requiring
109 licensure of correspondent mortgage lenders; authorizing
110 the commission to adopt application forms by rule;
111 authorizing the office to require applicants to provide
112 certain information; specifying criteria for receipt of
113 applications; clarifying provisions concerning audited
114 financial statements; providing educational requirements
115 for principal representatives; revising fingerprinting
116 requirements; prescribing procedures for processing

117 fingerprints; authorizing the commission to require
118 information from persons associated with the applicant;
119 revising grounds for disciplinary action; deleting certain
120 provisions relating to cancellation and reinstatement of
121 licenses; authorizing the commission to waive specified
122 examination requirements under certain circumstances;
123 authorizing the commission to prescribe additional testing
124 fees; requiring that the commission be notified of a
125 change in the principal representatives; amending s.
126 494.0064, F.S.; clarifying a requirement for professional
127 continuing education for a licensee operating a branch
128 office; amending s. 494.0065, F.S.; authorizing the
129 commission to require that applicants provide certain
130 information; specifying criteria for receipt of
131 applications; providing requirements for education and
132 testing for certain principal representatives and for
133 transfer applications; authorizing the commission to waive
134 specified examination requirements under certain
135 circumstances; authorizing the commission to prescribe
136 additional testing fees; authorizing the commission to
137 prescribe application forms by rule; specifying criteria
138 for receipt of applications; clarifying provisions
139 governing audited financial statements; revising
140 fingerprinting requirements; prescribing procedures for
141 processing fingerprints; authorizing the commission to
142 require applicants to provide information concerning
143 certain persons; revising provisions governing the denial
144 of transfers; requiring that a mortgage lender designate a
145 principal representative; providing criteria and

146 requirements; requiring notice of a change in the
147 principal representative; amending s. 494.0066, F.S.;
148 clarifying licensure requirements for branch offices;
149 authorizing the commission to adopt application forms by
150 rule; amending s. 494.0067, F.S.; deleting a requirement
151 that the license be displayed; revising requirements for
152 reporting information; requiring licensees to report
153 changes in persons associated with the licensee and
154 changes in the licensee's form of business organization;
155 requiring the submission of an initial application before
156 persons may acquire a controlling interest in a licensee;
157 authorizing the commission to waive the requirement for an
158 initial application under certain circumstances;
159 authorizing the commission to require licensees to provide
160 information concerning persons who have not previously
161 complied with certain provisions; authorizing the office
162 to bring an administrative action if it determines a
163 licensee no longer meets licensure requirements;
164 clarifying the requirements for professional continuing
165 education; amending s. 494.0072, F.S.; providing
166 additional grounds for disciplinary action; amending s.
167 494.00721, F.S.; conforming cross-references; amending s.
168 501.137, F.S.; imposing attorney's fees and costs on
169 lenders under certain circumstances; amending s. 516.01,
170 F.S.; defining the term "control person" for purposes of
171 the Florida Consumer Finance Act; amending s. 516.03,
172 F.S.; revising the information that the commission may
173 require from the applicant as part of the licensure
174 process; requiring that an applicant provide evidence of

175 liquid assets; specifying criteria for receipt of certain
176 applications; providing that specified fees are
177 nonrefundable; authorizing the commission to require
178 electronic submission of forms, documents, or fees;
179 providing for accommodating a technological or financial
180 hardship; authorizing the commission to adopt rules
181 governing such an accommodation; amending s. 516.031,
182 F.S.; increasing a reimbursement charge for certain
183 investigation costs; amending s. 516.05, F.S.; revising
184 investigation procedures; deleting provisions relating to
185 fees for licenses that have been denied; requiring
186 licensees to report changes to the initial application and
187 any amendments to the application; requiring licensees to
188 report changes in certain persons associated with the
189 licensee and changes in the licensee's form of business
190 organization; requiring the submission of an initial
191 application before a person may acquire a controlling
192 interest in a licensee; authorizing the commission to
193 waive the requirement for an initial application under
194 certain circumstances; authorizing the commission to
195 require licensees to provide information concerning
196 persons who have not previously complied with certain
197 provisions; authorizing the office to bring an
198 administrative action if it determines that a licensee no
199 longer meets licensure requirements; deleting provisions
200 authorizing the office to grant temporary licenses;
201 amending s. 516.07, F.S.; providing an additional ground
202 for disciplinary action; repealing s. 516.08, F.S.,
203 relating to requirements for displaying a license;

204 amending s. 516.12, F.S.; authorizing the commission to
205 prescribe minimum information that must be shown in a
206 licensee's books, accounts, records, and documents;
207 authorizing the commission to prescribe requirements for
208 destroying books, accounts, records, and documents;
209 amending s. 517.021, F.S.; redefining the term "branch
210 office"; amending s. 517.051, F.S.; requiring the use of
211 certain accounting standards; amending s. 517.061, F.S.;
212 revising provisions governing exempt transactions;
213 amending s. 517.081, F.S.; revising standards for
214 accounting principles to be used in preparing certain
215 financial statements; amending s. 517.12, F.S.; deleting a
216 requirement that applications be verified under oath;
217 revising provisions for taking and submitting fingerprints
218 of dealers, associated persons, and similarly situated
219 persons; revising provisions governing the expiration and
220 renewal of registration of such persons; authorizing the
221 commission to adopt uniform forms by rule; authorizing the
222 commission to require submission of uniform forms and fees
223 through central registration systems; providing an
224 exemption from registration requirements for a Canadian
225 dealer and an associated person who represents a Canadian
226 dealer, under certain conditions; requiring a notice
227 filing by a Canadian dealer under certain conditions;
228 providing that certain fees are nonrefundable; authorizing
229 the Office of Financial Regulation of the Financial
230 Services Commission to issue a permit to evidence the
231 effectiveness of a notice filing for a Canadian dealer;
232 providing for the renewal of a notice filing by a Canadian

233 dealer; providing for reinstatement of a notice filing;
234 providing obligations for a Canadian dealer who has given
235 notice of filing; providing obligations for an associated
236 person representing a Canadian dealer who has given notice
237 of filing; providing for the termination of a notice of
238 filing; providing for the collection of fees; amending s.
239 517.131, F.S.; revising conditions under which recovery
240 can be made from the Securities Guaranty Fund; authorizing
241 the commission to adopt rules; amending s. 517.141, F.S.;
242 prescribing circumstances under which a claimant must
243 reimburse the fund; providing for rulemaking; amending s.
244 517.161, F.S.; clarifying and providing an additional
245 ground for revocation, restriction, or suspension of a
246 registration; amending s. 520.02, F.S.; defining the term
247 "control person" for purposes of the Motor Vehicle Retail
248 Sales Finance Act; amending s. 520.03, F.S.; authorizing
249 the commission to require information from the applicant
250 and others; authorizing the commission to require the
251 applicant to provide certain information concerning
252 persons associated with the applicant; specifying criteria
253 for receipt of applications; deleting a requirement that
254 the licensee display a license; amending s. 520.31, F.S.;
255 defining the term "control person" for purposes of the
256 Retail Installment Sales Act; amending s. 520.32, F.S.;
257 authorizing the commission to require additional
258 information from an applicant for licensure; specifying
259 criteria for receipt of an application; amending s.
260 520.52, F.S.; providing additional requirements for a
261 license to engage in business as a sales finance company;

262 specifying criteria for receipt of an application;
263 amending s. 520.61, F.S.; defining the term "control
264 person" for purposes of the Home Improvement Sales and
265 Finance Act; amending s. 520.63, F.S.; authorizing the
266 commission to require information from the applicant and
267 others; authorizing the commission to require the
268 applicant to provide certain information concerning
269 persons associated with the applicant; specifying criteria
270 for receipt of applications; deleting a requirement that
271 the licensee display a license; amending s. 520.994, F.S.;
272 authorizing the commission to require electronic
273 submission of forms, documents, or fees; providing for
274 accommodating a technological or financial hardship;
275 authorizing the commission to adopt rules governing such
276 an accommodation; amending s. 520.995, F.S.; providing an
277 additional ground for disciplinary action; revising
278 provisions regarding disciplinary action; amending s.
279 520.997, F.S.; authorizing the commission to prescribe
280 certain minimum information that must be shown in a
281 licensee's books, accounts, records, and documents;
282 authorizing the commission to prescribe requirements for
283 destroying books, accounts, records, and documents;
284 providing for procedures; creating s. 520.999, F.S.;
285 providing additional requirements of licensees in sales
286 and finance; requiring licensees to report changes to the
287 initial application and any amendments to the application;
288 requiring licensees to report changes in persons
289 associated with the licensee and changes in the licensee's
290 form of business organization; requiring the submission of

291 an initial application before persons may acquire a
292 controlling interest in a licensee; authorizing the
293 commission to waive the requirement for an initial
294 application under certain circumstances; authorizing the
295 office to bring an administrative action if it determines
296 that a licensee no longer meets licensure requirements;
297 amending s. 537.009, F.S., relating to the Florida Title
298 Loan Act; authorizing the commission to prescribe certain
299 minimum information that must be shown in a licensee's
300 books, accounts, records, and documents; authorizing the
301 commission to prescribe requirements for destroying books,
302 accounts, records, and documents; providing for
303 procedures; amending s. 560.105, F.S., relating to the
304 Money Transmitters' Code; authorizing the commission to
305 require electronic submission of forms, documents, or
306 fees; amending s. 560.114, F.S.; providing an additional
307 ground for disciplinary action; amending s. 560.121, F.S.;
308 authorizing the commission to prescribe certain minimum
309 information that must be shown in a licensee's books,
310 accounts, records, and documents; authorizing the
311 commission to prescribe requirements for destroying books,
312 accounts, records, and documents; amending s. 560.126,
313 F.S.; requiring notice of changes in information contained
314 in a registration application; requiring licensees to
315 report changes in persons associated with the licensee and
316 changes in the licensee's form of business organization;
317 requiring the submission of an initial application before
318 persons may acquire a controlling interest in a licensee;
319 authorizing the commission to waive the requirement for an

320 initial application under certain circumstances;
321 authorizing the commission to require licensees to provide
322 information concerning persons who have not previously
323 complied with certain provisions; authorizing the office
324 to bring an administrative action if it determines a
325 licensee no longer meets licensure requirements; amending
326 s. 560.127, F.S.; revising the provisions specifying the
327 conditions under which a person has control over a money
328 transmitter; deleting provisions governing the acquisition
329 or purchase of a money transmitter; amending s. 560.205,
330 F.S.; revising fingerprinting requirements; prescribing
331 procedures for processing fingerprints; deleting a
332 requirement that an applicant provide a list of certain
333 vendors; authorizing the commission to require additional
334 information concerning persons associated with the
335 applicant; requiring the reporting of changes of
336 registration; amending s. 560.207, F.S.; revising
337 procedures for renewing a registration; providing that
338 specified fees are nonrefundable; providing conditions for
339 reinstating a registration; amending s. 560.210, F.S.;
340 revising permissible investment requirements for certain
341 registrants; specifying acceptable accounting principles;
342 amending s. 560.211, F.S.; requiring notice to the office
343 of the location of certain amended records; amending s.
344 560.305, F.S., relating to the Check Cashing and Foreign
345 Currency Exchange Act; revising application procedures for
346 registration under the act; amending s. 560.306, F.S.;
347 revising certain fingerprinting requirements; prescribing
348 procedures for processing fingerprints; amending s.

349 560.308, F.S.; revising requirements for renewal of
350 registration; providing that specified fees are
351 nonrefundable; providing conditions to the reinstatement
352 of a registration; amending s. 560.310, F.S.; requiring
353 that the commission be notified of the location of certain
354 records; amending s. 560.403, F.S.; revising requirements
355 for giving notice of intent in connection with the renewal
356 of registration; providing that specified fees are
357 nonrefundable; providing conditions to the reinstatement
358 of a notice of intent; amending s. 655.935, F.S.;
359 authorizing the search of a safe-deposit box co-leased by
360 a decedent; providing limitations; amending s. 655.936,
361 F.S.; providing for the delivery of a safe-deposit box to
362 a court-appointed personal representative; amending s.
363 655.937, F.S.; revising provisions for access to safe-
364 deposit boxes; amending s. 733.6065, F.S.; revising
365 provisions related to the initial opening of a safe-
366 deposit box leased or co-leased by a decedent; providing
367 an appropriation; providing an effective date.
368
369 Be It Enacted by the Legislature of the State of Florida:
370
371 Section 1. Present subsections (9) through (30) of section
372 494.001, Florida Statutes, are redesignated as subsections (10)
373 through (31), respectively, and a new subsection (9) is added to
374 that section, to read:
375 494.001 Definitions.--As used in ss. 494.001-494.0077, the
376 term:
377 <u>(9) "Control person" means an individual, partnership,</u>

378 corporation, trust, or other organization that possesses the
379 power, directly or indirectly, to direct the management or
380 policies of a company, whether through ownership of securities,
381 by contract, or otherwise. A person is presumed to control a
382 company if, with respect to a particular company, that person:
383 (a) Is a director, general partner, or officer exercising
384 executive responsibility or having similar status or functions;
385 (b) Directly or indirectly has the right to vote 10 percent
386 or more of a class of a voting security or has the power to sell
387 or direct the sale of 10 percent or more of a class of voting
388 securities; or
389 (c) In the case of a partnership, has the right to receive
390 upon dissolution, or has contributed, 10 percent or more of the
391 capital.
392 Section 2. Subsection (2) of section 494.0011, Florida
393 Statutes, is amended, and subsection (6) is added to that
394 section, to read:
395 494.0011 Powers and duties of the commission and office.--
396 (2) The commission may ~~has authority to~~ adopt rules
397 pursuant to ss. 120.536(1) and 120.54 to implement ss. 494.001-
398 494.0077. The commission may adopt rules that require ~~to allow~~
399 electronic submission of any forms, documents, or fees required
400 by this act if such rules reasonably accommodate technological or
401 financial hardship. The commission may prescribe by rule
402 requirements and procedures for obtaining an exemption due to a
403 technological or financial hardship. The commission may also
404 adopt rules to accept certification of compliance with
405 requirements of this act in lieu of requiring submission of
406 documents.

407 (6) The grant or denial of a license must be in accordance
408 with s. 120.60.
409 Section 3. Subsection (4) of section 494.0016, Florida
410 Statutes, is amended to read:
411 494.0016 Books, accounts, and records; maintenance;
412 examinations by the office.--
413 (4) The commission may prescribe by rule the minimum
414 information to be shown in the books, accounts, records, and
415 documents of licensees so that such records will enable the
416 office to determine the licensee's compliance with ss. 494.001-
417 494.0077. In addition, the commission may prescribe by rule
418 requirements for the destruction of books, accounts, records, and
419 documents retained by the licensee after completion of the time
420 period indicated in subsection (3).
421 Section 4. Section 494.0029, Florida Statutes, is amended
422 to read:
423 494.0029 Mortgage business schools.--
424 (1)(a) Each person, school, or institution, except
425 accredited colleges, universities, community colleges, and career
426 centers in this state, which offers or conducts mortgage business
427 training for the purpose of meeting professional continuing
428 education requirements, or as a condition precedent to licensure
429 as a mortgage broker, mortgage ~~or~~ lender, or ~~a~~ correspondent
430 mortgage lender must ~~shall~~ obtain a permit from the office to
431 operate as a mortgage business school before offering or
432 conducting mortgage business training and must abide by the
433 regulations imposed upon such person, school, or institution by
434 this chapter and rules adopted pursuant to this chapter. The
435 commission may require by rule that each applicant for a mortgage

436 business school permit provide any information reasonably
437 necessary to determine the applicant's eligibility. Each person,
438 school, or institution that applies for a permit under this part
439 must do so on forms adopted by the commission by rule. ~~The~~
440 ~~commission shall, by rule, recertify the permits annually with~~
441 ~~initial and renewal permit fees that do not exceed $500 plus the~~
442 ~~cost of accreditation.~~
443 (b) An application is considered received for purposes of
444 s. 120.60 upon receipt of a completed application form as
445 prescribed by commission rule, a nonrefundable application fee of
446 $500, the cost of accreditation as defined by commission rule,
447 and any other fee prescribed by law.
448 (c) A permit issued under this section is not transferable
449 or assignable.
450 (d) Each permitted mortgage business school shall report,
451 on a form prescribed by the commission, any change to the
452 information contained in the initial application form or any
453 amendment thereto, not later than 30 days after the change is
454 effective.
455 (e) A permit issued under this section expires on September
456 30th of each year. The office shall recertify a permit annually
457 upon submission of information the commission requires by rule,
458 together with a nonrefundable permit fee of $500, and the cost of
459 accreditation as defined by commission rule, which shall be for
460 the annual period beginning October 1 of each year.
461 ~~(2) All such schools shall maintain curriculum and training~~
462 ~~materials necessary to determine the school's compliance with~~
463 ~~this chapter and rules adopted pursuant to this chapter. Any~~
464 ~~school that offers or conducts mortgage business training shall~~

465 ~~at all times maintain an operation of training, materials, and~~
466 ~~curriculum which is open to review by the office to determine~~
467 ~~compliance and competency as a mortgage business school.~~
468 (2) ~~(3)~~ (a) It is unlawful for any such person, school, or
469 institution to offer or conduct mortgage business courses,
470 regardless of the number of pupils, without first procuring a
471 permit or to guarantee that the pupils will pass any mortgage
472 business examination given on behalf of the office or to
473 represent that the issuance of a permit is any recommendation or
474 endorsement of the person, school, or institution to which it is
475 issued or of any course of instruction given thereunder. Any
476 person who violates this paragraph commits a misdemeanor of the
477 second degree, punishable as provided in s. 775.082 or s.
478 775.083.
479 (b) The location of classes and the frequency of class
480 meetings shall be in the discretion of the school offering the
481 courses, if such courses conform to this chapter and related
482 rules adopted by the commission.
483 (c) A mortgage business school may not use advertising of
484 any nature which is false, inaccurate, misleading, or
485 exaggerated. Publicity and advertising of a mortgage business
486 school, or of its representative, shall be based upon relevant
487 facts and supported by evidence establishing their truth.
488 (d) A representative of a mortgage business school subject
489 to the provisions of this chapter may not promise or guarantee
490 employment or placement of any pupil or prospective pupil, using
491 information, training, or skill purported to be provided or
492 otherwise enhanced by a course or school as inducement to enroll
493 in the school, unless such person offers the pupil or prospective

494 pupil a bona fide contract of employment.
495 (e) A school shall advertise only as a school and under the
496 permitted name of such school as recognized by the office.
497 (f) Reference may not be made in any publication or
498 communication medium as to a pass/fail ratio on mortgage business
499 examinations by any school permitted by the office.
500 (3) Each person, school, or institution that is required to
501 be permitted under this section as a mortgage business school
502 shall maintain and make available for the office's review,
503 inspection, and observation such training, curriculum and
504 training materials as necessary for the office to determine
505 compliance with this chapter and the rules adopted under this
506 chapter. All documents prescribed by commission rule must be
507 submitted with the initial application or recertification.
508 (4) Each person, school, or institution that is required to
509 be permitted under this section as a mortgage business school
510 must provide electronic notification to the office, in a manner
511 prescribed by commission rule, of those pupils who have
512 successfully completed the 24-hour prelicensure classroom
513 instruction for mortgage brokers and principal representatives
514 and those pupils who have completed the 14-hour professional
515 continuing education for mortgage brokers.
516 Section 5. Section 494.00295, Florida Statutes, is amended
517 to read:
518 494.00295 Professional continuing education.--
519 (1) Mortgage brokers, and the principal representatives and
520 loan originators of a mortgage lender, correspondent mortgage
521 lender, or mortgage lender pursuant to the savings clause, must
522 successfully complete at least 14 hours of professional

523 continuing education covering primary and subordinate mortgage
524 financing transactions and the provisions of this chapter during
525 the 2 year period immediately preceding the renewal deadline for
526 a mortgage broker, mortgage lender, correspondent mortgage lender
527 or mortgage lender pursuant to the savings clause. At the time
528 of license renewal, a licensee must certify to the office that
529 the professional continuing education requirements of this
530 section have been met. Licensees shall maintain records
531 documenting compliance with this subsection for a period of 4
532 years. The requirements for professional continuing education
533 are waived for the license renewal of a mortgage broker for the
534 biennial license period immediately following the period in which
535 the person became licensed as a mortgage broker. The requirements
536 for professional continuing education for a principal
537 representative are waived for the license renewal of a mortgage
538 lender, correspondent mortgage lender, or mortgage lender
539 pursuant to the savings clause for the biennial license period
540 immediately following the period in which the principal
541 representative completed the 24 hours of classroom education and
542 passed a written test in order to qualify to be a principal
543 representative ~~Each mortgage broker, mortgage lender, and~~
544 ~~correspondent mortgage lender must certify to the office at the~~
545 ~~time of renewal that during the 2 years prior to an application~~
546 ~~for license renewal, all mortgage brokers and the principal~~
547 ~~representative, loan originators, and associates of a mortgage~~
548 ~~lender or correspondent mortgage lender have successfully~~
549 ~~completed at least 14 hours of professional education programs~~
550 ~~covering primary and subordinate mortgage financing transactions~~
551 ~~and the provisions of this chapter. Licensees shall maintain~~

552 ~~records documenting compliance with this subsection for a period~~
553 ~~of 4 years~~.
554 (2) Professional continuing education programs must
555 contribute directly to the professional competency of the
556 participants, may only be offered by permitted mortgage business
557 schools or entities specifically exempted from permitting as
558 mortgage business schools, and may include electronically
559 transmitted or distance education courses.
560 (3) The commission shall adopt rules necessary to
561 administer this section, including rules governing qualifying
562 hours for professional continuing education programs and
563 standards for electronically transmitted or distance education
564 courses, including course completion requirements.
565 Section 6. Paragraphs (b) and (c) of subsection (1) and
566 paragraph (e) of subsection (2) of section 494.003, Florida
567 Statutes, are amended to read:
568 494.003 Exemptions.--
569 (1) None of the following persons is subject to the
570 requirements of ss. 494.003-494.0043:
571 (b) A state or federal chartered bank, ~~bank holding~~
572 ~~company,~~ trust company, savings and loan association, savings
573 bank or~~,~~ credit union, bank holding company regulated under the
574 laws of any state or the United States, or consumer finance
575 company licensed pursuant to chapter 516.
576 (c) A wholly owned bank holding company subsidiary or a
577 wholly owned savings and loan association holding company
578 subsidiary formed and regulated under the laws of any state or
579 the United States that is approved or certified by the Department
580 of Housing and Urban Development, the Veterans Administration,

581 the Government National Mortgage Association, the Federal
582 National Mortgage Association, or the Federal Home Loan Mortgage
583 Corporation.
584 (2) None of the following persons is required to be
585 licensed under ss. 494.003-494.0043:
586 (e) A wholly owned subsidiary of a state or federal
587 chartered bank or savings and loan association the sole activity
588 of which is to distribute the lending programs of such state or
589 federal chartered bank or savings and loan association to persons
590 who arrange loans for, or make loans to, borrowers.
591 Section 7. Section 494.0031, Florida Statutes, is amended
592 to read:
593 494.0031 Licensure as a mortgage brokerage business.--
594 (1) Each person who acts as a mortgage brokerage business
595 must be licensed under this section unless otherwise exempt from
596 licensure.
597 (2) ~~(1)~~ Each initial application for a mortgage brokerage
598 business license must be in the form prescribed by rule of the
599 commission. The commission may require each applicant to provide
600 any information reasonably necessary to determine the applicant's
601 eligibility for licensure. The office shall issue a mortgage
602 brokerage business license to each person who:
603 (a) Has submitted a completed application form and a
604 nonrefundable application fee of $425. An application is
605 considered received for purposes of s. 120.60 upon receipt of a
606 completed application form as prescribed by commission rule, a
607 nonrefundable application fee of $425, and any other fee
608 prescribed by law. ~~; and~~
609 (b) Has a qualified principal broker pursuant to s.

610 494.0035.
611 (c) ~~(2)~~ Has provided a complete set of fingerprints as the
612 commission may require by rule for ~~that~~ each officer, director,
613 control person, member, partner, or joint venturer of the
614 applicant and each ultimate equitable owner of a 10-percent or
615 greater interest in the mortgage brokerage business. A
616 fingerprint card submitted to the office must be ~~submit a~~
617 ~~complete set of fingerprints~~ taken by an authorized law
618 enforcement agency ~~officer~~. The office shall submit the
619 fingerprints to the Department of Law Enforcement for state
620 processing and the Department of Law Enforcement shall forward
621 the fingerprints to the Federal Bureau of Investigation for
622 federal processing. The cost of the fingerprint processing may be
623 borne by the office, the employer, or the person subject to the
624 background check. The Department of Law Enforcement shall submit
625 an invoice to the office for the fingerprints received each
626 month. The office shall screen the background results to
627 determine if the applicant meets licensure requirements.
628 (d) Has provided information that the commission requires
629 by rule concerning any designated principal mortgage broker; any
630 officer, director, control person, member, partner, or joint
631 venturer of the applicant; or any individual who is the ultimate
632 equitable owner of a 10-percent or greater interest in the
633 mortgage brokerage business. The commission may require
634 information about any such applicant or person, including his or
635 her full name or other names by which he or she may have been
636 known, age, social security number, qualifications and
637 educational and business history, and disciplinary and criminal
638 history.

639 (3) Notwithstanding ~~the provisions of~~ subsection (2) ~~(1)~~,
640 it is a ground for denial of licensure if the applicant;
641 designated principal mortgage broker; any officer, director,
642 control person, member, partner, or joint venturer of the
643 applicant; ~~any natural person owning a 10-percent or greater~~
644 ~~interest in the mortgage brokerage business;~~ or any individual
645 ~~natural~~ person who is the ultimate equitable owner of a 10-
646 percent or greater interest in the mortgage brokerage business
647 has committed any violation specified in ss. 494.001-494.0077 or
648 has pending against him or her in any jurisdiction any criminal
649 prosecution or administrative enforcement action that~~, in any~~
650 ~~jurisdiction, which~~ involves fraud, dishonest dealing, or any
651 other act of moral turpitude.
652 (4) A mortgage brokerage business or branch office license
653 may be canceled if it was issued through mistake or inadvertence
654 of the office. A notice of cancellation must be issued by the
655 office within 90 days after the issuance of the license. A
656 notice of cancellation is ~~shall be~~ effective upon receipt. The
657 notice of cancellation must ~~shall~~ provide the applicant with
658 notification of the right to request a hearing within 21 days
659 after the applicant's receipt of the notice of cancellation. A
660 license must ~~shall~~ be reinstated if the applicant can demonstrate
661 that the requirements for obtaining the license under ~~pursuant to~~
662 this chapter have been satisfied.
663 ~~(5) If an initial mortgage brokerage business or branch~~
664 ~~office license has been issued but the check upon which the~~
665 ~~license is based is returned due to insufficient funds, the~~
666 ~~license shall be deemed canceled. A license deemed canceled~~
667 ~~pursuant to this subsection shall be reinstated if the office~~

668 ~~receives a certified check for the appropriate amount within 30~~
669 ~~days after the date the check was returned due to insufficient~~
670 ~~funds.~~
671 Section 8. Subsection (1) of section 494.0032, Florida
672 Statutes, is amended to read:
673 494.0032 Renewal of mortgage brokerage business license or
674 branch office license.--
675 (1) The office shall renew a mortgage brokerage business
676 license upon receipt of a completed renewal form and payment of a
677 nonrefundable renewal fee of $375. Each licensee shall pay at the
678 time of renewal a nonrefundable renewal fee of $225 for the
679 renewal of each branch office license. The license for a branch
680 office must be renewed in conjunction with the renewal of the
681 mortgage brokerage business license.
682 Section 9. Subsections (1), (2), and (7) of section
683 494.0033, Florida Statutes, are amended to read:
684 494.0033 Mortgage broker's license.--
685 (1) Each natural person who acts as a mortgage broker for a
686 mortgage brokerage business or acts as an associate for a
687 mortgage lender or correspondent mortgage lender must be licensed
688 under ~~pursuant to~~ this section. To act as a mortgage broker, an
689 individual must be an associate of a mortgage brokerage business,
690 a mortgage lender, or a correspondent mortgage lender. A mortgage
691 broker may not be ~~is prohibited from being~~ an associate of more
692 than one mortgage brokerage business, mortgage lender, or
693 correspondent mortgage lender.
694 (2) Each initial application for a mortgage broker's
695 license must be in the form prescribed by rule of the commission.
696 The commission may require each applicant to provide any

697 information reasonably necessary to make a determination of the
698 applicant's eligibility for licensure. The office shall issue an
699 initial license to any natural person who:
700 (a) Is at least 18 years of age.~~;~~
701 (b) Has passed a written test adopted and administered by
702 the office, or has passed an electronic test adopted and
703 administered by the office or a third party approved by the
704 office, which is designed to determine competency in primary and
705 subordinate mortgage financing transactions as well as to test
706 knowledge of ss. 494.001-494.0077 and the rules adopted pursuant
707 thereto. The commission may prescribe by rule an additional fee
708 that may not exceed $100 for the electronic version of the
709 mortgage broker test. The commission may waive by rule the
710 examination requirement for any person who has passed a test
711 approved by the Conference of State Bank Supervisors, the
712 American Association of Residential Mortgage Regulators, or the
713 United States Department of Housing and Urban Development if the
714 test covers primary and subordinate mortgage financing
715 transactions.~~;~~
716 (c) Has submitted a completed application and a
717 nonrefundable application fee of $200. An application is
718 considered received for purposes of s. 120.60 upon receipt of a
719 completed application form as prescribed by commission rule, a
720 nonrefundable application fee of $200, and any other fee
721 prescribed by law. ~~The commission may set by rule an additional~~
722 ~~fee for a retake of the examination; and~~
723 (d) Has filed a complete set of fingerprints~~, taken by an~~
724 ~~authorized law enforcement officer,~~ for submission by the office
725 to the Department of Law Enforcement or the Federal Bureau of

726 Investigation for processing. A fingerprint card submitted to the
727 office must be taken by an authorized law enforcement agency. The
728 office shall submit the fingerprints to the Department of Law
729 Enforcement for state processing and the Department of Law
730 Enforcement shall forward the fingerprints to the Federal Bureau
731 of Investigation for federal processing. The cost of the
732 fingerprint processing may be borne by the office, the employer,
733 or the person subject to the background check. The Department of
734 Law Enforcement shall submit an invoice to the office for the
735 fingerprints received each month. The office shall screen the
736 background results to determine if the applicant meets licensure
737 requirements.
738
739 The commission may require by rule information concerning any
740 such applicant or person, including his or her full name and any
741 other names by which he or she may have been known, age, social
742 security number, qualifications and educational and business
743 history, and disciplinary and criminal history.
744 ~~(7) If an initial mortgage broker license has been issued~~
745 ~~but the check upon which the license is based is returned due to~~
746 ~~insufficient funds, the license shall be deemed canceled. A~~
747 ~~license deemed canceled pursuant to this subsection shall be~~
748 ~~reinstated if the office receives a certified check for the~~
749 ~~appropriate amount within 30 days after the date the check was~~
750 ~~returned due to insufficient funds.~~
751 Section 10. Subsections (2) and (3) of section 494.0036,
752 Florida Statutes, are amended to read:
753 494.0036 Mortgage brokerage business branch offices.--
754 (2) The office shall issue a mortgage brokerage business

755 branch office license to a mortgage brokerage business licensee
756 after the office determines that the licensee has submitted ~~upon~~
757 ~~receipt of~~ a completed application for a branch office in a form
758 as prescribed by commission rule and payment of an initial
759 nonrefundable branch office license fee of $225. ~~Branch office~~
760 ~~licenses must be renewed in conjunction with the renewal of the~~
761 ~~mortgage brokerage business license.~~ The branch office license
762 shall be issued in the name of the mortgage brokerage business
763 that maintains the branch office. An application is considered
764 received for purposes of s. 120.60 upon receipt of a completed
765 application form as prescribed by commission rule, a
766 nonrefundable application fee of $225, and any other fee
767 prescribed by law.
768 ~~(3) Each branch office must prominently display the license~~
769 ~~issued for such branch office. Each person licensed as a mortgage~~
770 ~~broker must prominently display his or her license in the office~~
771 ~~where such person acts as a mortgage broker.~~
772 Section 11. Section 494.0039, Florida Statutes, is amended
773 to read:
774 494.0039 Principal place of business requirements.--
775 ~~(1)~~ Each mortgage brokerage business licensee shall
776 maintain and transact business from a principal place of
777 business.
778 ~~(2) A licensee under ss. 494.003-494.0043 shall report any~~
779 ~~change of address of the principal place of business or any~~
780 ~~branch office within 15 days after the change.~~
781 ~~(3) Each mortgage brokerage business must prominently~~
782 ~~display its license at the principal place of business. Each~~
783 ~~licensed mortgage broker must prominently display his or her~~

784 ~~license in the office where such person acts as a mortgage~~
785 ~~broker.~~
786 Section 12. Section 494.004, Florida Statutes, is amended
787 to read:
788 494.004 Requirements of licensees.--
789 (1) Each licensee under ss. 494.003-494.0043 shall report,
790 in writing, any conviction of, or plea of nolo contendere to,
791 regardless of adjudication, any crime or administrative violation
792 that involves fraud, dishonest dealing, or any other act of moral
793 turpitude, in any jurisdiction, by the licensee or any natural
794 person named in s. 494.0031(2)(d) ~~s. 494.0031(3)~~, not later than
795 30 days after the date of conviction, entry of a plea of nolo
796 contendere, or final administrative action.
797 (2) Each licensee under ss. 494.003-494.0043 shall report,
798 in a form prescribed by rule of the commission, any conviction
799 of, or plea of nolo contendere to, regardless of whether
800 adjudication is withheld, any felony committed by the licensee or
801 any natural person named in s. 494.0031(2)(d) ~~s. 494.0031(3)~~, not
802 later than 30 days after the date of conviction or the date the
803 plea of nolo contendere is entered.
804 (3) Each licensee under ss. 494.003-494.0043 shall report
805 any action in bankruptcy, voluntary or involuntary, to the office
806 not later than 7 business days after the action is instituted.
807 (4) Each licensee under ss. 494.003-494.0043 shall report
808 on a form prescribed by rule of the commission any change to the
809 information contained in any initial application form, or any
810 amendment thereto, ~~any change in the form of business~~
811 ~~organization or any change of a person named, pursuant to s.~~
812 ~~494.0031(3), to the office in writing~~ not later than 30 days

813 after the change is effective.
814 (5) A license issued under ss. 494.003-494.0043 is not
815 transferable or assignable.
816 (6) Each licensee under ss. 494.003-494.0043 shall report
817 any change in the principal broker, partners, officers, members,
818 joint venturers, directors, control persons of any licensee, or
819 any individual who is the ultimate equitable owner of a 10-
820 percent or greater interest in the licensee, or any change in the
821 form of business organization, by written amendment in the form
822 and at the time that the commission specifies by rule.
823 (a) In any case in which a person or a group of persons,
824 directly or indirectly or acting by or through one or more
825 persons, proposes to purchase or acquire a controlling interest
826 in a licensee, such person or group must submit an initial
827 application for licensure as a mortgage brokerage business before
828 such purchase or acquisition and at the time and in the form that
829 the commission prescribes by rule.
830 (b) As used in this subsection, the term "controlling
831 interest" means possession of the power to direct or cause the
832 direction of the management or policies of a company whether
833 through ownership of securities, by contract, or otherwise. Any
834 person who directly or indirectly has the right to vote 25
835 percent or more of the voting securities of a company or is
836 entitled to 25 percent or more of its profits is presumed to
837 possess a controlling interest.
838 (c) Any addition of a partner, officer, member, joint
839 venturer, director, control person, or ultimate equitable owner
840 of the applicant who does not have a controlling interest and who
841 has not previously complied with the provisions of ss.

842 494.0031(2)(c) and 494.0031(2)(d) is subject thereto unless
843 required to file an initial application in accordance with
844 paragraph (a). If the office finds that the licensee does not
845 continue to meet licensure requirements, the office may bring an
846 administrative action in accordance with s. 494.0041 to enforce
847 the provisions of this chapter.
848 (d) The commission shall adopt rules providing for the
849 waiver of the application required by this subsection if the
850 person or group of persons proposing to purchase or acquire a
851 controlling interest in a licensee has previously complied with
852 the provisions of ss. 494.0031(2)(c) and 494.0031(2)(d) with
853 respect to the same legal entity or is currently licensed by the
854 office under this chapter.
855 (7) ~~(6)~~ On or before April 30, 2000, each mortgage brokerage
856 business shall file an initial report stating the name, social
857 security number, date of birth, mortgage broker license number,
858 date of hire and, if applicable, date of termination for each
859 person who was an associate of the mortgage brokerage business
860 during the immediate preceding quarter. Thereafter, a mortgage
861 brokerage business shall file a quarterly report only if a person
862 became an associate or ceased to be an associate of the mortgage
863 brokerage business during the immediate preceding quarter. Such
864 report shall be filed within 30 days after the last day of each
865 calendar quarter and shall contain the name, social security
866 number, date of birth, mortgage broker license number, date of
867 hire and, if applicable, the date of termination of each person
868 who became or ceased to be an associate of the mortgage brokerage
869 business during the immediate preceding quarter. The commission
870 shall prescribe, by rule, the procedures for filing reports

871 required by this subsection.
872 Section 13. Paragraphs (s), (t), and (u) are added to
873 subsection (2) and subsection (3) of section 494.0041, Florida
874 Statutes, is amended, to read:
875 494.0041 Administrative penalties and fines; license
876 violations.--
877 (2) Each of the following acts constitutes a ground for
878 which the disciplinary actions specified in subsection (1) may be
879 taken:
880 (s) Payment to the office for a license or permit with a
881 check or electronic transmission of funds that is dishonored by
882 the applicant's or licensee's financial institution.
883 (t) Having a final judgment entered against her or him in a
884 civil action upon grounds of fraud, embezzlement,
885 misrepresentation, or deceit.
886 (u)1. Having been the subject of any decision, finding,
887 injunction, suspension, prohibition, revocation, denial,
888 judgment, or administrative order by any court of competent
889 jurisdiction, administrative law judge, state or federal agency,
890 national securities exchange, national commodities exchange,
891 national option exchange, national securities association,
892 national commodities association, or national option association
893 involving a violation of any federal or state securities or
894 commodities law, or any rule or regulation adopted thereunder, or
895 involving a violation of any rule or regulation of any national
896 securities, commodities, or options exchange or national
897 securities, commodities, or options association.
898 2. Having been the subject of any injunction or adverse
899 administrative order by a state or federal agency regulating

900 banking, insurance, finance or small loan companies, real estate,
901 mortgage brokers or lenders, money transmitters, or other related
902 or similar industries.
903 (3) A mortgage brokerage business is subject to the
904 disciplinary actions specified in subsection (1) for a violation
905 of subsection (2) by any officer, member, director, control
906 person, joint venturer, partner, ultimate equitable owner of a
907 10-percent or greater interest in the mortgage brokerage
908 business, or associate mortgage broker of the licensee.
909 Section 14. Paragraphs (a) and (c) of subsection (1) and
910 paragraph (a) of subsection (2) of section 494.006, Florida
911 Statutes, are amended to read:
912 494.006 Exemptions.--
913 (1) None of the following persons are subject to the
914 requirements of ss. 494.006-494.0077 in order to act as a
915 mortgage lender or correspondent mortgage lender:
916 (a) A state or federal chartered bank, a ~~bank holding~~
917 ~~company,~~ trust company, a savings and loan association, a savings
918 bank or~~,~~ credit union, a bank holding company regulated under the
919 laws of any state or the United States, or an insurance company
920 if the insurance company is duly licensed in this state.
921 (c) A wholly owned bank holding company subsidiary or a
922 wholly owned savings and loan association holding company
923 subsidiary that is formed and regulated under the laws of any
924 state or the United States and that is approved or certified by
925 the Department of Housing and Urban Development, the Veterans
926 Administration, the Government National Mortgage Association, the
927 Federal National Mortgage Association, or the Federal Home Loan
928 Mortgage Corporation.

929 (2)(a) A natural person employed by a mortgage lender or
930 correspondent mortgage lender licensed under ss. 494.001-494.0077
931 is exempt from the licensure requirements of ss. 494.001-494.0077
932 when acting within the scope of employment with the licensee.
933 Section 15. Section 494.0061, Florida Statutes, is amended
934 to read:
935 494.0061 Mortgage lender's license requirements.--
936 (1) Each person who acts as a mortgage lender must be
937 licensed under this section unless otherwise exempt from
938 licensure.
939 (2) ~~(1)~~ Each initial application for a mortgage lender
940 license must be in the form prescribed by rule of the commission.
941 The commission or office may require each applicant for a
942 mortgage lender license to provide any information reasonably
943 necessary to make a determination of the applicant's eligibility
944 for licensure. The office shall issue an initial mortgage lender
945 license to any person that submits:
946 (a) A completed application form.~~;~~
947 (b) A nonrefundable application fee of $575. An application
948 is considered received for purposes of s. 120.60 upon receipt of
949 a completed application form as prescribed by commission rule, a
950 nonrefundable application fee of $575, and any other fee
951 prescribed by law.~~;~~
952 (c) Audited financial statements, which documents disclose
953 that the applicant has a bona fide and verifiable net worth,
954 pursuant to United States generally accepted accounting
955 principles, of at least $250,000, which must be continuously
956 maintained as a condition of licensure.~~;~~
957 (d) A surety bond in the amount of $10,000, payable to the

958 state and conditioned upon compliance with ss. 494.001-494.0077,
959 which inures to the office and which must be continuously
960 maintained thereafter in full force.~~;~~
961 (e) Documentation that the applicant is duly incorporated,
962 registered, or otherwise formed as a general partnership, limited
963 partnership, limited liability company, or other lawful entity
964 under the laws of this state or another state of the United
965 States.~~; and~~
966 (f) ~~For applications submitted after October 1, 2001,~~ Proof
967 that the applicant's principal representative has completed 24
968 hours of classroom instruction in primary and subordinate
969 financing transactions and in the provisions of this chapter and
970 rules adopted under this chapter. This requirement is satisfied
971 if the principal representative has continuously served in the
972 capacity of a principal representative for a licensed entity
973 under this chapter for at least 1 year and has not had a lapse in
974 designation as a principal representative of more than 2 years
975 before the date of the submission of the application or amendment
976 in the case of a change in the principal representative. This
977 requirement is also satisfied if the principal representative
978 currently holds an active license as a mortgage broker in this
979 state.
980 (g) A complete set of fingerprints as the commission
981 requires by rule for the designated principal representative and
982 each officer, director, control person, member, partner, or joint
983 venturer of the applicant, and ultimate equitable owner of a 10-
984 percent or greater interest in the applicant. A fingerprint card
985 submitted to the office must be taken by an authorized law
986 enforcement agency. The office shall submit the fingerprints to

987 the Department of Law Enforcement for state processing and the
988 Department of Law Enforcement shall forward the fingerprints to
989 the Federal Bureau of Investigation for federal processing. The
990 cost for the fingerprint processing may be borne by the office,
991 the employer, or the person subject to the background check. The
992 Department of Law Enforcement shall submit an invoice to the
993 office for the fingerprints received each month. The office shall
994 screen the background results to determine if the applicant meets
995 licensure requirements.
996 (h) Information that the commission requires by rule
997 concerning any designated principal representative; any officer,
998 director, control person, member, partner, or joint venturer of
999 the applicant, or any person having the same or substantially
1000 similar status or performing substantially similar functions; or
1001 any natural person who is the ultimate equitable owner of a 10-
1002 percent or greater interest in the mortgage lender. The
1003 commission may require information concerning any such applicant
1004 or person, including his or her full name and any other names by
1005 which he or she may have been known, social security number, age,
1006 qualifications and educational and business history, and
1007 disciplinary and criminal history.
1008 (3)~~(2)~~ Notwithstanding ~~the provisions of~~ subsection (2)
1009 ~~(1)~~, it is a ground for denial of licensure if the applicant;
1010 designated principal representative;~~,~~ any principal officer, ~~or~~
1011 director, control person, member, partner, or joint venturer of
1012 the applicant;~~, or~~ any natural person owning a 10-percent or
1013 greater interest in the applicant;~~,~~ or any natural person who is
1014 the ultimate equitable owner of a 10-percent or greater interest
1015 in the applicant has committed any violation specified in s.

1016 494.0072, or has pending against her or him any criminal
1017 prosecution or administrative enforcement action, in any
1018 jurisdiction, which involves fraud, dishonest dealing, or any act
1019 of moral turpitude.
1020 ~~(3) Each initial application for a mortgage lender's~~
1021 ~~license must be in a form prescribed by the commission. The~~
1022 ~~commission or office may require each applicant to provide any~~
1023 ~~information reasonably necessary to make a determination of the~~
1024 ~~applicant's eligibility for licensure. The commission or office~~
1025 ~~may require that each officer, director, and ultimate equitable~~
1026 ~~owner of a 10 percent or greater interest in the applicant submit~~
1027 ~~a complete set of fingerprints taken by an authorized law~~
1028 ~~enforcement officer.~~
1029 (4) A person required to be licensed under ss. 494.006-
1030 494.0077, or an agent or employee thereof, is deemed to have
1031 consented to the venue of courts of competent jurisdiction in
1032 this state regarding any matter within the authority of ss.
1033 494.001-494.0077 regardless of where an act or violation was
1034 committed.
1035 (5) A license issued in accordance with ss. 494.006-
1036 494.0077 is not transferable or assignable.
1037 (6) A mortgage lender or branch office license may be
1038 canceled if it was issued through mistake or inadvertence of the
1039 office. A notice of cancellation must be issued by the office
1040 within 90 days after the issuance of the license. A notice of
1041 cancellation shall be effective upon receipt. The notice of
1042 cancellation shall provide the applicant with notification of the
1043 right to request a hearing within 21 days after the applicant's
1044 receipt of the notice of cancellation. A license shall be

1045 reinstated if the applicant can demonstrate that the requirements
1046 for obtaining the license under ~~pursuant to~~ this chapter have
1047 been satisfied.
1048 ~~(7) If an initial mortgage lender or branch office license~~
1049 ~~has been issued but the check upon which the license is based is~~
1050 ~~returned due to insufficient funds, the license shall be deemed~~
1051 ~~canceled. A license deemed canceled pursuant to this subsection~~
1052 ~~shall be reinstated if the office receives a certified check for~~
1053 ~~the appropriate amount within 30 days after the date the check~~
1054 ~~was returned due to insufficient funds.~~
1055 (7) ~~(8)~~ Each lender, regardless of the number of branches it
1056 operates, shall designate a principal representative who
1057 exercises control of the licensee's business and shall maintain a
1058 form prescribed by the commission designating the principal
1059 representative. If the form is not accurately maintained, the
1060 business is considered to be operated by each officer, director,
1061 or equitable owner of a 10-percent or greater interest in the
1062 business.
1063 (8) ~~(9)~~ ~~After October 1, 2001,~~ An applicant's principal
1064 representative must pass a written test prescribed by the
1065 commission and administered by the office, or must pass an
1066 electronic test prescribed by the commission and administered by
1067 the office or a third party approved by the office, which covers
1068 primary and subordinate mortgage financing transactions and the
1069 provisions of this chapter and rules adopted under this chapter.
1070 The commission may set a fee by rule, which may not exceed $100,
1071 for the electronic version of the mortgage broker test. The
1072 commission may waive by rule the examination requirement for any
1073 person who has passed a test approved by the Conference of State

1074 Bank Supervisors, the American Association of Residential
1075 Mortgage Regulators, or the United States Department of Housing
1076 and Urban Development if the test covers primary and subordinate
1077 mortgage financing transactions. This requirement is satisfied if
1078 the principal representative has continuously served in the
1079 capacity of a principal representative for a licensed entity
1080 under this chapter for at least 1 year and has not had a lapse in
1081 designation as a principal representative of more than 2 years
1082 before the date of the submission of the application or amendment
1083 in the case of a change in the principal representative. This
1084 requirement is also satisfied if the principal representative
1085 holds an active license as a mortgage broker in this state.
1086 (9) ~~(10)~~ A lender shall notify the office of any change in
1087 the designation of its principal representative within 30 days
1088 after the change is effective. A new principal representative
1089 shall satisfy ~~the name and address of any new principal~~
1090 ~~representative and shall document that the person has completed~~
1091 the educational and testing requirements of this section within
1092 90 days after being designated as ~~upon~~ the ~~designation of a~~ new
1093 principal representative. This requirement is satisfied if the
1094 principal representative has continuously served in the capacity
1095 of a principal representative for a licensed entity under this
1096 chapter for at least 1 year and has not had a lapse in
1097 designation as a principal representative of more than 2 years
1098 before the date of the submission of the application or amendment
1099 in the case of a change in the principal representative. This
1100 requirement is also satisfied if the principal representative
1101 holds an active license as a mortgage broker in this state.
1102 Section 16. Section 494.0062, Florida Statutes, is amended

1103 to read:
1104 494.0062 Correspondent mortgage lender's license
1105 requirements.--
1106 (1) Each person who acts as a correspondent mortgage lender
1107 must be licensed under this section unless otherwise exempt from
1108 licensure.
1109 (2) ~~(1)~~ Each initial application for a correspondent
1110 mortgage lender's license must be in the form prescribed by rule
1111 of the commission. The office may require each applicant to
1112 provide any information reasonably necessary to determine the
1113 applicant's eligibility for licensure. The office shall issue an
1114 initial correspondent mortgage lender license to any person who
1115 submits:
1116 (a) A completed application form. ~~;~~
1117 (b) A nonrefundable application fee of $500. An application
1118 is considered received for purposes of s. 120.60 upon receipt of
1119 a completed application form as prescribed by commission rule, a
1120 nonrefundable application fee of $500, and any other fee
1121 prescribed by law. ~~;~~
1122 (c) Audited financial statements that ~~, which~~ document that
1123 the applicant ~~application~~ has a bona fide and verifiable net
1124 worth pursuant to United States generally accepted accounting
1125 principles of $25,000 or more, which must be continuously
1126 maintained as a condition of licensure. ~~;~~
1127 (d) A surety bond in the amount of $10,000, payable to the
1128 State of Florida and conditioned upon compliance with ss.
1129 494.001-494.0077, which inures to the office and which must be
1130 continuously maintained, thereafter, in full force. ~~;~~
1131 (e) Documentation that the applicant is duly incorporated,

1132 registered, or otherwise formed as a general partnership, limited
1133 partnership, limited liability company, or other lawful entity
1134 under the laws of this state or another state of the United
1135 States.~~; and~~
1136 (f) Proof ~~For applications filed after October 1, 2001,~~
1137 ~~proof~~ that the applicant's principal representative has completed
1138 24 hours of classroom instruction in primary and subordinate
1139 financing transactions and in the provisions of this chapter and
1140 rules enacted under this chapter. This requirement is satisfied
1141 if the principal representative has continuously served in the
1142 capacity of a principal representative for a licensed entity
1143 under this chapter for at least 1 year and has not had a lapse in
1144 designation as a principal representative of more than 2 years
1145 before the date of the submission of the application or amendment
1146 in the case of a change in the principal representative. This
1147 requirement is also satisfied if the principal representative
1148 holds an active license as a mortgage broker in this state.
1149 (g) A complete set of fingerprints as the commission
1150 requires by rule for the designated principal representative and
1151 each officer, director, control person, member, partner, or joint
1152 venturer of the applicant, and ultimate equitable owner of a 10-
1153 percent or greater interest in the applicant. A fingerprint card
1154 submitted to the office must be taken by an authorized law
1155 enforcement agency. The office shall submit the fingerprints to
1156 the Department of Law Enforcement for state processing and the
1157 Department of Law Enforcement shall forward the fingerprints to
1158 the Federal Bureau of Investigation for federal processing. The
1159 cost of the fingerprint processing may be borne by the office,
1160 the employer, or the person subject to the background check. The

1161 Department of Law Enforcement shall submit an invoice to the
1162 office for the fingerprints received each month. The office shall
1163 screen the background results to determine if the applicant meets
1164 licensure requirements.
1165 (h) Information that the commission requires by rule
1166 concerning any designated principal representative; any officer,
1167 director, control person, member, partner, or joint venturer of
1168 the applicant or any person having the same or substantially
1169 similar status or performing substantially similar functions; or
1170 any natural person who is the ultimate equitable owner of a 10-
1171 percent or greater interest in the correspondent mortgage lender.
1172 The office may require information concerning any such applicant
1173 or person, including his or her full name and any other names by
1174 which he or she may have been known, age, social security number,
1175 qualifications and educational and business history, and
1176 disciplinary and criminal history.
1177 (3) ~~(2)~~ Notwithstanding ~~the provisions of~~ subsection (2)
1178 ~~(1)~~, it is a ground for denial of licensure if the applicant; any
1179 designated principal representative; ~~,~~ any principal officer, ~~or~~
1180 director, control person, member, partner, or joint venturer of
1181 the applicant; ~~,~~ or any natural person who is the ultimate
1182 equitable owner of a 10-percent or greater interest in the
1183 applicant has committed any violation specified in s. 494.0072,
1184 or has pending against her or him any criminal prosecution or
1185 administrative enforcement action, in any jurisdiction, which
1186 involves fraud, dishonest dealing, or any act of moral turpitude.
1187 ~~(3) Each initial application for a correspondent mortgage~~
1188 ~~lender's license must be in a form prescribed by the commission.~~
1189 ~~The commission or office may require each applicant to provide~~

1190 ~~any information reasonably necessary to make a determination of~~
1191 ~~the applicant's eligibility for licensure. The commission or~~
1192 ~~office may require that each officer, director, and ultimate~~
1193 ~~equitable owner of a 10 percent or greater interest submit a~~
1194 ~~complete set of fingerprints taken by an authorized law~~
1195 ~~enforcement officer.~~
1196 (4) Each license is valid for the remainder of the biennium
1197 in which the license is issued.
1198 (5) A person licensed as a correspondent mortgage lender
1199 may make mortgage loans, but may not service a mortgage loan for
1200 more than 4 months after the date the mortgage loan was made or
1201 acquired by the correspondent mortgage lender.
1202 (6) A licensee under ss. 494.006-494.0077, or an agent or
1203 employee thereof, is deemed to have consented to the venue of
1204 courts of competent jurisdiction in this state regarding any
1205 matter within the authority of ss. 494.001-494.0077 regardless of
1206 where an act or violation was committed.
1207 (7) A correspondent mortgage lender is subject to the same
1208 requirements and restrictions as a licensed mortgage lender
1209 unless otherwise provided in this section.
1210 (8) A license issued under this section is not transferable
1211 or assignable.
1212 (9) A correspondent mortgage lender or branch office
1213 license may be canceled if it was issued through mistake or
1214 inadvertence of the office. A notice of cancellation must be
1215 issued by the office within 90 days after the issuance of the
1216 license. A notice of cancellation shall be effective upon
1217 receipt. The notice of cancellation shall provide the applicant
1218 with notification of the right to request a hearing within 21

1219 days after the applicant's receipt of the notice of cancellation.
1220 A license shall be reinstated if the applicant can demonstrate
1221 that the requirements for obtaining the license pursuant to this
1222 chapter have been satisfied.
1223 ~~(10) If an initial correspondent mortgage lender or branch~~
1224 ~~office license has been issued but the check upon which the~~
1225 ~~license is based is returned due to insufficient funds, the~~
1226 ~~license shall be deemed canceled. A license deemed canceled~~
1227 ~~pursuant to this subsection shall be reinstated if the office~~
1228 ~~receives a certified check for the appropriate amount within 30~~
1229 ~~days after the date the check was returned due to insufficient~~
1230 ~~funds.~~
1231 (10) ~~(11)~~ Each correspondent lender shall designate a
1232 principal representative who exercises control over the business
1233 and shall maintain a form prescribed by the commission
1234 designating the principal representative. If the form is not
1235 accurately maintained, the business is considered to be operated
1236 by each officer, director, or equitable owner of a 10-percent or
1237 greater interest in the business.
1238 (11) ~~(12)~~ ~~After October 1, 2001,~~ An applicant's principal
1239 representative must pass a written test prescribed by the
1240 commission and administered by the office or must pass an
1241 electronic test prescribed by the commission and administered by
1242 the office or a third party approved by the office which covers
1243 primary and subordinate mortgage financing transactions and the
1244 provisions of this chapter and rules adopted under this chapter.
1245 The commission may waive by rule the examination requirement for
1246 any person who has passed a test approved by the Conference of
1247 State Bank Supervisors, the American Association of Residential

1248 Mortgage Regulators, or the United States Department of Housing
1249 and Urban Development if the test covers primary and subordinate
1250 mortgage financing transactions. The commission may set by rule a
1251 fee not to exceed $100 for taking the examination. This
1252 requirement is satisfied if the principal representative has
1253 continuously served in the capacity of a principal representative
1254 for a licensed entity under this chapter for at least 1 year and
1255 has not had a lapse in designation as a principal representative
1256 of more than 2 years before the date of the submission of the
1257 application or amendment in the case of a change in the principal
1258 representative. This requirement is also satisfied if the
1259 principal representative holds an active license as a mortgage
1260 broker in this state.
1261 (12) ~~(13)~~ A correspondent lender shall notify the office of
1262 any change in the designation of its principal representative
1263 within 30 days after the change is effective. A new principal
1264 representative shall satisfy ~~the name and address of any new~~
1265 ~~principal representative and shall document that such person has~~
1266 ~~completed~~ the educational and testing requirements of this
1267 section within 90 days after being designated as ~~upon~~ the
1268 ~~lender's designation of a~~ new principal representative. This
1269 requirement is satisfied if the principal representative has
1270 continuously served in the capacity of a principal representative
1271 for a licensed entity under this chapter for at least 1 year and
1272 has not had a lapse in designation as a principal representative
1273 of more than 2 years before the date of the submission of the
1274 application or amendment in the case of a change in the principal
1275 representative. This requirement is also satisfied if the
1276 principal representative holds an active license as a mortgage

1277 broker in this state.
1278 Section 17. Paragraph (b) of subsection (1) and subsection
1279 (2) of section 494.0064, Florida Statutes, are amended to read:
1280 494.0064 Renewal of mortgage lender's license; branch
1281 office license renewal.--
1282 (1)
1283 (b) A licensee shall also submit, as part of the renewal
1284 form, certification that during the preceding 2 years the
1285 licensee's principal representative and~~,~~ loan originators~~, and~~
1286 ~~associates~~ have completed the professional continuing education
1287 requirements of s. 494.00295.
1288 (2) The commission shall adopt rules establishing a
1289 procedure for the biennial renewal of mortgage lender's licenses,
1290 correspondent lender's licenses, and branch office licenses
1291 ~~permits~~. The commission may prescribe the form for renewal and
1292 may require an update of all information provided in the
1293 licensee's initial application.
1294 Section 18. Section 494.0065, Florida Statutes, is amended
1295 to read:
1296 494.0065 Saving clause.--
1297 (1)(a) Any person in good standing who holds an active
1298 registration pursuant to former s. 494.039 or license pursuant to
1299 former s. 521.205, or any person who acted solely as a mortgage
1300 servicer on September 30, 1991, is eligible to apply to the
1301 office for a mortgage lender's license and is eligible for
1302 licensure if the applicant:
1303 1. For at least 12 months during the period of October 1,
1304 1989, through September 30, 1991, has engaged in the business of
1305 either acting as a seller or assignor of mortgage loans or as a

1306 servicer of mortgage loans, or both;
1307 2. Has documented a minimum net worth of $25,000 in audited
1308 financial statements; and
1309 3. Has applied for licensure pursuant to this section by
1310 January 1, 1992, and paid an application fee of $100.
1311 (b) A licensee pursuant to paragraph (a) may operate a
1312 wholly owned subsidiary or affiliate for the purpose of servicing
1313 accounts if the subsidiary or affiliate is operational as of
1314 September 30, 1991. Such subsidiary or affiliate is not required
1315 to obtain a separate license, but is subject to all the
1316 requirements of a licensee under ss. 494.006-494.0077.
1317 (2) A licensee issued a license pursuant to subsection (1)
1318 may renew its mortgage lending license if it documents a minimum
1319 net worth of $25,000, according to United States generally
1320 accepted accounting principles, which must be continuously
1321 maintained as a condition to licensure. The office shall require
1322 an audited financial statement which documents such net worth.
1323 (3) The commission may prescribe by rule forms and
1324 procedures for application for licensure, and amendment and
1325 withdrawal of application for licensure, or transfer, including
1326 any existing branch offices, in accordance with subsections (4)
1327 and (5), and for renewal of licensure of licensees under this
1328 section. The office may require each applicant to provide any
1329 information reasonably necessary to determine the applicant's
1330 eligibility for licensure. An application is considered received
1331 for purposes of s. 120.60 upon receipt of a completed application
1332 form as prescribed by commission rule, a nonrefundable
1333 application fee of $500, and any other fee prescribed by law.
1334 (4)(a) Notwithstanding ss. 494.0061(5) and 494.0067(3), the

1335 ultimate equitable owner, as of the effective date of this act,
1336 of a mortgage lender licensed under this section may transfer,
1337 one time, at least 50 percent of the ownership, control, or power
1338 to vote any class of equity securities of such mortgage lender,
1339 except as provided in paragraph (b). For purposes of this
1340 subsection, satisfaction of the amount of the ownership
1341 transferred may be met in multiple transactions or in a single
1342 transaction.
1343 (b) A person who is an ultimate equitable owner on the
1344 effective date of this act may transfer, at any time, at least 50
1345 percent of the ownership, control, or power to vote any class of
1346 equity securities of such person to the person's spouse or child,
1347 and any such transferee may transfer, at any time, such
1348 ownership, control, or power to vote to a spouse or child of such
1349 transferee, in perpetuity.
1350 (c) For any transfer application filed on or after October
1351 1, 2006:
1352 1. An applicant must provide proof that the applicant's
1353 principal representative has completed 24 hours of instruction in
1354 primary and subordinate financing transactions and in the
1355 provisions of this chapter and rules adopted under this chapter.
1356 This requirement is satisfied if the principal representative has
1357 continuously served in the capacity of a principal representative
1358 for a licensed entity under this chapter for at least 1 year and
1359 has not had a lapse in designation as a principal representative
1360 of more than 2 years before the date of the submission of the
1361 application or amendment in the case of a change in the principal
1362 representative. This requirement is also satisfied if the
1363 principal representative holds an active license as a mortgage

1364 broker in this state.
1365 2. An applicant's principal representative must pass a
1366 written test prescribed by the commission and administered by the
1367 office, or must pass an electronic test prescribed by the
1368 commission and administered by the office or a third party
1369 approved by the office, which covers primary and subordinate
1370 mortgage financing transactions and the provisions of this
1371 chapter and rules adopted under this chapter. The commission may
1372 set by rule a fee not to exceed $100 for the electronic version
1373 of the mortgage broker test. The commission may waive by rule the
1374 examination requirement for any person who has passed a test
1375 approved by the Conference of State Bank Supervisors, the
1376 American Association of Residential Mortgage Regulators, or the
1377 United States Department of Housing and Urban Development if the
1378 test covers primary and subordinate mortgage financing
1379 transactions. This requirement is satisfied if the principal
1380 representative has continuously served in the capacity of a
1381 principal representative for a licensed entity under this chapter
1382 for at least 1 year and has not had a lapse in designation as a
1383 principal representative of more than 2 years before the date of
1384 the submission of the application or amendment in the case of a
1385 change in the principal representative. This requirement is also
1386 satisfied if the principal representative holds an active license
1387 as a mortgage broker in this state.
1388 (5) Each initial application for a transfer must be in the
1389 form prescribed by rule of the commission. The commission or
1390 office may require each applicant for any transfer to provide any
1391 information reasonably necessary to make a determination of the
1392 applicant's eligibility for licensure. The office shall issue the

1393 transfer of licensure to any person who submits the following
1394 documentation at least 90 days prior to the anticipated transfer:
1395 (a) A completed application form.
1396 (b) A nonrefundable fee set by rule of the commission in
1397 the amount of $500. An application is considered received for
1398 purposes of s. 120.60 upon receipt of a completed application
1399 form as prescribed by commission rule, a nonrefundable
1400 application fee of $500, and any other fee prescribed by law.
1401 (c) Audited financial statements that substantiate that the
1402 applicant has a bona fide and verifiable net worth, according to
1403 United States generally accepted accounting principles, of at
1404 least $25,000, which must be continuously maintained as a
1405 condition of licensure.
1406 (d) Documentation that the applicant is incorporated,
1407 registered, or otherwise formed as a general partnership, limited
1408 partnership, limited liability company, or other lawful entity
1409 under the laws of this state or another state of the United
1410 States.
1411 (e) A complete set of fingerprints as the commission
1412 requires by rule for ~~or office may require that~~ each designated
1413 principal representative, officer, director, control person,
1414 member, partner, or joint venturer of the applicant and the
1415 ultimate equitable owner of a 10-percent or greater interest in
1416 the applicant. A fingerprint card submitted to the office must be
1417 ~~submit a complete set of fingerprints~~ taken by an authorized law
1418 enforcement agency ~~officer~~. The office shall submit the
1419 fingerprints to the Department of Law Enforcement for state
1420 processing and the Department of Law Enforcement shall forward
1421 the fingerprints to the Federal Bureau of Investigation for

1422 federal processing. The cost of the fingerprint processing may be
1423 borne by the office, the employer, or the person subject to the
1424 background check. The Department of Law Enforcement shall submit
1425 an invoice to the office for the fingerprints received each
1426 month. The office shall screen the background results to
1427 determine if the applicant meets licensure requirements.
1428 (f) Information that the commission requires by rule
1429 concerning any designated principal representative; any officer,
1430 director, control person, members, partner, or joint venturer of
1431 the applicant or any person having the same or substantially
1432 similar status or performing substantially similar functions; or
1433 any individual who is the ultimate equitable owner of a 10-
1434 percent or greater interest in the mortgage lender. The
1435 commission may require information concerning such applicant or
1436 person, including his or her full name and any other names by
1437 which he or she may have been known, age, social security number,
1438 qualifications and educational and business history, and
1439 disciplinary and criminal history.
1440 (6) Notwithstanding subsection (5), a transfer under
1441 subsection (4) may be denied if the applicant; designated
1442 principal representative;~~,~~ any principal officer, ~~or~~ director,
1443 control person, member, partner, or joint venturer of the
1444 applicant;~~,~~ or any natural person owning a 10-percent or greater
1445 interest in the applicant has committed any violation specified
1446 in s. 494.0072, or has entered a plea of nolo contendere,
1447 regardless of adjudication, or has an action pending against the
1448 applicant in any criminal prosecution or administrative
1449 enforcement action, in any jurisdiction, which involves fraud,
1450 dishonest dealing, or any act of moral turpitude.

1451 (7) A license issued in accordance with this section is not
1452 transferable or assignable except as provided in subsection (4).
1453 (8) Each person applying for a transfer of any branch
1454 office pursuant to subsection (4) must comply with the
1455 requirements of s. 494.0066.
1456 (9) Each mortgage lender shall designate a principal
1457 representative who exercises control over the business and shall
1458 keep the designation current on a form prescribed by commission
1459 rule designating the principal representative. If the information
1460 on the form is not kept current, the business is considered to be
1461 operated by each officer, director, or equitable owner of a 10-
1462 percent or greater interest in the business.
1463 (10) A lender shall notify the office of any change in the
1464 designation of its principal representative within 30 days after
1465 the change is effective. A new principal representative must
1466 satisfy the educational and testing requirements of this section
1467 within 90 days after being designated as the new principal
1468 representative. This requirement is satisfied if the principal
1469 representative has continuously served in the capacity of a
1470 principal representative for a licensed entity under this chapter
1471 for at least 1 year and has not had a lapse in designation as a
1472 principal representative of more than 2 years before the date of
1473 the submission of the application or amendment in the case of a
1474 change in the principal representative. This requirement is also
1475 satisfied if the principal representative currently holds an
1476 active license as mortgage broker in this state.
1477 Section 19. Subsection (2) of section 494.0066, Florida
1478 Statutes, is amended to read:
1479 494.0066 Branch offices.--

1480 (2) The office shall issue a branch office license to a
1481 licensee licensed under ss. 494.006-494.0077 after the office
1482 determines that the licensee has submitted ~~upon receipt of~~ a
1483 completed branch office application form as prescribed by rule by
1484 the commission and an initial nonrefundable branch office license
1485 fee of $325. The branch office application must include the name
1486 and license number of the licensee under ss. 494.006-494.0077,
1487 the name of the licensee's employee in charge of the branch
1488 office, and the address of the branch office. The branch office
1489 license shall be issued in the name of the licensee under ss.
1490 494.006-494.0077 and must be renewed in conjunction with the
1491 license renewal.
1492 Section 20. Section 494.0067, Florida Statutes, is amended
1493 to read:
1494 494.0067 Requirements of licensees under ss. 494.006-
1495 494.0077.--
1496 ~~(1) Each license of a mortgage lender, correspondent~~
1497 ~~mortgage lender, or branch office shall be prominently displayed~~
1498 ~~in the office for which it is issued.~~
1499 (1)~~(2)~~ Each licensee under ss. 494.006-494.0077 which makes
1500 mortgage loans on real estate in this state shall transact
1501 business from a principal place of business. Each principal place
1502 of business and each branch office shall be operated under the
1503 full charge, control, and supervision of the licensee under ss.
1504 494.006-494.0077.
1505 (2)~~(3)~~ A license issued under ss. 494.006-494.0077 is not
1506 transferable or assignable.
1507 (3) Each licensee under ss. 494.006-494.0077 shall report,
1508 on a form prescribed by rule of the commission, any change in the

1509 information contained in any initial application form, or any
1510 amendment thereto, not later than 30 days after the change is
1511 effective.
1512 (4) Each licensee under ss. 494.006-494.0077 shall report
1513 any changes in the partners, officers, members, joint venturers,
1514 directors, or control persons of any licensee or changes in the
1515 form of business organization by written amendment in such form
1516 and at such time that the commission specifies by rule.
1517 (a) In any case in which a person or a group of persons,
1518 directly or indirectly or acting by or through one or more
1519 persons, proposes to purchase or acquire a controlling interest
1520 in a licensee, such person or group must submit an initial
1521 application for licensure as a mortgage lender or correspondent
1522 mortgage lender before such purchase or acquisition and at the
1523 time and in the form prescribed by the commission by rule.
1524 (b) As used in this subsection, the term "controlling
1525 interest" means possession of the power to direct or cause the
1526 direction of the management or policies of a company whether
1527 through ownership of securities, by contract, or otherwise. Any
1528 person who directly or indirectly has the right to vote 25
1529 percent or more of the voting securities of a company or who is
1530 entitled to 25 percent or more of its profits is presumed to
1531 possess a controlling interest.
1532 (c) Any addition of a designated principal representative,
1533 partner, officer, member, joint venturer, director, or control
1534 person of the applicant who does not have a controlling interest
1535 and who has not previously complied with the provisions of ss.
1536 494.0061(2)(g) and 494.0061(2)(h), ss. 494.0062(2)(g) and
1537 494.0062(2)(h), or ss. 494.0065(5)(e) and 494.0065(5)(f) shall be

1538 subject thereto unless required to file an initial application in
1539 accordance with paragraph (a). If the office determines that the
1540 licensee does not continue to meet licensure requirements, the
1541 office may bring administrative action in accordance with s.
1542 494.0072 to enforce the provisions of this section.
1543 (d) The commission shall adopt rules providing for the
1544 waiver of the application required by this subsection if the
1545 person or group of persons proposing to purchase or acquire a
1546 controlling interest in a licensee has previously complied with
1547 the provisions of ss. 494.0061(2)(g) and 494.0061(2)(h), ss.
1548 494.0062(2)(g) and 494.0062(2)(h), or ss. 494.0065(5)(e) and
1549 494.0065(5)(f) with the same legal entity or is currently
1550 licensed with the office under this chapter.
1551 ~~(4) The commission or office may require each licensee~~
1552 ~~under ss. 494.006-494.0077 to report any change of address of the~~
1553 ~~principal place of business, change of address of any branch~~
1554 ~~office, or change of principal officer, director, or ultimate~~
1555 ~~equitable owner of 10 percent or more of the licensed corporation~~
1556 ~~to the office in a form prescribed by rule of the commission not~~
1557 ~~later than 30 business days after the change is effective.~~
1558 (5) Each licensee under ss. 494.006-494.0077 shall report
1559 in a form prescribed by rule by the commission any indictment,
1560 information, charge, conviction, plea of nolo contendere, or plea
1561 of guilty to any crime or administrative violation that involves
1562 fraud, dishonest dealing, or any other act of moral turpitude, in
1563 any jurisdiction, by the licensee under ss. 494.006-494.0077 or
1564 any principal officer, director, or ultimate equitable owner of
1565 10 percent or more of the licensed corporation, not later than 30
1566 business days after the indictment, information, charge,

1567 conviction, or final administrative action.
1568 (6) Each licensee under ss. 494.006-494.0077 shall report
1569 any action in bankruptcy, voluntary or involuntary, to the
1570 office, not later than 7 business days after the action is
1571 instituted.
1572 (7) Each licensee under ss. 494.006-494.0077 shall
1573 designate a registered agent in this state for service of
1574 process.
1575 (8) Each licensee under ss. 494.006-494.0077 shall provide
1576 an applicant for a mortgage loan a good faith estimate of the
1577 costs the applicant can reasonably expect to pay in obtaining a
1578 mortgage loan. The good faith estimate of costs shall be mailed
1579 or delivered to the applicant within a reasonable time after the
1580 licensee receives a written loan application from the applicant.
1581 The estimate of costs may be provided to the applicant by a
1582 person other than the licensee making the loan. The commission
1583 may adopt rules that set forth the disclosure requirements of
1584 this section.
1585 (9) On or before April 30, 2000, each mortgage lender or
1586 correspondent mortgage lender shall file an initial report
1587 stating the full legal name, residential address, social security
1588 number, date of birth, mortgage broker license number, date of
1589 hire, and, if applicable, date of termination for each person who
1590 acted as a loan originator or an associate of the mortgage lender
1591 or correspondent mortgage lender during the immediate preceding
1592 quarter. Thereafter, a mortgage lender or correspondent mortgage
1593 lender shall file a report only if a person became or ceased to
1594 be a loan originator or an associate of the mortgage lender or
1595 correspondent mortgage lender during the immediate preceding

1596 quarter. Such report shall be filed within 30 days after the last
1597 day of each calendar quarter and shall contain the full legal
1598 name, residential address, social security number, date of birth,
1599 date of hire and, if applicable, the mortgage broker license
1600 number and date of termination of each person who became or
1601 ceased to be a loan originator or an associate of the mortgage
1602 lender or correspondent mortgage lender during the immediate
1603 preceding quarter. The commission shall prescribe, by rule, the
1604 procedures for filing reports required by this subsection.
1605 (10)(a) Each licensee shall require the principal
1606 representative and all loan originators ~~or associates~~ who perform
1607 services for the licensee to complete 14 hours of professional
1608 continuing education during each biennial license period. The
1609 education shall cover primary and subordinate mortgage financing
1610 transactions and the provisions of this chapter and the rules
1611 adopted under this chapter.
1612 (b) The licensee shall maintain records of such training
1613 for a period of 4 years, including records of the content of and
1614 hours designated for each program and the date and location of
1615 the program.
1616 (c) Evidence of completion of such programs shall be
1617 included with the licensee's renewal application.
1618 Section 21. Paragraphs (s), (t), and (u) are added to
1619 subsection (2) and subsection (3) of section 494.0072, Florida
1620 Statutes, is amended, to read:
1621 494.0072 Administrative penalties and fines; license
1622 violations.--
1623 (2) Each of the following acts constitutes a ground for
1624 which the disciplinary actions specified in subsection (1) may be

1625 taken:
1626 (s) Payment to the office for a license or permit with a
1627 check or electronic transmission of funds that is dishonored by
1628 the applicant's or licensee's financial institution.
1629 (t) Having a final judgment entered against her or him in a
1630 civil action upon grounds of fraud, embezzlement,
1631 misrepresentation, or deceit.
1632 (u)1. Having been the subject of any decision, finding,
1633 injunction, suspension, prohibition, revocation, denial,
1634 judgment, or administrative order by any court of competent
1635 jurisdiction, administrative law judge, state or federal agency,
1636 national securities exchange, national commodities exchange,
1637 national option exchange, national securities association,
1638 national commodities association, or national option association
1639 involving a violation of any federal or state securities or
1640 commodities law, or any rule or regulation adopted thereunder, or
1641 involving a violation of any rule or regulation of any national
1642 securities, commodities, or options exchange or national
1643 securities, commodities, or options association.
1644 2. Having been the subject of any injunction or adverse
1645 administrative order by a state or federal agency regulating
1646 banking, insurance, finance or small loan companies, real estate,
1647 mortgage brokers or lenders, money transmitters, or other related
1648 or similar industries.
1649 (3) A mortgage lender or correspondent mortgage lender is
1650 subject to the disciplinary actions specified in subsection (1)
1651 if any officer, member, director, control person, joint venturer,
1652 or ultimate equitable owner of a 10-percent or greater interest
1653 in the mortgage lender or correspondent mortgage lender,

1654 associate, or employee of the mortgage lender or correspondent
1655 mortgage lender violates any provision of subsection (2).
1656 Section 22. Subsection (2) of section 494.00721, Florida
1657 Statutes, is amended to read:
1658 494.00721 Net worth.--
1659 (2) If a mortgage lender or correspondent mortgage lender
1660 fails to satisfy the net worth requirements, the mortgage lender
1661 or correspondent mortgage lender shall immediately cease taking
1662 any new mortgage loan applications. Thereafter, the mortgage
1663 lender or correspondent mortgage lender shall have up to 60 days
1664 within which to satisfy the net worth requirements. If the
1665 licensee makes the office aware, prior to an examination, that
1666 the licensee no longer meets the net worth requirements, the
1667 mortgage lender or correspondent mortgage lender shall have 120
1668 days within which to satisfy the net worth requirements. A
1669 mortgage lender or correspondent mortgage lender shall not resume
1670 acting as a mortgage lender or correspondent mortgage lender
1671 without written authorization from the office, which
1672 authorization shall be granted if the mortgage lender or
1673 correspondent mortgage lender provides the office with
1674 documentation which satisfies the requirements of s.
1675 494.0061(2)(c), s. 494.0062(2)(c) ~~s. 494.0061(1)(c), s.~~
1676 ~~494.0062(1)(c)~~, or s. 494.0065(2), whichever is applicable.
1677 Section 23. Paragraph (c) of subsection (3) of section
1678 501.137, Florida Statutes, is amended to read:
1679 501.137 Mortgage lenders; tax and insurance payments from
1680 escrow accounts; duties.--
1681 (3)
1682 (c) If the lender violates paragraph (a) and the premium

1683 payment is more than 90 days overdue or if the insurer refuses to
1684 reinstate the insurance policy, the lender shall pay the
1685 difference between the cost of the previous insurance policy and
1686 a new, comparable insurance policy for a period of 2 years. If
1687 the lender refuses, the lender is liable for the reasonable
1688 attorney's fees and costs of the property owner for a violation
1689 of this section.
1690 Section 24. Subsection (8) is added to section 516.01,
1691 Florida Statutes, to read:
1692 516.01 Definitions.--As used in this chapter, the term:
1693 (8) "Control person" means an individual, partnership,
1694 corporation, trust, or other organization that possesses the
1695 power, directly or indirectly, to direct the management or
1696 policies of a company, whether through ownership of securities,
1697 by contract, or otherwise. A person is presumed to control a
1698 company if, with respect to a particular company, that person:
1699 (a) Is a director, general partner, or officer exercising
1700 executive responsibility or having similar status or functions;
1701 (b) Directly or indirectly has the right to vote 10 percent
1702 or more of a class of a voting security or has the power to sell
1703 or direct the sale of 10 percent or more of a class of voting
1704 securities; or
1705 (c) In the case of a partnership, has the right to receive
1706 upon dissolution, or has contributed, 10 percent or more of the
1707 capital.
1708 Section 25. Section 516.03, Florida Statutes, is amended to
1709 read:
1710 516.03 Application for license; fees; etc.--
1711 (1) APPLICATION.--Application for a license to make loans

1712 under this chapter shall be in the form prescribed by rule of the
1713 commission. The commission may require each applicant to provide
1714 any information reasonably necessary to determine the applicant's
1715 eligibility for licensure. The applicant shall also provide
1716 information that the office requires concerning any officer,
1717 director, control person, member, partner, or joint venturer of
1718 the applicant or any person having the same or substantially
1719 similar status or performing substantially similar functions, or
1720 concerning any individual who is the ultimate equitable owner of
1721 a 10-percent or greater interest in the applicant. The office may
1722 require information concerning any such applicant or person,
1723 including his or her full name and any other names by which he or
1724 she may have been known, age, social security number, residential
1725 history, qualifications, educational and business history, and
1726 disciplinary and criminal history. The applicant must provide
1727 evidence of liquid assets of at least $25,000. ~~, and shall~~
1728 ~~contain the name, residence and business addresses of the~~
1729 ~~applicant and, if the applicant is a copartnership or~~
1730 ~~association, of every member thereof and, if a corporation, of~~
1731 ~~each officer and director thereof, also the county and~~
1732 ~~municipality with the street and number or approximate location~~
1733 ~~where the business is to be conducted, and such further relevant~~
1734 ~~information as the commission or office may require.~~ At the time
1735 of making such application the applicant shall pay to the office
1736 a nonrefundable biennial license fee of $625. Applications,
1737 except for applications to renew or reactivate a license, must
1738 also be accompanied by a nonrefundable ~~an~~ investigation fee of
1739 $200. An application is considered received for purposes of s.
1740 120.60 upon receipt of a completed application form as prescribed

1741 by commission rule, a nonrefundable application fee of $625, and
1742 any other fee prescribed by law. The commission may adopt rules
1743 to require ~~allow~~ electronic submission of any form, document, or
1744 fee required by this act if such rules reasonably accommodate
1745 technological or financial hardship. The commission may prescribe
1746 by rule requirements and procedures for obtaining an exemption
1747 due to a technological or financial hardship.
1748 (2) FEES.--Fees ~~herein~~ provided for in this section shall
1749 be collected by the office and shall be turned into the State
1750 Treasury to the credit of the regulatory trust fund under the
1751 office. The office shall have full power to employ such
1752 examiners or clerks to assist the office as may from time to time
1753 be deemed necessary and fix their compensation. The commission
1754 may adopt rules to require ~~allow~~ electronic submission of any fee
1755 required by this section if such rules reasonably accommodate
1756 technological or financial hardship. The commission may prescribe
1757 by rule requirements and procedures for obtaining an exemption
1758 due to a technological or financial hardship.
1759 Section 26. Paragraph (a) of subsection (3) of section
1760 516.031, Florida Statutes, is amended to read:
1761 516.031 Finance charge; maximum rates.--
1762 (3) OTHER CHARGES.--
1763 (a) In addition to the interest, delinquency, and insurance
1764 charges herein provided for, no further or other charges or
1765 amount whatsoever for any examination, service, commission, or
1766 other thing or otherwise shall be directly or indirectly charged,
1767 contracted for, or received as a condition to the grant of a
1768 loan, except:
1769 1. An amount not to exceed $25 ~~$10~~ to reimburse a portion

1770 of the costs for investigating the character and credit of the
1771 person applying for the loan;
1772 2. An annual fee of $25 on the anniversary date of each
1773 line-of-credit account;
1774 3. Charges paid for brokerage fee on a loan or line of
1775 credit of more than $10,000, title insurance, and the appraisal
1776 of real property offered as security when paid to a third party
1777 and supported by an actual expenditure;
1778 4. Intangible personal property tax on the loan note or
1779 obligation when secured by a lien on real property;
1780 5. The documentary excise tax and lawful fees, if any,
1781 actually and necessarily paid out by the licensee to any public
1782 officer for filing, recording, or releasing in any public office
1783 any instrument securing the loan, which fees may be collected
1784 when the loan is made or at any time thereafter;
1785 6. The premium payable for any insurance in lieu of
1786 perfecting any security interest otherwise required by the
1787 licensee in connection with the loan, if the premium does not
1788 exceed the fees which would otherwise be payable, which premium
1789 may be collected when the loan is made or at any time thereafter;
1790 7. Actual and reasonable attorney's fees and court costs as
1791 determined by the court in which suit is filed;
1792 8. Actual and commercially reasonable expenses of
1793 repossession, storing, repairing and placing in condition for
1794 sale, and selling of any property pledged as security; or
1795 9. A delinquency charge not to exceed $10 for each payment
1796 in default for a period of not less than 10 days, if the charge
1797 is agreed upon, in writing, between the parties before imposing
1798 the charge.

1799

1800 Any charges, including interest, in excess of the combined total
1801 of all charges authorized and permitted by this chapter
1802 constitute a violation of chapter 687 governing interest and
1803 usury, and the penalties of that chapter apply. In the event of a
1804 bona fide error, the licensee shall refund or credit the borrower
1805 with the amount of the overcharge immediately but within 20 days
1806 from the discovery of such error.
1807 Section 27. Section 516.05, Florida Statutes, is amended to
1808 read:
1809 516.05 License.--
1810 (1) Upon the filing of an application for a license and
1811 payment of all applicable fees, the office shall, unless the
1812 application is to renew or reactivate an existing license, make
1813 an investigation of the facts concerning the applicant's
1814 background ~~proposed activities~~. If the office determines that a
1815 license should be granted, it shall issue the license for a
1816 period not to exceed 2 years. Biennial licensure periods and
1817 procedures for renewal of licenses shall be established by the
1818 rule of the commission. If the office determines that grounds
1819 exist under this chapter for denial of an application other than
1820 an application to renew a license, it shall deny such
1821 application~~, return to the applicant the sum paid as a license~~
1822 ~~fee, and retain the investigation fee~~.
1823 (2) A license that is not renewed at the end of the
1824 biennium established by the commission shall automatically revert
1825 to inactive status. An inactive license may be reactivated upon
1826 submission of a completed reactivation application, payment of
1827 the biennial license fee, and payment of a reactivation fee which

1828 shall equal the biennial license fee. A license expires on the
1829 date at which it has been inactive for 6 months.
1830 (3) Only one place of business for the purpose of making
1831 loans under this chapter may be maintained under one license, but
1832 the office may issue additional licenses to a licensee upon
1833 compliance with all the provisions of this chapter governing
1834 issuance of a single license.
1835 (4) Each licensee shall report, on a form prescribed by
1836 rule of the commission, any change to the information contained
1837 in any initial application form, or any amendment thereto, not
1838 later than 30 days after the change is effective.
1839 (5) Each licensee shall report any changes in the partners,
1840 officers, members, joint venturers, directors, or control persons
1841 of any licensee, or changes in the form of business organization,
1842 by written amendment in such form and at such time as the
1843 commission specifies by rule.
1844 (a) In any case in which a person or a group of persons,
1845 directly or indirectly or acting by or through one or more
1846 persons, proposes to purchase or acquire a controlling interest
1847 in a licensee, such person or group must submit an initial
1848 application for licensure before such purchase or acquisition at
1849 such time and in such form as the commission prescribes by rule.
1850 (b) As used in this subsection, the term "controlling
1851 interest" means possession of the power to direct or cause the
1852 direction of the management or policies of a company whether
1853 through ownership of securities, by contract, or otherwise. Any
1854 person who directly or indirectly has the right to vote 25
1855 percent or more of the voting securities of a company or is
1856 entitled to 25 percent or more of its profits is presumed to

1857 possess a controlling interest.
1858 (c) Any addition of a partner, officer, member, joint
1859 venturer, director, or control person of the applicant who does
1860 not have a controlling interest and who has not previously
1861 complied with the provisions of s. 516.03(1) shall be subject
1862 thereto unless required to file an initial application in
1863 accordance with paragraph (a). If the office determines that the
1864 licensee does not continue to meet licensure requirements, the
1865 office may bring administrative action in accordance with s.
1866 516.07 to enforce the provisions of this chapter.
1867 (d) The commission shall adopt rules providing for the
1868 waiver of the application required by this subsection if the
1869 person or group of persons proposing to purchase or acquire a
1870 controlling interest in a licensee has previously complied with
1871 the provisions of s. 516.03(1) with the same legal entity or is
1872 currently licensed with the office under this chapter.
1873 ~~(4) Prior to relocating his or her place of business, a~~
1874 ~~licensee must file with the office, in the manner prescribed by~~
1875 ~~commission rule, notice of the relocation.~~
1876 (6) ~~(5)~~ A licensee may conduct the business of making loans
1877 under this chapter within a place of business in which other
1878 business is solicited or engaged in, unless the office shall find
1879 that the conduct of such other business by the licensee results
1880 in an evasion of this chapter. Upon such finding, the office
1881 shall order the licensee to desist from such evasion; provided,
1882 however, that no license shall be granted to or renewed for any
1883 person or organization engaged in the pawnbroker business.
1884 ~~(6) If any person purchases substantially all of the assets~~
1885 ~~of any existing licensed place of business, the purchaser shall~~

1886 ~~give immediate notice thereof to the office and shall be granted~~
1887 ~~a 90-day temporary license for the place of business within 10~~
1888 ~~days after the office's receipt of an application for a permanent~~
1889 ~~license. Issuance of a temporary license for a place of business~~
1890 ~~nullifies the existing license for the place of business, and the~~
1891 ~~temporary licensee is subject to any disciplinary action provided~~
1892 ~~for by this chapter.~~
1893 (7) Licenses are not transferable or assignable. A licensee
1894 may invalidate any license by delivering it to the office with a
1895 written notice of the delivery, but such delivery does not affect
1896 any civil or criminal liability or the authority to enforce this
1897 chapter for acts committed in violation thereof.
1898 (8) The office may refuse to process an initial application
1899 for a license if the applicant or any person with power to direct
1900 the management or policies of the applicant's business is the
1901 subject of a pending criminal prosecution in any jurisdiction
1902 until conclusion of such criminal prosecution.
1903 (9) A licensee that is the subject of a voluntary or
1904 involuntary bankruptcy filing must report such filing to the
1905 office within 7 business days after the filing date.
1906 Section 28. Subsection (1) of section 516.07, Florida
1907 Statutes, is amended to read:
1908 516.07 Grounds for denial of license or for disciplinary
1909 action.--
1910 (1) The following acts are violations of this chapter and
1911 constitute grounds for denial of an application for a license to
1912 make consumer finance loans and grounds for any of the
1913 disciplinary actions specified in subsection (2):
1914 (a) A material misstatement of fact in an application for a

1915 license.~~;~~
1916 (b) Failure to maintain liquid assets of at least $25,000
1917 at all times for the operation of business at a licensed location
1918 or proposed location.~~;~~
1919 (c) Failure to demonstrate financial responsibility,
1920 experience, character, or general fitness, such as to command the
1921 confidence of the public and to warrant the belief that the
1922 business operated at the licensed or proposed location is lawful,
1923 honest, fair, efficient, and within the purposes of this
1924 chapter.~~;~~
1925 (d) The violation, either knowingly or without the exercise
1926 of due care, of any provision of this chapter, any rule or order
1927 adopted under this chapter, or any written agreement entered into
1928 with the office.~~;~~
1929 (e) Any act of fraud, misrepresentation, or deceit,
1930 regardless of reliance by or damage to a borrower, or any illegal
1931 activity, where such acts are in connection with a loan under
1932 this chapter. Such acts include, but are not limited to:
1933 1. Willful imposition of illegal or excessive charges; or
1934 2. Misrepresentation, circumvention, or concealment of any
1935 matter required to be stated or furnished to a borrower.~~;~~
1936 (f) The use of unreasonable collection practices or of
1937 false, deceptive, or misleading advertising, where such acts are
1938 in connection with the operation of a business to make consumer
1939 finance loans.~~;~~
1940 (g) Any violation of part III of chapter 817 or part II of
1941 chapter 559 or of any rule adopted under part II of chapter 559.~~;~~
1942 (h) Failure to maintain, preserve, and keep available for
1943 examination, all books, accounts, or other documents required by

1944 this chapter, by any rule or order adopted under this chapter, or
1945 by any agreement entered into with the office.~~;~~
1946 (i) Refusal to permit inspection of books and records in an
1947 investigation or examination by the office or refusal to comply
1948 with a subpoena issued by the office.~~;~~
1949 (j) Pleading nolo contendere to, or having been convicted
1950 or found guilty of, a crime involving fraud, dishonest dealing,
1951 or any act of moral turpitude, regardless of whether adjudication
1952 is withheld.~~;~~
1953 (k) Paying money or anything else of value, directly or
1954 indirectly, to any person as compensation, inducement, or reward
1955 for referring loan applicants to a licensee.~~;~~
1956 (l) Allowing any person other than the licensee to use the
1957 licensee's business name, address, or telephone number in an
1958 advertisement.~~;~~
1959 (m) Accepting or advertising that the licensee accepts
1960 money on deposit or as consideration for the issuance or delivery
1961 of certificates of deposit, savings certificates, or similar
1962 instruments, except to the extent permitted under chapter 517.~~;~~
1963 ~~or~~
1964 (n) Failure to pay any fee, charge, or fine imposed or
1965 assessed pursuant to this chapter or any rule adopted under this
1966 chapter.
1967 (o) Using the name or logo of a financial institution, as
1968 defined in s. 655.005(1), or its affiliates or subsidiaries when
1969 marketing or soliciting existing or prospective customers if such
1970 marketing materials are used without the written consent of the
1971 financial institution and in a manner that would lead a
1972 reasonable person to believe that the material or solicitation

1973 originated from, was endorsed by, or is related to or the
1974 responsibility of the financial institution or its affiliates or
1975 subsidiaries.
1976 (p) Payment to the office for a license or permit with a
1977 check or electronic transmission of funds which is dishonored by
1978 the applicant's or licensee's financial institution.
1979 Section 29. Section 516.08, Florida Statutes, is repealed.
1980 Section 30. Subsection (3) is added to section 516.12,
1981 Florida Statutes, to read:
1982 516.12 Records to be kept by licensee.--
1983 (3) The commission may prescribe by rule the minimum
1984 information to be shown in the books, accounts, records, and
1985 documents of licensees for purposes of enabling the office to
1986 determine the licensee's compliance with ss. 516.001-516.36. In
1987 addition, the commission may prescribe by rule the requirements
1988 for the destruction of books, accounts, records, and documents
1989 retained by the licensee after completion of the time period
1990 specified in subsection (1).
1991 Section 31. Subsection (4) of section 517.021, Florida
1992 Statutes, is amended to read:
1993 517.021 Definitions.--When used in this chapter, unless the
1994 context otherwise indicates, the following terms have the
1995 following respective meanings:
1996 (4) "Branch office" means any location in this state of a
1997 dealer or investment adviser where one or more associated persons
1998 regularly conduct the business of rendering investment advice or
1999 effecting any transactions in, or inducing or attempting to
2000 induce the purchase or sale of, any security, or that is held out
2001 as such. The commission may adopt by rule exceptions to this

2002 definition for dealers in order to maintain consistency with the
2003 definition of a branch office used by self-regulatory
2004 organizations authorized by the Securities and Exchange
2005 Commission, including, but not limited to, the National
2006 Association of Securities Dealers or the New York Stock Exchange.
2007 The commission may adopt by rule exceptions to this definition
2008 for investment advisers. ~~office of a dealer or investment adviser~~
2009 ~~located in this state, other than the principal office of the~~
2010 ~~dealer or investment adviser, which nonprincipal office is owned~~
2011 ~~or controlled by the dealer or investment adviser for the purpose~~
2012 ~~of conducting a securities business.~~
2013 Section 32. Subsection (9) of section 517.051, Florida
2014 Statutes, is amended to read:
2015 517.051 Exempt securities.--The exemptions provided herein
2016 from the registration requirements of s. 517.07 are self-
2017 executing and do not require any filing with the office prior to
2018 claiming such exemption. Any person who claims entitlement to any
2019 of these exemptions bears the burden of proving such entitlement
2020 in any proceeding brought under this chapter. The registration
2021 provisions of s. 517.07 do not apply to any of the following
2022 securities:
2023 (9) A security issued by a corporation organized and
2024 operated exclusively for religious, educational, benevolent,
2025 fraternal, charitable, or reformatory purposes and not for
2026 pecuniary profit, no part of the net earnings of which
2027 corporation inures to the benefit of any private stockholder or
2028 individual, or any security of a fund that is excluded from the
2029 definition of an investment company under s. 3(c)(10)(B) of the
2030 Investment Company Act of 1940; provided that no person shall

2031 directly or indirectly offer or sell securities under this
2032 subsection except by an offering circular containing full and
2033 fair disclosure, as prescribed by the rules of the commission, of
2034 all material information, including, but not limited to, a
2035 description of the securities offered and terms of the offering,
2036 a description of the nature of the issuer's business, a statement
2037 of the purpose of the offering and the intended application by
2038 the issuer of the proceeds thereof, and financial statements of
2039 the issuer prepared in conformance with United States generally
2040 accepted accounting principles. Section 6(c) of the Philanthropy
2041 Protection Act of 1995, Pub. L. No. 104-62, shall not preempt any
2042 provision of this chapter.
2043 Section 33. Subsection (18) of section 517.061, Florida
2044 Statutes, is amended to read:
2045 517.061 Exempt transactions.--The exemption for each
2046 transaction listed below is self-executing and does not require
2047 any filing with the office prior to claiming such exemption. Any
2048 person who claims entitlement to any of the exemptions bears the
2049 burden of proving such entitlement in any proceeding brought
2050 under this chapter. The registration provisions of s. 517.07 do
2051 not apply to any of the following transactions; however, such
2052 transactions are subject to the provisions of ss. 517.301,
2053 517.311, and 517.312:
2054 (18) The offer or sale of any security effected by or
2055 through a person in compliance with ~~registered pursuant to~~ s.
2056 517.12(17).
2057 Section 34. Paragraph (g) of subsection (3) of section
2058 517.081, Florida Statutes, is amended to read:
2059 517.081 Registration procedure.--

2060 (3) The office may require the applicant to submit to the
2061 office the following information concerning the issuer and such
2062 other relevant information as the office may in its judgment deem
2063 necessary to enable it to ascertain whether such securities shall
2064 be registered pursuant to the provisions of this section:
2065 (g)1. A specimen copy of the security and a copy of any
2066 circular, prospectus, advertisement, or other description of such
2067 securities.
2068 2. The commission shall adopt a form for a simplified
2069 offering circular to be used solely by corporations to register,
2070 under this section, securities of the corporation that are sold
2071 in offerings in which the aggregate offering price in any
2072 consecutive 12-month period does not exceed the amount provided
2073 in s. 3(b) of the Securities Act of 1933. The following issuers
2074 shall not be eligible to submit a simplified offering circular
2075 adopted pursuant to this subparagraph:
2076 a. An issuer seeking to register securities for resale by
2077 persons other than the issuer.
2078 b. An issuer who is subject to any of the disqualifications
2079 described in 17 C.F.R. s. 230.262, adopted pursuant to the
2080 Securities Act of 1933, or who has been or is engaged or is about
2081 to engage in an activity that would be grounds for denial,
2082 revocation, or suspension under s. 517.111. For purposes of this
2083 subparagraph, an issuer includes an issuer's director, officer,
2084 shareholder who owns at least 10 percent of the shares of the
2085 issuer, promoter, or selling agent of the securities to be
2086 offered or any officer, director, or partner of such selling
2087 agent.
2088 c. An issuer who is a development-stage company that either

2089 has no specific business plan or purpose or has indicated that
2090 its business plan is to merge with an unidentified company or
2091 companies.
2092 d. An issuer of offerings in which the specific business or
2093 properties cannot be described.
2094 e. Any issuer the office determines is ineligible if the
2095 form would not provide full and fair disclosure of material
2096 information for the type of offering to be registered by the
2097 issuer.
2098 f. Any corporation which has failed to provide the office
2099 the reports required for a previous offering registered pursuant
2100 to this subparagraph.
2101
2102 As a condition precedent to qualifying for use of the simplified
2103 offering circular, a corporation shall agree to provide the
2104 office with an annual financial report containing a balance sheet
2105 as of the end of the issuer's fiscal year and a statement of
2106 income for such year, prepared in accordance with United States
2107 generally accepted accounting principles and accompanied by an
2108 independent accountant's report. If the issuer has more than 100
2109 security holders at the end of a fiscal year, the financial
2110 statements must be audited. Annual financial reports must be
2111 filed with the office within 90 days after the close of the
2112 issuer's fiscal year for each of the first 5 years following the
2113 effective date of the registration.
2114 Section 35. Subsections (6), (7), (10), (11), (15), and
2115 (17) of section 517.12, Florida Statutes, are amended to read:
2116 517.12 Registration of dealers, associated persons,
2117 investment advisers, and branch offices.--

2118 (6) A dealer, associated person, investment adviser, or
2119 branch office, in order to obtain registration, must file with
2120 the office a written application, on a form which the commission
2121 may by rule prescribe~~, verified under oath~~. The commission may
2122 establish, by rule, procedures for depositing fees and filing
2123 documents by electronic means provided such procedures provide
2124 the office with the information and data required by this
2125 section. Each dealer or investment adviser must also file an
2126 irrevocable written consent to service of civil process similar
2127 to that provided for in s. 517.101. The application shall
2128 contain such information as the commission or office may require
2129 concerning such matters as:
2130 (a) The name of the applicant and the address of its
2131 principal office and each office in this state.
2132 (b) The applicant's form and place of organization; and, if
2133 the applicant is a corporation, a copy of its articles of
2134 incorporation and amendments to the articles of incorporation or,
2135 if a partnership, a copy of the partnership agreement.
2136 (c) The applicant's proposed method of doing business and
2137 financial condition and history, including a certified financial
2138 statement showing all assets and all liabilities, including
2139 contingent liabilities of the applicant as of a date not more
2140 than 90 days prior to the filing of the application.
2141 (d) The names and addresses of all associated persons of
2142 the applicant to be employed in this state and the offices to
2143 which they will be assigned.
2144 (7) The application shall also contain such information as
2145 the commission or office may require about the applicant; any
2146 partner, officer, or director of the applicant or any person

2147 having a similar status or performing similar functions; any
2148 person directly or indirectly controlling the applicant; or any
2149 employee of a dealer or of an investment adviser rendering
2150 investment advisory services. Each applicant shall file a
2151 complete set of fingerprints. A fingerprint card submitted to the
2152 office must be taken by an authorized law enforcement agency
2153 ~~officer~~. The office shall submit the ~~Such~~ fingerprints ~~shall be~~
2154 ~~submitted~~ to the Department of Law Enforcement for state
2155 processing and the Department of Law Enforcement shall forward
2156 the fingerprints to ~~or~~ the Federal Bureau of Investigation for
2157 ~~state and~~ federal processing. The cost of the fingerprint
2158 processing may be borne by the office, the employer, or the
2159 person subject to the background check. The Department of Law
2160 Enforcement shall submit an invoice to the office for the
2161 fingerprints received each month. The office shall screen the
2162 background results to determine if the applicant meets licensure
2163 requirements. The commission may waive, by rule, the requirement
2164 that applicants must file a set of fingerprints or the
2165 requirement that such fingerprints must be processed by the
2166 Department of Law Enforcement or the Federal Bureau of
2167 Investigation. The commission or office may require information
2168 about any such applicant or person concerning such matters as:
2169 (a) His or her full name, and any other names by which he
2170 or she may have been known, and his or her age, social security
2171 number, photograph, qualifications, and educational and business
2172 history.
2173 (b) Any injunction or administrative order by a state or
2174 federal agency, national securities exchange, or national
2175 securities association involving a security or any aspect of the

2176 securities business and any injunction or administrative order by
2177 a state or federal agency regulating banking, insurance, finance,
2178 or small loan companies, real estate, mortgage brokers, or other
2179 related or similar industries, which injunctions or
2180 administrative orders relate to such person.
2181 (c) His or her conviction of, or plea of nolo contendere
2182 to, a criminal offense or his or her commission of any acts which
2183 would be grounds for refusal of an application under s. 517.161.
2184 (d) The names and addresses of other persons of whom the
2185 office may inquire as to his or her character, reputation, and
2186 financial responsibility.
2187 (10) An applicant for registration shall pay an assessment
2188 fee of $200, in the case of a dealer or investment adviser, or
2189 $40, in the case of an associated person. The assessment fee of
2190 an associated person shall be reduced to $30, but only after the
2191 office determines, by final order, that sufficient funds have
2192 been allocated to the Securities Guaranty Fund pursuant to s.
2193 517.1203 to satisfy all valid claims filed in accordance with s.
2194 517.1203(2) and after all amounts payable under any service
2195 contract entered into by the office pursuant to s. 517.1204, and
2196 all notes, bonds, certificates of indebtedness, other
2197 obligations, or evidences of indebtedness secured by such notes,
2198 bonds, certificates of indebtedness, or other obligations, have
2199 been paid or provision has been made for the payment of such
2200 amounts, notes, bonds, certificates of indebtedness, other
2201 obligations, or evidences of indebtedness. An associated person
2202 may ~~not having current fingerprint cards filed with the National~~
2203 ~~Association of Securities Dealers or a national securities~~
2204 ~~exchange registered with the Securities and Exchange Commission~~

2205 ~~shall~~ be assessed an additional fee to cover the cost for the
2206 ~~said~~ fingerprint cards to be processed by the office. Such fee
2207 shall be determined by rule of the commission. Each dealer and
2208 each investment adviser shall pay an assessment fee of $100 for
2209 each office in this state~~, except its designated principal~~
2210 ~~office~~. Such fees become the revenue of the state, except for
2211 those assessments provided for under s. 517.131(1) until such
2212 time as the Securities Guaranty Fund satisfies the statutory
2213 limits, and are not returnable in the event that registration is
2214 withdrawn or not granted.
2215 (11) If the office finds that the applicant is of good
2216 repute and character and has complied with the provisions of this
2217 chapter and the rules made pursuant hereto, it shall register the
2218 applicant. The registration of each dealer, investment adviser,
2219 branch office, and associated person expires ~~will expire~~ on
2220 December 31 of the year the registration became effective unless
2221 the registrant has renewed his or her registration on or before
2222 that date. The commission may establish by rule procedures for
2223 renewing the registration of a branch office through the Central
2224 Registration Depository ~~, and the registration of each branch~~
2225 ~~office will expire on March 31, of the year in which it became~~
2226 ~~effective unless the registrant has renewed its registration on~~
2227 ~~or before that date~~. Registration may be renewed by furnishing
2228 such information as the commission may require, together with
2229 payment of the fee required in subsection (10) for dealers,
2230 investment advisers, associated persons, or branch offices and
2231 the payment of any amount lawfully due and owing to the office
2232 pursuant to any order of the office or pursuant to any agreement
2233 with the office. Any dealer, investment adviser, or associated

2234 person registrant who has not renewed a registration by the time
2235 the current registration expires may request reinstatement of
2236 such registration by filing with the office, on or before January
2237 31 of the year following the year of expiration, such information
2238 as may be required by the commission, together with payment of
2239 the fee required in subsection (10) for dealers, investment
2240 advisers, or associated persons and a late fee equal to the
2241 amount of such fee. Any reinstatement of registration granted by
2242 the office during the month of January shall be deemed effective
2243 retroactive to January 1 of that year.
2244 (15) (a) In order to facilitate uniformity and streamline
2245 procedures for persons who are subject to registration in
2246 multiple jurisdictions, the commission may adopt by rule uniform
2247 forms that have been approved by the Securities and Exchange
2248 Commission, and any subsequent amendments to such forms, if the
2249 forms are substantially consistent with the provisions of this
2250 chapter. Uniform forms that the commission may adopt to
2251 administer this section include, but are not limited to:
2252 1. Form BR, Uniform Branch Office Registration Form,
2253 adopted October 2005.
2254 2. Form U4, Uniform Application for Securities Industry
2255 Registration or Transfer, adopted October 2005.
2256 3. Form U5, Uniform Termination Notice for Securities
2257 Industry Registration, adopted October 2005.
2258 4. Form ADV, Uniform Application for Investment Adviser
2259 Registration, adopted October 2003.
2260 5. Form ADV-W, Notice of Withdrawal from Registration as an
2261 Investment Adviser, adopted October 2003.
2262 6. Form BD, Uniform Application for Broker-Dealer

2263 Registration, adopted July 1999.
2264 7. Form BDW, Uniform Request for Broker-Dealer Withdrawal,
2265 adopted August 1999.
2266 (b) In lieu of filing with the office the applications
2267 specified in subsection (6), the fees required by subsection
2268 (10), renewals required under subsection (11) and the termination
2269 notices required by subsection (12), the commission may by rule
2270 establish procedures for the deposit of such fees and documents
2271 with the Central Registration Depository or the Investment
2272 Adviser Registration Depository of the National Association of
2273 Securities Dealers, Inc., as developed under contract with the
2274 North American Securities Administrators Association, Inc.~~;~~
2275 ~~provided, however, that such procedures shall provide the office~~
2276 ~~with the information and data as required by this section.~~
2277 (17)(a) A dealer that is located in Canada, does not have
2278 an ~~and has no~~ office or other physical presence in this state,
2279 and has made a notice filing in accordance with this subsection
2280 is exempt from the registration requirements of this section and
2281 may~~, provided the dealer is registered in accordance with this~~
2282 ~~section,~~ effect transactions in securities with or for, or induce
2283 or attempt to induce the purchase or sale of any security by:
2284 1. A person from Canada who is present ~~temporarily resides~~
2285 in this state and with whom the Canadian dealer had a bona fide
2286 dealer-client relationship before the person entered the United
2287 States; or
2288 2. A person from Canada who is present in ~~a resident of~~
2289 this state~~,~~ and whose transactions are in a self-directed, tax-
2290 advantaged ~~tax advantage~~ retirement plan in Canada of which the
2291 person is the holder or contributor.

2292 (b) A notice filing under this subsection must consist of
2293 documents that the commission by rule requires to be filed,
2294 together with a consent to service of process and a nonrefundable
2295 filing fee of $200. The commission may establish by rule
2296 procedures for the deposit of fees and the filing of documents to
2297 be made by electronic means, if such procedures provide the
2298 office with the information and data required by this section.
2299 (c) A Canadian dealer may make a notice filing under this
2300 subsection if such dealer provides to the office:
2301 1. A notice filing in the form that the commission by rule
2302 requires.
2303 2. A consent to service of process.
2304 3. Evidence that the Canadian dealer is registered as a
2305 dealer in the jurisdiction in which its main office is located.
2306 4. Evidence that the Canadian dealer is a member of a self-
2307 regulatory organization or stock exchange in Canada.
2308 (d) The office may issue a permit to evidence the
2309 effectiveness of a notice filing for a Canadian dealer.
2310 (e) A notice filing is effective upon receipt. A notice
2311 filing expires on December 31 of the year in which the filing
2312 becomes effective unless the Canadian dealer has renewed the
2313 filing on or before that date. A Canadian dealer may annually
2314 renew a notice filing by furnishing to the office such
2315 information as the office requires together with a renewal fee of
2316 $200 and the payment of any amount due and owing the office
2317 pursuant to any agreement with the office. Any Canadian dealer
2318 who has not renewed a notice filing by the time a current notice
2319 filing expires may request reinstatement of such notice filing by
2320 filing with the office, on or before January 31 of the year

2321 following the year the notice filing expires, such information as
2322 the commission requires, by rule, together with the payment of
2323 $200 and a late fee of $200. Any reinstatement of a notice filing
2324 granted by the office during the month of January is effective
2325 retroactively to January 1 of that year.
2326 (f) An associated person who represents a Canadian dealer
2327 who has made a notice filing under this subsection is exempt from
2328 the registration requirements of this section and may effect
2329 transactions in securities in this state as permitted for a
2330 dealer under paragraph (a) if such person is registered in the
2331 jurisdiction from which he or she is effecting transactions into
2332 this state.
2333 (g) A Canadian dealer who has made a notice of filing under
2334 this subsection shall:
2335 1. Maintain its provincial or territorial registration and
2336 its membership in a self-regulatory organization or stock
2337 exchange in good standing.
2338 2. Provide the office upon request with its books and
2339 records relating to its business in this state as a dealer.
2340 3. Provide the office upon request notice of each civil,
2341 criminal, or administrative action initiated against the dealer.
2342 4. Disclose to its clients in this state that the dealer
2343 and its associated persons are not subject to the full regulatory
2344 requirements under this chapter.
2345 5. Correct any inaccurate information within 30 days after
2346 the information contained in the notice of filing becomes
2347 inaccurate for any reason.
2348 (h) An associated person representing a Canadian dealer who
2349 has made a notice of filing under this subsection shall:

2350 1. Maintain provincial or territorial registration in good
2351 standing.
2352 2. Provide the office upon request with notice of each
2353 civil, criminal, or administrative action initiated against such
2354 person.
2355 (i) A notice filing may be terminated by filing notice of
2356 such termination with the office. Unless another date is
2357 specified by the Canadian dealer, such notice is effective upon
2358 its receipt by the office.
2359 (j) All fees collected under this subsection become the
2360 revenue of the state, except for those assessments provided for
2361 under s. 517.131(1), until the Securities Guaranty Fund has
2362 satisfied the statutory limits, and these fees are not returnable
2363 if a notice filing is withdrawn.
2364 ~~(b) An associated person who represents a Canadian dealer~~
2365 ~~registered under this section may, provided the agent is~~
2366 ~~registered in accordance with this section, effect transactions~~
2367 ~~in securities in this state as permitted for a dealer, under~~
2368 ~~subsection (a).~~
2369 ~~(c) A Canadian dealer may register under this section~~
2370 ~~provided that such dealer:~~
2371 ~~1. Files an application in the form required by the~~
2372 ~~jurisdiction in which the dealer has a head office.~~
2373 ~~2. Files a consent to service of process.~~
2374 ~~3. Is registered as a dealer in good standing in the~~
2375 ~~jurisdiction from which it is effecting transactions into this~~
2376 ~~state and files evidence of such registration with the office.~~
2377 ~~4. Is a member of a self-regulatory organization or stock~~
2378 ~~exchange in Canada.~~

2379 ~~(d) An associated person who represents a Canadian dealer~~
2380 ~~registered under this section in effecting transactions in~~
2381 ~~securities in this state may register under this section provided~~
2382 ~~that such person:~~
2383 ~~1. Files an application in the form required by the~~
2384 ~~jurisdiction in which the dealer has its head office.~~
2385 ~~2. Is registered in good standing in the jurisdiction from~~
2386 ~~which he or she is effecting transactions into this state and~~
2387 ~~files evidence of such registration with the office.~~
2388 ~~(e) If the office finds that the applicant is of good~~
2389 ~~repute and character and has complied with the provisions of this~~
2390 ~~chapter, the office shall register the applicant.~~
2391 ~~(f) A Canadian dealer registered under this section shall:~~
2392 ~~1. Maintain its provincial or territorial registration and~~
2393 ~~its membership in a self-regulatory organization or stock~~
2394 ~~exchange in good standing.~~
2395 ~~2. Provide the office upon request with its books and~~
2396 ~~records relating to its business in this state as a dealer.~~
2397 ~~3. Provide the office notice of each civil, criminal, or~~
2398 ~~administrative action initiated against the dealer.~~
2399 ~~4. Disclose to its clients in this state that the dealer~~
2400 ~~and its agents are not subject to the full regulatory~~
2401 ~~requirements under this chapter.~~
2402 ~~5. Correct any inaccurate information within 30 days, if~~
2403 ~~the information contained in the application form becomes~~
2404 ~~inaccurate for any reason before or after the dealer becomes~~
2405 ~~registered.~~
2406 ~~(g) An associated person of a Canadian dealer registered~~
2407 ~~under this section shall:~~

2408 ~~1. Maintain provincial or territorial registration in good~~
2409 ~~standing.~~
2410 ~~2. Provide the office with notice of each civil, criminal,~~
2411 ~~or administrative action initiated against such person.~~
2412 ~~3. Through the dealer, correct any inaccurate information~~
2413 ~~within 30 days, if the information contained in the application~~
2414 ~~form becomes inaccurate for any reason before or after the~~
2415 ~~associated person becomes registered.~~
2416 ~~(h) Renewal applications for Canadian dealers and~~
2417 ~~associated persons under this section must be filed before~~
2418 ~~December 31 each year. Every applicant for registration or~~
2419 ~~renewal registration under this section shall pay the fee for~~
2420 ~~dealers and associated persons under this chapter.~~
2421 Section 36. Paragraphs (b) and (e) of subsection (3) of
2422 section 517.131, Florida Statutes, are amended, and subsection
2423 (5) is added to that section, to read:
2424 517.131 Securities Guaranty Fund.--
2425 (3) Any person is eligible to seek recovery from the
2426 Securities Guaranty Fund if:
2427 (b) Such person has made all reasonable searches and
2428 inquiries to ascertain whether the judgment debtor possesses real
2429 or personal property or other assets subject to being sold or
2430 applied in satisfaction of the judgment, and by her or his search
2431 the person has discovered no property or assets; or she or he has
2432 discovered property and assets and has taken all necessary action
2433 and proceedings for the application thereof to the judgment, but
2434 the amount thereby realized was insufficient to satisfy the
2435 judgment. To verify compliance with such condition, the office
2436 may require such person to have a writ of execution be issued

2437 upon such judgment, ~~and~~ may ~~further~~ require a showing that no
2438 personal or real property of the judgment debtor liable to be
2439 levied upon in complete satisfaction of the judgment can be
2440 found, or may require an affidavit from the claimant setting
2441 forth the reasonable searches and inquiries undertaken and the
2442 result of those searches and inquiries.
2443 (e) The office waives compliance with the requirements of
2444 paragraph (a) or paragraph (b). The office may waive such
2445 compliance if the dealer, investment adviser, or associated
2446 person which is the subject of the claim filed with the office is
2447 the subject of any proceeding in which a receiver has been
2448 appointed by a court of competent jurisdiction. If the office
2449 waives such compliance, the office may, upon petition by the
2450 debtor or the court-appointed trustee, examiner, or receiver,
2451 distribute funds from the Securities Guaranty Fund up to the
2452 amount allowed under s. 517.141. Any waiver granted pursuant to
2453 this section shall be considered a judgment for purposes of
2454 complying with the requirements of this section and of s.
2455 517.141.
2456 (5) The commission may by rule specify the procedures for
2457 complying with subsections (2), (3), and (4), including rules for
2458 the form of submission and guidelines for the sufficiency and
2459 content of submissions of notices and claims.
2460 Section 38. Subsections (2) and (5) of section 517.141,
2461 Florida Statutes, are amended, and subsection (11) is added to
2462 that section, to read:
2463 517.141 Payment from the fund.--
2464 (2) Regardless of the number of claims or claimants
2465 involved, payments for claims shall be limited in the aggregate

2466 to $100,000 against any one dealer, investment adviser, or
2467 associated person. If the total claims exceed the aggregate limit
2468 of $100,000, the office shall prorate the payment based upon the
2469 ratio that the person's claim bears to the total claims filed.
2470 (5) If the final judgment that ~~which~~ gave rise to the claim
2471 is overturned in any appeal or in any collateral proceeding, the
2472 claimant shall reimburse the fund all amounts paid from the fund
2473 to the claimant on the claim. If the claimant satisfies the
2474 judgment referred to in s. 517.131(3)(a), the claimant shall
2475 reimburse the fund all amounts paid from the fund to the claimant
2476 on the claim. Such reimbursement shall be paid to the office
2477 within 60 days after the final resolution of the appellate or
2478 collateral proceedings or the satisfaction of judgment, with the
2479 60-day period commencing on the date the final order or decision
2480 is entered in such proceedings.
2481 (11) The commission may by rule specify the procedures for
2482 complying with this section, including rules for the form of
2483 submission and guidelines for the sufficiency and content of
2484 submissions of notices and claims.
2485 Section 38. Subsection (1) of section 517.161, Florida
2486 Statutes, is amended to read:
2487 517.161 Revocation, denial, or suspension of registration
2488 of dealer, investment adviser, associated person, or branch
2489 office.--
2490 (1) Registration under s. 517.12 may be denied or any
2491 registration granted may be revoked, restricted, or suspended by
2492 the office if the office determines that such applicant or
2493 registrant:
2494 (a) Has violated any provision of this chapter or any rule

2495 or order made under this chapter;
2496 (b) Has made a material false statement in the application
2497 for registration;
2498 (c) Has been guilty of a fraudulent act in connection with
2499 rendering investment advice or in connection with any sale of
2500 securities, has been or is engaged or is about to engage in
2501 making fictitious or pretended sales or purchases of any such
2502 securities or in any practice involving the rendering of
2503 investment advice or the sale of securities which is fraudulent
2504 or in violation of the law;
2505 (d) Has made a misrepresentation or false statement to, or
2506 concealed any essential or material fact from, any person in the
2507 rendering of investment advice or the sale of a security to such
2508 person;
2509 (e) Has failed to account to persons interested for all
2510 money and property received;
2511 (f) Has not delivered, after a reasonable time, to persons
2512 entitled thereto securities held or agreed to be delivered by the
2513 dealer, broker, or investment adviser, as and when paid for, and
2514 due to be delivered;
2515 (g) Is rendering investment advice or selling or offering
2516 for sale securities through any associated person not registered
2517 in compliance with the provisions of this chapter;
2518 (h) Has demonstrated unworthiness to transact the business
2519 of dealer, investment adviser, or associated person;
2520 (i) Has exercised management or policy control over or
2521 owned 10 percent or more of the securities of any dealer or
2522 investment adviser that has been declared bankrupt, or had a
2523 trustee appointed under the Securities Investor Protection Act;

2524 or is, in the case of a dealer or investment adviser, insolvent;
2525 (j) Has been convicted of, or has entered a plea of guilty
2526 or nolo contendere to, a crime against the laws of this state or
2527 any other state or of the United States or of any other country
2528 or government which relates to registration as a dealer,
2529 investment adviser, issuer of securities, associated person, or
2530 branch office; which relates to the application for such
2531 registration; or which involves moral turpitude or fraudulent or
2532 dishonest dealing;
2533 (k) Has had a final judgment entered against her or him in
2534 a civil action upon grounds of fraud, embezzlement,
2535 misrepresentation, or deceit;
2536 (l) Is of bad business repute; ~~or~~
2537 (m) Has been the subject of any decision, finding,
2538 injunction, suspension, prohibition, revocation, denial,
2539 judgment, or administrative order by any court of competent
2540 jurisdiction, administrative law judge, or by any state or
2541 federal agency, national securities, commodities, or option
2542 exchange, or national securities, commodities, or option
2543 association, involving a violation of any federal or state
2544 securities or commodities law or any rule or regulation
2545 promulgated thereunder, or any rule or regulation of any national
2546 securities, commodities, or options exchange or national
2547 securities, commodities, or options association, or has been the
2548 subject of any injunction or adverse administrative order by a
2549 state or federal agency regulating banking, insurance, finance or
2550 small loan companies, real estate, mortgage brokers <u>or lenders</u>,
2551 <u>money transmitters,</u> or other related or similar industries. For
2552 purposes of this subsection, the office may not deny registration

2553 to any applicant who has been continuously registered with the
2554 office for 5 years from the entry of such decision, finding,
2555 injunction, suspension, prohibition, revocation, denial,
2556 judgment, or administrative order provided such decision,
2557 finding, injunction, suspension, prohibition, revocation, denial,
2558 judgment, or administrative order has been timely reported to the
2559 office pursuant to the commission's rules; or~~.~~
2560 (n) Made payment to the office for a registration or notice
2561 filing with a check or electronic transmission of funds which is
2562 dishonored by the applicant's, registrant's, or notice filer's
2563 financial institution.
2564 Section 39. Present subsection (18) of section 520.02,
2565 Florida Statutes, is redesignated as subsection (19), and a new
2566 subsection (18) is added to that section, to read:
2567 520.02 Definitions.--In this act, unless the context or
2568 subject matter otherwise requires:
2569 (18) "Control person" means an individual, partnership,
2570 corporation, trust, or other organization that possesses the
2571 power, directly or indirectly, to direct the management or
2572 policies of a company, whether through ownership of securities,
2573 by contract, or otherwise. A person is presumed to control a
2574 company if, with respect to a particular company, that person:
2575 (a) Is a director, general partner, or officer exercising
2576 executive responsibility or having similar status or functions;
2577 (b) Directly or indirectly has the right to vote 10 percent
2578 or more of a class of a voting security or has the power to sell
2579 or direct the sale of 10 percent or more of a class of voting
2580 securities; or
2581 (c) In the case of a partnership, has the right to receive

2582 upon dissolution, or has contributed, 10 percent or more of the
2583 capital.
2584 Section 40. Subsections (2), (3), (4), and (5) of section
2585 520.03, Florida Statutes, are amended to read:
2586 520.03 Licenses.--
2587 (2) An application for a license under this part must be
2588 submitted to the office in such form as the commission may
2589 prescribe by rule. The commission may require each applicant to
2590 provide any information reasonably necessary to determine the
2591 applicant's eligibility for licensure. The applicant shall also
2592 provide information that the office requires concerning any
2593 officer, director, control person, member, partner, or joint
2594 venturer of the applicant or any person having the same or
2595 substantially similar status or performing substantially similar
2596 functions, or any individual who is the ultimate equitable owner
2597 of a 10-percent or greater interest in the applicant. The office
2598 may require information concerning any such applicant or person,
2599 including his or her full name and any other names by which he or
2600 she may have been known, age, social security number, residential
2601 history, qualifications, educational and business history, and
2602 disciplinary and criminal history. If the office determines that
2603 an application should be granted, it shall issue the license for
2604 a period not to exceed 2 years. A nonrefundable application fee
2605 of $175 shall accompany an initial application for the principal
2606 place of business and each application for a branch location of a
2607 retail installment seller who is required to be licensed under
2608 this chapter. An application is considered received for purposes
2609 of s. 120.60 upon receipt of a completed application form as
2610 prescribed by commission rule, a nonrefundable application fee of

2611 $175, and any other fee prescribed by law.
2612 (3) The nonrefundable renewal fee for a motor vehicle
2613 retail installment seller license shall be $175. The commission
2614 shall establish by rule biennial licensure periods and procedures
2615 for renewal of licenses. A license that is not renewed by the end
2616 of the biennium established by the commission shall revert from
2617 active to inactive status. An inactive license may be reactivated
2618 within 6 months after becoming inactive upon filing a completed
2619 reactivation form, payment of the nonrefundable renewal fee, and
2620 payment of a reactivation fee equal to the nonrefundable renewal
2621 fee. A license that is not reactivated within 6 months after
2622 becoming inactive automatically expires.
2623 (4) ~~Each license shall specify the location for which it is~~
2624 ~~issued and must be conspicuously displayed at that location.~~
2625 ~~Prior to relocating a principal place of business or any branch~~
2626 ~~location, the licensee must provide to the office notice of the~~
2627 ~~relocation in a form prescribed by commission rule.~~ A licensee
2628 may not transact business as a motor vehicle retail installment
2629 seller except under the name by which it is licensed. Licenses
2630 issued under this part are not transferable or assignable.
2631 (5) The office may deny an initial application for a
2632 license under this part if the applicant or any officer,
2633 director, control person, member, partner, or joint venturer
2634 ~~person with power to direct the management or policies~~ of the
2635 applicant is the subject of a pending criminal prosecution or
2636 governmental enforcement action, in any jurisdiction, until
2637 conclusion of such criminal prosecution or enforcement action.
2638 Section 41. Subsection (19) is added to section 520.31,
2639 Florida Statutes, to read:

2640 520.31 Definitions.--Unless otherwise clearly indicated by
2641 the context, the following words when used in this act, for the
2642 purposes of this act, shall have the meanings respectively
2643 ascribed to them in this section:
2644 (19) "Control person" means an individual, partnership,
2645 corporation, trust, or other organization that possesses the
2646 power, directly or indirectly, to direct the management or
2647 policies of a company, whether through ownership of securities,
2648 by contract, or otherwise. A person is presumed to control a
2649 company if, with respect to a particular company, that person:
2650 (a) Is a director, general partner, or officer exercising
2651 executive responsibility or having similar status or functions;
2652 (b) Directly or indirectly has the right to vote 10 percent
2653 or more of a class of a voting security or has the power to sell
2654 or direct the sale of 10 percent or more of a class of voting
2655 securities; or
2656 (c) In the case of a partnership, has the right to receive
2657 upon dissolution, or has contributed, 10 percent or more of the
2658 capital.
2659 Section 42. Subsections (2), (3), (4), and (5) of section
2660 520.32, Florida Statutes, are amended to read:
2661 520.32 Licenses.--
2662 (2) An application for a license under this part must be
2663 submitted to the office in such form as the commission may
2664 prescribe by rule. The commission may require each applicant to
2665 provide any information reasonably necessary to determine the
2666 applicant's eligibility for licensure. The applicant shall also
2667 provide information that the office requires concerning any
2668 officer, director, control person, member, partner, or joint

2669 venturer of the applicant or any person having the same or
2670 substantially similar status or performing substantially similar
2671 functions, or any individual who is the ultimate equitable owner
2672 of a 10-percent or greater interest in the applicant. The office
2673 may require information concerning any such applicant or person,
2674 including his or her full name and any other names by which he or
2675 she may have been known, age, social security number, residential
2676 history, qualifications, educational and business history, and
2677 disciplinary and criminal history. If the office determines that
2678 an application should be granted, it shall issue the license for
2679 a period not to exceed 2 years. A nonrefundable application fee
2680 of $175 shall accompany an initial application for the principal
2681 place of business and each application for a branch location of a
2682 retail installment seller. An application is considered received
2683 for purposes of s. 120.60 upon receipt of a completed application
2684 form as prescribed by commission rule, a nonrefundable
2685 application fee of $175, and any other fee prescribed by law.
2686 (3) The nonrefundable renewal fee for a retail seller
2687 license shall be $175. Biennial licensure periods and procedures
2688 for renewal of licenses may also be established by the commission
2689 by rule. A license that is not renewed at the end of the
2690 biennium established by the commission shall revert from active
2691 to inactive status. An inactive license may be reactivated
2692 within 6 months after becoming inactive upon filing a completed
2693 reactivation form, payment of the nonrefundable renewal fee, and
2694 payment of a reactivation fee equal to the nonrefundable renewal
2695 fee. A license that is not reactivated within 6 months after
2696 becoming inactive automatically expires.
2697 (4) ~~Each license must specify the location for which it is~~

2698 ~~issued and must be conspicuously displayed at that location. If a~~
2699 ~~licensee's principal place of business or branch location~~
2700 ~~changes, the licensee shall notify the office and the office~~
2701 ~~shall endorse the change of location without charge.~~ A licensee
2702 may not transact business as a retail installment seller except
2703 under the name by which it is licensed. A license issued under
2704 this part is not transferable or assignable.
2705 (5) The office may deny an initial application for a
2706 license under this part if the applicant or any officer,
2707 director, control person, member, partner, or joint venturer
2708 ~~person with power to direct the management or policies~~ of the
2709 applicant is the subject of a pending criminal prosecution or
2710 governmental enforcement action, in any jurisdiction, until
2711 conclusion of such criminal prosecution or enforcement action.
2712 Section 43. Subsections (2), (3), (4), and (5) of section
2713 520.52, Florida Statutes, are amended to read:
2714 520.52 Licensees.--
2715 (2) An application for a license under this part must be
2716 submitted to the office in such form as the commission may
2717 prescribe by rule. The commission may require each applicant to
2718 provide any information reasonably necessary to determine the
2719 applicant's eligibility for licensure. The applicant shall also
2720 provide information that the office requires concerning any
2721 officer, director, control person, member, partner, or joint
2722 venturer of the applicant or any person having the same or
2723 substantially similar status or performing substantially similar
2724 functions, or any individual who is the ultimate equitable owner
2725 of a 10-percent or greater interest in the applicant. The office
2726 may require information concerning any such applicant or person,

2727 including his or her full name and any other names by which he or
2728 she may have been known, age, social security number, residential
2729 history, qualifications, educational and business history, and
2730 disciplinary and criminal history. If the office determines that
2731 an application should be granted, it shall issue the license for
2732 a period not to exceed 2 years. A nonrefundable application fee
2733 of $175 shall accompany an initial application for the principal
2734 place of business and each branch location of a sales finance
2735 company. An application is considered received for purposes of s.
2736 120.60 upon receipt of a completed application form as prescribed
2737 by commission rule, a nonrefundable application fee of $175, and
2738 any other fee prescribed by law.
2739 (3) The nonrefundable renewal fee for a sales finance
2740 company license shall be $175. Biennial licensure periods and
2741 procedures for renewal of licenses may also be established by the
2742 commission by rule. A license that is not renewed at the end of
2743 the biennium established by the commission shall revert from
2744 active to inactive status. An inactive license may be reactivated
2745 within 6 months after becoming inactive upon filing a completed
2746 reactivation form, payment of the nonrefundable renewal fee, and
2747 payment of a reactivation fee equal to the nonrefundable renewal
2748 fee. A license that is not reactivated within 6 months after
2749 becoming inactive automatically expires.
2750 (4) ~~Each license must specify the location for which it is~~
2751 ~~issued and must be conspicuously displayed at that location. If a~~
2752 ~~licensee's principal place of business or branch location~~
2753 ~~changes, the licensee shall notify the office and the office~~
2754 ~~shall endorse the change of location without charge.~~ A licensee
2755 may not transact business as a sales finance company except under

2756 the name by which it is licensed. A license issued under this
2757 part is not transferable or assignable.
2758 (5) The office may deny an initial application for a
2759 license under this part if the applicant or any officer,
2760 director, control person, member, partner, or joint venturer
2761 ~~person with power to direct the management or policies~~ of the
2762 applicant is the subject of a pending criminal prosecution or
2763 governmental enforcement action, in any jurisdiction, until
2764 conclusion of such criminal prosecution or enforcement action.
2765 Section 44. Subsection (23) is added to section 520.61,
2766 Florida Statutes, to read:
2767 520.61 Definitions.--As used in this act:
2768 (23) "Control person" means an individual, partnership,
2769 corporation, trust, or other organization that possesses the
2770 power, directly or indirectly, to direct the management or
2771 policies of a company, whether through ownership of securities,
2772 by contract, or otherwise. A person is presumed to control a
2773 company if, with respect to a particular company, that person:
2774 (a) Is a director, general partner, or officer exercising
2775 executive responsibility or having similar status or functions;
2776 (b) Directly or indirectly has the right to vote 10 percent
2777 or more of a class of a voting security or has the power to sell
2778 or direct the sale of 10 percent or more of a class of voting
2779 securities; or
2780 (c) In the case of a partnership, has the right to receive
2781 upon dissolution, or has contributed, 10 percent or more of the
2782 capital.
2783 Section 45. Subsections (2), (3), (4), and (5) of section
2784 520.63, Florida Statutes, are amended to read:

2785 520.63 Licensees.--
2786 (2) An application for a license under this part must be
2787 submitted to the office in such form as the commission may
2788 prescribe by rule. The commission may require each applicant to
2789 provide any information reasonably necessary to determine the
2790 applicant's eligibility for licensure. The applicant shall also
2791 provide information that the office requires concerning any
2792 officer, director, control person, member, partner, or joint
2793 venturer of the applicant or any person having the same or
2794 substantially similar status or performing substantially similar
2795 functions, or any individual who is the ultimate equitable owner
2796 of a 10-percent or greater interest in the applicant. The office
2797 may require information concerning any such applicant or person,
2798 including his or her full name and any other names by which he or
2799 she may have been known, age, social security number, residential
2800 history, qualifications, educational and business history, and
2801 disciplinary and criminal history. If the office determines that
2802 an application should be granted, it shall issue the license for
2803 a period not to exceed 2 years. A nonrefundable application fee
2804 of $175 shall accompany an initial application for the principal
2805 place of business and each application for a branch location of a
2806 home improvement finance seller. An application is considered
2807 received for purposes of s. 120.60 upon receipt of a completed
2808 application form as prescribed by commission rule, a
2809 nonrefundable application fee of $175, and any other fee
2810 prescribed by law.
2811 (3) The nonrefundable renewal fee for a home improvement
2812 finance license shall be $175. Biennial licensure periods and
2813 procedures for renewal of licenses may also be established by the

2814 commission by rule. A license that is not renewed at the end of
2815 the biennium established by the commission shall automatically
2816 revert from active to inactive status. An inactive license may be
2817 reactivated within 6 months after becoming inactive upon filing a
2818 completed reactivation form, payment of the nonrefundable renewal
2819 fee, and payment of a reactivation fee equal to the nonrefundable
2820 renewal fee. A license that is not reactivated within 6 months
2821 after becoming inactive automatically expires.
2822 (4) ~~Each license must specify the location for which it is~~
2823 ~~issued and must be conspicuously displayed at that location. If a~~
2824 ~~home improvement finance seller's principal place of business or~~
2825 ~~any branch location changes, the licensee shall notify the office~~
2826 ~~and the office shall endorse the change of location without~~
2827 ~~charge.~~ A licensee may not transact business as a home
2828 improvement finance seller except under the name by which it is
2829 licensed. A license issued under this part is not transferable or
2830 assignable.
2831 (5) The office may deny an initial application for a
2832 license under this part if the applicant or any officer,
2833 director, control person, member, partner, or joint venturer
2834 ~~person with power to direct the management or policies~~ of the
2835 applicant is the subject of a pending criminal prosecution or
2836 governmental enforcement action, in any jurisdiction, until
2837 conclusion of such criminal prosecution or enforcement action.
2838 Section 46. Subsection (5) of section 520.994, Florida
2839 Statutes, is amended to read:
2840 520.994 Powers of office.--
2841 (5) The office shall administer and enforce this chapter.
2842 The commission has authority to adopt rules pursuant to ss.

2843 120.536(1) and 120.54 to implement the provisions of this
2844 chapter. The commission may adopt rules to require ~~allow~~
2845 electronic submission of any form, document, or fee required by
2846 this chapter if such rules reasonably accommodate technological
2847 or financial hardship. The commission may prescribe by rule
2848 requirements and procedures for obtaining an exemption due to a
2849 technological or financial hardship.
2850 Section 47. Subsections (1) and (4) of section 520.995,
2851 Florida Statutes, are amended to read:
2852 520.995 Grounds for disciplinary action.--
2853 (1) The following acts are violations of this chapter and
2854 constitute grounds for the disciplinary actions specified in
2855 subsection (2):
2856 (a) Failure to comply with any provision of this chapter,
2857 any rule or order adopted pursuant to this chapter, or any
2858 written agreement entered into with the office.~~;~~
2859 (b) Fraud, misrepresentation, deceit, or gross negligence
2860 in any home improvement finance transaction or retail installment
2861 transaction, regardless of reliance by or damage to the buyer or
2862 owner.~~;~~
2863 (c) Fraudulent misrepresentation, circumvention, or
2864 concealment of any matter required to be stated or furnished to a
2865 retail buyer or owner pursuant to this chapter, regardless of
2866 reliance by or damage to the buyer or owner.~~;~~
2867 (d) Willful imposition of illegal or excessive charges in
2868 any retail installment transaction or home improvement finance
2869 transaction.~~;~~
2870 (e) False, deceptive, or misleading advertising by a seller
2871 or home improvement finance seller.~~;~~

2872 (f) Failure to maintain, preserve, and keep available for
2873 examination, all books, accounts, or other documents required by
2874 this chapter, by any rule or order adopted pursuant to this
2875 chapter, or by any agreement entered into with the office.~~;~~
2876 (g) Refusal to permit inspection of books and records in an
2877 investigation or examination by the office or refusal to comply
2878 with a subpoena issued by the office.~~;~~
2879 (h) Criminal conduct in the course of a person's business
2880 as a seller, as a home improvement finance seller, or as a sales
2881 finance company.~~; or~~
2882 (i) Failure to timely pay any fee, charge, or fine imposed
2883 or assessed pursuant to this chapter or any rule adopted under
2884 this chapter.
2885 (j) Using the name or logo of a financial institution, as
2886 defined in s. 655.005(1), or its affiliates or subsidiaries when
2887 marketing or soliciting existing or prospective customers if such
2888 marketing materials are used without the written consent of the
2889 financial institution and in a manner that would lead a
2890 reasonable person to believe that the material or solicitation
2891 originated from, was endorsed by, or is related to or the
2892 responsibility of the financial institution or its affiliates or
2893 subsidiaries.
2894 (k) Payment to the office for a license or permit with a
2895 check or electronic transmission of funds which is dishonored by
2896 the applicant's or licensee's financial institution.
2897 (4) It is sufficient cause for the office to take any of
2898 the actions specified in subsection (2) as to any partnership,
2899 corporation, or association, if the office finds grounds for such
2900 action as to any member of the partnership, as to any officer or

2901 director of the corporation or association, or as to any control
2902 person, partner, or joint venturer ~~person with power to direct~~
2903 ~~the management or policies~~ of the partnership, corporation, or
2904 association.
2905 Section 48. Subsection (4) of section 520.997, Florida
2906 Statutes, is amended to read:
2907 520.997 Books, accounts, and records.--
2908 (4) The commission may prescribe by rule the minimum
2909 information to be shown in the books, accounts, documents, and
2910 records of licensees so that such records will enable the office
2911 to determine compliance with ~~the provisions of~~ this chapter. In
2912 addition, the commission may prescribe by rule requirements for
2913 the destruction of books, accounts, records, and documents
2914 retained by the licensee after completion of the time period
2915 specified in subsection (3).
2916 Section 49. Section 520.999, Florida Statutes, is created
2917 to read:
2918 520.999 Requirements of licensees.--
2919 (1) Each licensee under ss. 520.01-520.999 shall report, on
2920 a form prescribed by rule of the commission, any change in the
2921 information contained in any initial application form, or any
2922 amendment thereto, not later than 30 days after the change is
2923 effective.
2924 (2) Each licensee under ss. 520.01-520.999 shall report any
2925 changes in the partners, officers, members, joint venturers,
2926 directors, or control persons of any licensee or changes in the
2927 form of business organization by written amendment in such form
2928 and at such time as the commission specifies by rule.
2929 (a) In any case in which a person or a group of persons,

2930 directly or indirectly or acting by or through one or more
2931 persons, proposes to purchase or acquire a controlling interest
2932 in a licensee, such person or group must submit an initial
2933 application for licensure before such purchase or acquisition at
2934 such time and in such form as the commission prescribes by rule.
2935 (b) As used in subsection, the term "controlling interest"
2936 means possession of the power to direct or cause the direction of
2937 the management or policies of a company whether through ownership
2938 of securities, by contract, or otherwise. Any person who directly
2939 or indirectly has the right to vote 25 percent or more of the
2940 voting securities of a company or is entitled to 25 percent or
2941 more of its profits is presumed to possess a controlling
2942 interest.
2943 (c) Any addition of a partner, officer, member, joint
2944 venturer, director, or control person of the applicant who does
2945 not have a controlling interest and who has not previously
2946 complied with the provisions of ss. 520.03(2), 520.32(2),
2947 520.52(2), and 520.63(2) shall be subject thereto unless required
2948 to file an initial application in accordance with paragraph (a).
2949 If the office determines that the licensee does not continue to
2950 meet licensure requirements, the office may bring administrative
2951 action in accordance with s. 520.995 to enforce the provisions of
2952 this chapter.
2953 (d) The commission shall adopt rules providing for the
2954 waiver of the application required by this subsection if the
2955 person or group of persons proposing to purchase or acquire a
2956 controlling interest in a licensee has previously complied with
2957 the provisions of ss. 520.03(2), 520.32(2), 520.52(2), and
2958 520.63(2) with the same legal entity or is currently licensed

2959 with the office under this chapter.
2960 Section 50. Subsection (5) of section 537.009, Florida
2961 Statutes, is amended to read:
2962 537.009 Recordkeeping; reporting; safekeeping of property.--
2963 (5) The commission may prescribe by rule the books,
2964 accounts, documents, and records, and the minimum information to
2965 be shown in the books, accounts, documents, and records, of
2966 licensees so that such records will enable the office to
2967 determine compliance with the provisions of this act. In
2968 addition, the commission may prescribe by rule requirements for
2969 the destruction of books, accounts, records, and documents
2970 retained by the licensee after completion of the time period
2971 specified in subsection (3).
2972 Section 51. Subsection (3) is added to section 560.105,
2973 Florida Statutes, to read:
2974 560.105 Supervisory powers; rulemaking.--
2975 (3) The commission may adopt rules that require electronic
2976 submission of any forms, documents, or fees required by this code
2977 if such rules reasonably accommodate technological or financial
2978 hardship. The commission may prescribe by rule requirements and
2979 procedures for obtaining an exemption due to a technological or
2980 financial hardship.
2981 Section 52. Paragraph (y) is added to subsection (1) of
2982 section 560.114, Florida Statutes, to read:
2983 560.114 Disciplinary actions.--
2984 (1) The following actions by a money transmitter or money
2985 transmitter-affiliated party are violations of the code and
2986 constitute grounds for the issuance of a cease and desist order,
2987 the issuance of a removal order, the denial of a registration

2988 application or the suspension or revocation of any registration
2989 previously issued pursuant to the code, or the taking of any
2990 other action within the authority of the office pursuant to the
2991 code:
2992 (y) Payment to the office for a license or permit with a
2993 check or electronic transmission of funds which is dishonored by
2994 the applicant's or licensee's financial institution.
2995 Section 53. Subsection (2) of section 560.121, Florida
2996 Statutes, is amended to read:
2997 560.121 Records; limited restrictions upon public access.--
2998 (2) The commission may prescribe by rule the minimum
2999 information that must be shown in the books, accounts, records,
3000 and documents of licensees for purposes of enabling the office to
3001 determine the licensee's compliance with ss. 560.101-560.408. In
3002 addition, the commission may prescribe by rule requirements for
3003 the destruction of books, accounts, records, and documents
3004 retained by the licensee after completion of the time period
3005 specified in this subsection. Examination reports, investigatory
3006 records, applications, and related information compiled by the
3007 office, or photographic copies thereof, shall be retained by the
3008 office for a period of at least 3 years following the date that
3009 the examination or investigation ceases to be active. Application
3010 records, and related information compiled by the office, or
3011 photographic copies thereof, shall be retained by the office for
3012 a period of at least 2 years following the date that the
3013 registration ceases to be active.
3014 Section 54. Section 560.126, Florida Statutes, is amended
3015 to read:
3016 560.126 Significant events; notice required.--

3017 (1) Unless exempted by the office, every money transmitter
3018 must provide the office with a written notice within 30 ~~15~~ days
3019 after the occurrence or knowledge of, whichever period of time is
3020 greater, any of the following events:
3021 (a) ~~(1)~~ The filing of a petition under the United States
3022 Bankruptcy Code for bankruptcy or reorganization by the money
3023 transmitter.
3024 (b) ~~(2)~~ The commencement of any registration suspension or
3025 revocation proceeding, either administrative or judicial, or the
3026 denial of any original registration request or a registration
3027 renewal, by any state, the District of Columbia, any United
3028 States territory, or any foreign country, in which the money
3029 transmitter operates or plans to operate or has registered to
3030 operate.
3031 (c) ~~(3)~~ A felony indictment relating to the money
3032 transmission business involving the money transmitter or a money
3033 transmitter-affiliated party of the money transmitter.
3034 (d) ~~(4)~~ The felony conviction, guilty plea, or plea of nolo
3035 contendere, if the court adjudicates the nolo contendere pleader
3036 guilty, or the adjudication of guilt of a money transmitter or
3037 money transmitter-affiliated party.
3038 (e) ~~(5)~~ The interruption of any corporate surety bond
3039 required by the code.
3040 (f) ~~(6)~~ Any suspected criminal act, as defined by the
3041 commission by rule, perpetrated in this state against a money
3042 transmitter or authorized vendor.
3043
3044 However, a person does not incur liability ~~no liability shall be~~
3045 ~~incurred by any person~~ as a result of making a good-faith ~~good~~

3046 ~~faith~~ effort to fulfill this disclosure requirement.
3047 (2)(a) Each registrant under this code shall report, on a
3048 form prescribed by rule of the commission, any change in the
3049 information contained in any initial application form, or any
3050 amendment thereto, not later than 30 days after the change is
3051 effective.
3052 (b) Each registrant under the code shall report any changes
3053 in the partners, officers, members, joint venturers, directors,
3054 controlling shareholders, or responsible persons of any
3055 registrant or changes in the form of business organization by
3056 written amendment in such form and at such time as the commission
3057 specifies by rule.
3058 1. In any case in which a person or a group of persons,
3059 directly or indirectly or acting by or through one or more
3060 persons, proposes to purchase or acquire a controlling interest
3061 in a licensee, such person or group must submit an initial
3062 application for registration as a money transmitter before such
3063 purchase or acquisition at such time and in such form as the
3064 commission prescribes by rule.
3065 2. As used in this subsection, the term "controlling
3066 interest" means possession of the power to direct or cause the
3067 direction of the management or policies of a company whether
3068 through ownership of securities, by contract, or otherwise. Any
3069 person who directly or indirectly has the right to vote 25
3070 percent or more of the voting securities of a company or is
3071 entitled to 25 percent or more of its profits is presumed to
3072 possess a controlling interest.
3073 3. Any addition of a partner, officer, member, joint
3074 venturer, director, controlling shareholder, or responsible

3075 person of the applicant who does not have a controlling interest
3076 and who has not previously complied with ss. 560.205 and 560.306
3077 shall be subject thereto unless required to file an initial
3078 application in accordance with subparagraph 1. If the office
3079 determines that the registrant does not continue to meet
3080 registration requirements, the office may bring administrative
3081 action in accordance with s. 560.114 to enforce the provisions of
3082 this code.
3083 4. The commission shall adopt rules providing for the
3084 waiver of the application required by this subsection if the
3085 person or group of persons proposing to purchase or acquire a
3086 controlling interest in a registrant has previously complied with
3087 the provisions of ss. 560.205 and 560.306 with the same legal
3088 entity or is currently registered with the office under this
3089 code.
3090 Section 55. Section 560.127, Florida Statutes, is amended
3091 to read:
3092 560.127 Control of a money transmitter.--
3093 ~~(1)~~ A person has control over a money transmitter if:
3094 (1)~~(a)~~ The individual, partnership, corporation, trust, or
3095 other organization possesses the power, directly or indirectly,
3096 to direct the management or policies of a company, whether
3097 through ownership of securities, by contract, or otherwise. A
3098 person is presumed to control a company if, with respect to a
3099 particular company, that person:
3100 (a) Is a director, general partner, or officer exercising
3101 executive responsibility or having similar status or functions;
3102 (b) Directly or indirectly has the right to vote 25 percent
3103 or more of a class of a voting security or has the power to sell

3104 or direct the sale of 25 percent or more of a class of voting
3105 securities; or
3106 (c) In the case of a partnership, has the right to receive
3107 upon dissolution, or has contributed, 25 percent or more of the
3108 capital. ~~The person directly or indirectly or acting through one~~
3109 ~~or more other persons owns, controls, or has power to vote 25~~
3110 ~~percent or more of any class of voting securities of the money~~
3111 ~~transmitter; or~~
3112 (2) ~~(b)~~ The office determines, after notice and opportunity
3113 for hearing, that the person directly or indirectly exercises a
3114 controlling influence over the activities of the money
3115 transmitter.
3116 ~~(2) In any case in which a person or a group of persons,~~
3117 ~~directly or indirectly or acting by or through one or more~~
3118 ~~persons, proposes to purchase or acquire a controlling interest~~
3119 ~~in a money transmitter, and thereby to change the control of that~~
3120 ~~money transmitter, each person or group of persons shall provide~~
3121 ~~written notice to the office.~~
3122 ~~(a) A money transmitter whose stock is traded on an~~
3123 ~~organized stock exchange shall provide the office with written~~
3124 ~~notice within 15 days after knowledge of such change in control.~~
3125 ~~(b) A money transmitter whose stock is not publicly traded~~
3126 ~~shall provide the office with not less than 30 days' prior~~
3127 ~~written notice of such proposed change in control.~~
3128 ~~(3) After a review of the written notification, the office~~
3129 ~~may require the money transmitter to provide additional~~
3130 ~~information relating to other and former addresses, and the~~
3131 ~~reputation, character, responsibility, and business affiliations,~~
3132 ~~of the proposed new owner or each of the proposed new owners of~~

3133 ~~the money transmitter.~~
3134 ~~(a) The office may deny the person or group of persons~~
3135 ~~proposing to purchase, or who have acquired control of, a money~~
3136 ~~transmitter if, after investigation, the office determines that~~
3137 ~~the person or persons are not qualified by reputation, character,~~
3138 ~~experience, or financial responsibility to control or operate the~~
3139 ~~money transmitter in a legal and proper manner and that the~~
3140 ~~interests of the other stockholders, if any, or the interests of~~
3141 ~~the public generally may be jeopardized by the proposed change in~~
3142 ~~ownership, controlling interest, or management.~~
3143 ~~(b) The office may disapprove any person who has been~~
3144 ~~convicted of, or pled guilty or nolo contendere to, a violation~~
3145 ~~of s. 560.123, s. 655.50, chapter 896, or any similar state,~~
3146 ~~federal, or foreign law.~~
3147 Section 56. Section 560.205, Florida Statutes, is amended
3148 to read:
3149 560.205 Qualifications of applicant for registration;
3150 contents.--
3151 (1) To qualify for registration under this part, an
3152 applicant must demonstrate to the office such character and
3153 general fitness as to command the confidence of the public and
3154 warrant the belief that the registered business will be operated
3155 lawfully and fairly. The office may investigate each applicant to
3156 ascertain whether the qualifications and requirements prescribed
3157 by this part have been met. The office's investigation may
3158 include a criminal background investigation of all controlling
3159 shareholders, principals, officers, directors, members, and
3160 responsible persons of a funds transmitter and a payment
3161 instrument seller and all persons designated by a funds

3162 transmitter or payment instrument seller as an authorized vendor.
3163 Each controlling shareholder, principal, officer, director,
3164 member, and responsible person of a funds transmitter or payment
3165 instrument seller, unless the applicant is a publicly traded
3166 corporation as defined by the commission by rule, a subsidiary
3167 thereof, or a subsidiary of a bank or bank holding company
3168 organized and regulated under the laws of any state or the United
3169 States, shall file a complete set of fingerprints. A fingerprint
3170 card submitted to the office must be taken by an authorized law
3171 enforcement agency ~~officer~~. The office shall submit the ~~Such~~
3172 fingerprints ~~must be submitted~~ to the Department of Law
3173 Enforcement for state processing and the Department of Law
3174 Enforcement shall forward the fingerprints to ~~or~~ the Federal
3175 Bureau of Investigation for state and federal processing. The
3176 cost of the fingerprint processing may be borne by the office,
3177 the employer, or the person subject to the background check. The
3178 Department of Law Enforcement shall submit an invoice to the
3179 office for the fingerprints received each month. The office shall
3180 screen the background results to determine if the applicant meets
3181 licensure requirements. The commission may waive by rule the
3182 requirement that applicants file a set of fingerprints or the
3183 requirement that such fingerprints be processed by the Department
3184 of Law Enforcement or the Federal Bureau of Investigation.
3185 (2) Each application for registration must be submitted
3186 under oath to the office on such forms as the commission
3187 prescribes by rule and must be accompanied by a nonrefundable
3188 application fee. Such fee may not exceed $500 for each payment
3189 instrument seller or funds transmitter and $50 for each
3190 authorized vendor or location operating within this state. The

3191 application must contain ~~forms shall set forth~~ such information
3192 as the commission ~~reasonably~~ requires by rule, including, but not
3193 limited to:
3194 (a) The name and address of the applicant, including any
3195 fictitious or trade names used by the applicant in the conduct of
3196 its business.
3197 (b) The history of the applicant's material litigation,
3198 criminal convictions, pleas of nolo contendere, and cases of
3199 adjudication withheld.
3200 (c) A description of the activities conducted by the
3201 applicant, the applicant's history of operations, and the
3202 business activities in which the applicant seeks to engage in
3203 this state.
3204 ~~(d) A list identifying the applicant's proposed authorized~~
3205 ~~vendors in this state, including the location or locations in~~
3206 ~~this state at which the applicant and its authorized vendors~~
3207 ~~propose to conduct registered activities.~~
3208 (d) ~~(e)~~ A sample authorized vendor contract, if applicable.
3209 (e) ~~(f)~~ A sample form of payment instrument, if applicable.
3210 (f) ~~(g)~~ The name and address of the clearing financial
3211 institution or financial institutions through which the
3212 applicant's payment instruments will be drawn or through which
3213 such payment instruments will be payable.
3214 (g) ~~(h)~~ Documents revealing that the net worth and bonding
3215 requirements specified in s. 560.209 have been or will be
3216 fulfilled.
3217 (3) Each application for registration by an applicant that
3218 is a corporation shall contain ~~also set forth~~ such information as
3219 the commission ~~reasonably~~ requires by rule, including, but not

3220 limited to:
3221 (a) The date of the applicant's incorporation and state of
3222 incorporation.
3223 (b) A certificate of good standing from the state or
3224 country in which the applicant was incorporated.
3225 (c) A description of the corporate structure of the
3226 applicant, including the identity of any parent or subsidiary of
3227 the applicant, and the disclosure of whether any parent or
3228 subsidiary is publicly traded on any stock exchange.
3229 (d) The name, social security number, business and
3230 residence addresses, and employment history for the past 5 years
3231 for each executive officer, each director, each controlling
3232 shareholder, and the responsible person who will be in charge of
3233 all the applicant's business activities in this state.
3234 (e) The history of material litigation and criminal
3235 convictions, pleas of nolo contendere, and cases of adjudication
3236 withheld for each ~~executive~~ officer, each director, each
3237 controlling shareholder, and the responsible person who will be
3238 in charge of the applicant's registered activities.
3239 (f) Copies of the applicant's audited financial statements
3240 for the current year and, if available, for the immediately
3241 preceding 2-year period. In cases where the applicant is a wholly
3242 owned subsidiary of another corporation, the parent's
3243 consolidated audited financial statements may be submitted to
3244 satisfy this requirement. An applicant who is not required to
3245 file audited financial statements may satisfy this requirement by
3246 filing unaudited financial statements verified under penalty of
3247 perjury, as provided by the commission by rule.
3248 (g) An applicant who is not required to file audited

3249 financial statements may file copies of the applicant's
3250 unconsolidated, unaudited financial statements for the current
3251 year and, if available, for the immediately preceding 2-year
3252 period.
3253 (h) If the applicant is a publicly traded company, copies
3254 of all filings made by the applicant with the United States
3255 Securities and Exchange Commission, or with a similar regulator
3256 in a country other than the United States, within the year
3257 preceding the date of filing of the application.
3258 (4) Each application for registration submitted to the
3259 office by an applicant that is not a corporation shall contain
3260 ~~also set forth~~ such information as the commission ~~reasonably~~
3261 requires by rule, including, but not limited to:
3262 (a) Evidence that the applicant is registered to do
3263 business in this state.
3264 (b) The name, business and residence addresses, personal
3265 financial statement and employment history for the past 5 years
3266 for each individual having a controlling ownership interest in
3267 the applicant, and each responsible person who will be in charge
3268 of the applicant's registered activities.
3269 (c) The history of material litigation and criminal
3270 convictions, pleas of nolo contendere, and cases of adjudication
3271 withheld for each individual having a controlling ownership
3272 interest in the applicant and each responsible person who will be
3273 in charge of the applicant's registered activities.
3274 (d) Copies of the applicant's audited financial statements
3275 for the current year, and, if available, for the preceding 2
3276 years. An applicant who is not required to file audited financial
3277 statements may satisfy this requirement by filing unaudited

3278 financial statements verified under penalty of perjury, as
3279 provided by the commission by rule.
3280 (5) Each applicant shall designate and maintain an agent in
3281 this state for service of process.
3282 Section 57. Section 560.207, Florida Statutes, is amended
3283 to read:
3284 560.207 Renewal of registration; registration fee.--
3285 (1) Registration may be renewed for a 24-month period or
3286 the remainder of any such period without proration following the
3287 date of its expiration by furnishing such information as the
3288 commission requires by rule, together with the payment of the
3289 fees required under subsections (2), (3), and (4)~~, upon the~~
3290 ~~filing with the office of an application and other statements and~~
3291 ~~documents as may reasonably be required of registrants by the~~
3292 ~~commission~~. ~~However, the registrant must remain qualified for~~
3293 ~~such registration under the provisions of this part.~~
3294 (2) Each renewal of ~~All~~ registration must ~~renewal~~
3295 ~~applications shall~~ be accompanied by a nonrefundable renewal fee
3296 not to exceed $1,000. A registration expires on April 30 of the
3297 year in which the existing registration expires, unless the
3298 registrant has renewed his or her registration on or before that
3299 date. In no event shall a registration be issued for a period in
3300 excess of 24 months. The commission may adopt rules to implement
3301 this section. ~~All renewal applications must be filed on or after~~
3302 ~~January 1 of the year in which the existing registration expires,~~
3303 ~~but before the expiration date of April 30. If the renewal~~
3304 ~~application is filed prior to the expiration date of an existing~~
3305 ~~registration, no late fee shall be paid in connection with such~~
3306 ~~renewal application. If the renewal application is filed within~~

3307 ~~60 calendar days after the expiration date of an existing~~
3308 ~~registration, then, in addition to the $1,000 renewal fee, the~~
3309 ~~renewal application shall be accompanied by a nonrefundable late~~
3310 ~~fee of $500. If the registrant has not filed a renewal~~
3311 ~~application within 60 calendar days after the expiration date of~~
3312 ~~an existing registration, a new application shall be filed with~~
3313 ~~the office pursuant to s. 560.205.~~
3314 (3) In addition to the renewal fee required under
3315 subsection (2), each registrant must pay ~~Every registration~~
3316 ~~renewal application shall also include~~ a 2-year nonrefundable
3317 registration renewal fee of $50 for each authorized vendor or
3318 location operating within this state or, at the option of the
3319 registrant, a total 2-year nonrefundable renewal fee of $20,000
3320 may be paid to renew the registration of all such locations
3321 currently registered at the time of renewal.
3322 (4) A registration may be reinstated only if the renewal
3323 fee and a nonrefundable late fee of $500 are filed within 60
3324 calendar days after the expiration of the existing registration.
3325 The office shall grant a reinstatement of registration if
3326 application is filed during the 60-day period, and the
3327 reinstatement is effective upon receipt of the required fees and
3328 any information that the commission requires by rule. If a
3329 registrant does not file an application for reinstatement of the
3330 registration within the 60 calendar days after expiration of an
3331 existing registration, the registration expires and a new
3332 application must be filed with the office pursuant to s. 560.205.
3333 Section 58. Subsection (1) of section 560.210, Florida
3334 Statutes, is amended to read:
3335 560.210 Permissible investments.--

3336 (1) A registrant shall at all times possess permissible
3337 investments with an aggregate market value calculated in
3338 accordance with United States generally accepted accounting
3339 principles of not less than the aggregate face amount of all
3340 outstanding funds transmissions ~~transmitted~~ and ~~outstanding~~
3341 payment instruments issued or sold by the registrant or an
3342 authorized vendor in the United States.
3343 Section 59. Subsection (2) of section 560.211, Florida
3344 Statutes, is amended to read:
3345 560.211 Records.--
3346 (2) The records required to be maintained by the code may
3347 be maintained by the registrant at any location if~~, provided that~~
3348 the registrant notifies the office in writing of the location of
3349 the records in its application or otherwise by amendment as
3350 prescribed by commission rule. The registrant shall make such
3351 records available to the office for examination and investigation
3352 in this state, as permitted by the code, within 7 days after
3353 receipt of a written request.
3354 Section 60. Section 560.305, Florida Statutes, is amended
3355 to read:
3356 560.305 Application.--Each application for registration
3357 must ~~shall~~ be in writing and under oath to the office, in such
3358 form as the commission prescribes. The application must contain
3359 such information as the commission requires by rule, including,
3360 but not limited to ~~shall include the following~~:
3361 (1) The legal name, social security number, and residence
3362 and business addresses of the applicant if the applicant is a
3363 natural person, or, if the applicant is a partnership,
3364 association, or corporation, the name of every partner, officer,

3365 ~~or~~ director, member, controlling shareholder, or responsible
3366 person thereof.
3367 (2) The location of the principal office of the applicant.
3368 (3) The complete address of any other locations at which
3369 the applicant proposes to engage in such activities since the
3370 provisions of registration apply to each and every operating
3371 location of a registrant.
3372 (4) Such other information as the commission or office
3373 reasonably requires with respect to the applicant or any money
3374 transmitter-affiliated party of the applicant; however, the
3375 commission or office may not require more information than is
3376 specified in part II.
3377 Section 61. Subsections (1) and (4) of section 560.306,
3378 Florida Statutes, are amended to read:
3379 560.306 Standards.--
3380 (1) In order to qualify for registration under this part,
3381 an applicant must demonstrate to the office that he or she has
3382 such character and general fitness as will command the confidence
3383 of the public and warrant the belief that the registered business
3384 will be operated lawfully and fairly. The office may investigate
3385 each applicant to ascertain whether the qualifications and
3386 requirements prescribed by this part have been met. The office's
3387 investigation may include a criminal background investigation of
3388 all controlling shareholders, principals, officers, directors,
3389 members, and responsible persons of a check casher and a foreign
3390 currency exchanger and all persons designated by a foreign
3391 currency exchanger or check casher as an authorized vendor. Each
3392 controlling shareholder, principal, officer, director, member,
3393 and responsible person of a check casher or foreign currency

3394 exchanger, unless the applicant is a publicly traded corporation
3395 as defined by the commission by rule, a subsidiary thereof, or a
3396 subsidiary of a bank or bank holding company organized and
3397 regulated under the laws of any state or the United States, shall
3398 file a complete set of fingerprints. A fingerprint card submitted
3399 to the office must be taken by an authorized law enforcement
3400 agency ~~officer~~. The office shall submit the ~~Such~~ fingerprints
3401 ~~must be submitted~~ to the Department of Law Enforcement for state
3402 processing and the Department of Law Enforcement shall forward
3403 the fingerprints to ~~or~~ the Federal Bureau of Investigation for
3404 ~~state and~~ federal processing. The cost for the fingerprint
3405 processing may be borne by the office, the employer, or the
3406 person subject to the background check. The Department of Law
3407 Enforcement shall submit an invoice to the office for the
3408 fingerprints received each month. The office shall screen the
3409 background results to determine if the applicant meets licensure
3410 requirements. The commission may waive by rule the requirement
3411 that applicants file a set of fingerprints or the requirement
3412 that such fingerprints be processed by the Department of Law
3413 Enforcement or the Federal Bureau of Investigation.
3414 (4) Each registration application and renewal application
3415 must specify the location at which the applicant proposes to
3416 establish its principal place of business and any other location,
3417 including authorized vendors operating in this state. The
3418 registrant shall notify the office of any changes to any such
3419 locations. ~~Any registrant may satisfy this requirement by~~
3420 ~~providing the office with a list of such locations, including all~~
3421 ~~authorized vendors operating in this state, not less than~~
3422 ~~annually.~~ A registrant may not transact business as a check

3423 casher or a foreign currency exchanger except pursuant to the
3424 name under which it is registered.
3425 Section 62. Section 560.308, Florida Statutes, is amended
3426 to read:
3427 560.308 Registration terms; renewal; renewal fees.--
3428 (1) Registration may be renewed for a 24-month period, or
3429 the remainder of any such period without proration, following the
3430 date of its expiration by furnishing such information as the
3431 commission requires by rule, together with the payment of the
3432 fees required under subsections (2), (3), and (4). Registration
3433 pursuant to this part shall remain effective through the
3434 remainder of the second calendar year following its date of
3435 issuance unless during such calendar year the registration is
3436 surrendered, suspended, or revoked.
3437 (2) Each application for renewal of registration must be
3438 accompanied by ~~The office shall renew registration upon receipt~~
3439 ~~of a completed renewal form and payment of~~ a nonrefundable
3440 renewal fee not to exceed $500. A registration expires on
3441 December 31 of the year in which the existing registration
3442 expires, unless the registrant has renewed his or her
3443 registration on or before that date. ~~The completed renewal form~~
3444 ~~and payment of the renewal fee shall occur on or after June 1 of~~
3445 ~~the year in which the existing registration expires.~~
3446 (3) In addition to the renewal fee required by subsection
3447 (2), each registrant must pay a 2-year nonrefundable registration
3448 renewal fee of $50 for each authorized vendor or location
3449 operating within this state or, at the option of the registrant,
3450 a total 2-year nonrefundable renewal fee of $20,000 may be paid
3451 to renew the registration of all such locations currently

3452 registered at the time of renewal.
3453 (4) ~~Registration that is not renewed on or before the~~
3454 ~~expiration date of the registration period automatically expires.~~
3455 A renewal ~~application and~~ fee~~,~~ and a nonrefundable late fee of
3456 $250~~,~~ must be filed within 60 calendar days after the expiration
3457 of an existing registration in order for the registration to be
3458 reinstated. The office shall grant a reinstatement of
3459 registration if application is filed during the 60-day period,
3460 and the reinstatement is effective upon receipt of the required
3461 fees and any information that the commission requires by rule. If
3462 the registrant has not filed an ~~a renewal~~ application within 60
3463 calendar days after the expiration date of an existing
3464 registration, the registration expires and a new application must
3465 be filed with the office pursuant to s. 560.307.
3466 Section 63. Subsection (2) of section 560.310, Florida
3467 Statutes, is amended to read:
3468 560.310 Records of check cashers and foreign currency
3469 exchangers.--
3470 (2) The records required to be maintained by the code may
3471 be maintained by the registrant at any location if~~, provided that~~
3472 the registrant notifies the office, in writing, of the location
3473 of the records in its application or otherwise by amendment as
3474 prescribed by commission rule. The registrant shall make such
3475 records available to the office for examination and investigation
3476 in this state, as permitted by the code, within 7 days after
3477 receipt of a written request.
3478 Section 64. Subsections (2) and (4) of section 560.403,
3479 Florida Statutes, are amended to read:
3480 560.403 Requirements of registration; declaration of

3481 intent.--
3482 (2) A registrant under this part shall renew his or her
3483 intent to engage in the business of deferred presentment
3484 transactions or to act as a deferred presentment provider upon
3485 renewing his or her registration under part II or part III and
3486 shall do so by indicating his or her intent ~~on the renewal form~~
3487 ~~and~~ by submitting a nonrefundable deferred presentment provider
3488 renewal fee of $1,000, in addition to any fees required for
3489 renewal of registration under part II or part III.
3490 (4) The notice of intent of a registrant under this part
3491 who fails to timely renew his or her intent to engage in the
3492 business of deferred presentment transactions or to act as a
3493 deferred presentment provider on or before the expiration date of
3494 the registration period automatically expires. A renewal
3495 ~~declaration of intent and~~ fee~~,~~ and a nonrefundable late fee of
3496 $500~~,~~ must be filed within 60 calendar days after the expiration
3497 of an existing registration in order for the declaration of
3498 intent to be reinstated. The office shall grant a reinstatement
3499 of registration if application is filed during the 60-day period,
3500 and the reinstatement is effective upon receipt of the required
3501 fees and any information that the commission requires by rule. If
3502 the registrant has not filed a reinstatement of a renewal
3503 declaration of intent within 60 calendar days after the
3504 expiration date of an existing registration, the notice of intent
3505 expires and a new declaration of intent must be filed with the
3506 office.
3507 Section 65. Section 655.935, Florida Statutes, is amended
3508 to read:
3509 655.935 Search procedure on death of lessee.--If

3510 satisfactory proof of the death of the lessee is presented, a
3511 lessor shall permit the person named in a court order for the
3512 purpose, or if no order has been served upon the lessor, the
3513 spouse, a parent, an adult descendant, or a person named as a
3514 personal representative in a copy of a purported will produced by
3515 such person, to open and examine the contents of a safe-deposit
3516 box leased or co-leased by a decedent, or any documents delivered
3517 by a decedent for safekeeping, in the presence of an officer of
3518 the lessor; and the lessor, if so requested by such person, shall
3519 deliver:
3520 (1) Any writing purporting to be a will of the decedent, to
3521 the court having probate jurisdiction in the county in which the
3522 financial institution is located;
3523 (2) Any writing purporting to be a deed to a burial plot or
3524 to give burial instructions, to the person making the request for
3525 a search; and
3526 (3) Any document purporting to be an insurance policy on
3527 the life of the decedent, to the beneficiary named therein.
3528
3529 No other contents may be removed pursuant to this section and
3530 access granted pursuant to this section shall not be considered
3531 the initial opening of the safe-deposit box pursuant to s.
3532 733.6065 by a personal representative appointed by a court in
3533 this state.
3534 Section 66. Section 655.936, Florida Statutes, is amended
3535 to read:
3536 655.936 Delivery of safe-deposit box contents or property
3537 held in safekeeping to personal representative.--
3538 (1) Subject to the provisions of subsection (3), the lessor

3539 shall immediately deliver to a ~~resident~~ personal representative
3540 appointed by a court in this state, upon presentation of a
3541 certified copy of his or her letters of authority, all property
3542 deposited with it by the decedent for safekeeping, and shall
3543 grant the ~~resident~~ personal representative access to any safe-
3544 deposit box in the decedent's name and permit him or her to
3545 remove from such box any part or all of the contents thereof.
3546 (2) If a ~~foreign~~ personal representative of a deceased
3547 lessee has been appointed by a court of any other state, a lessor
3548 may, at its discretion, after 3 months from the issuance to such
3549 ~~foreign~~ personal representative of his or her letters of
3550 authority, deliver to such ~~foreign~~ personal representative all
3551 properties deposited with it for safekeeping and the contents of
3552 any safe-deposit box in the name of the decedent if at such time
3553 the lessor has not received written notice of the appointment of
3554 a personal representative in this state, and such delivery is a
3555 valid discharge of the lessor for all property or contents so
3556 delivered. A ~~Such foreign~~ personal representative appointed by a
3557 court of any other state shall furnish the lessor with an
3558 affidavit setting forth facts showing the domicile of the
3559 deceased lessee to be other than this state and stating that
3560 there are no unpaid creditors of the deceased lessee in this
3561 state, together with a certified copy of his or her letters of
3562 authority. A lessor making delivery pursuant to this subsection
3563 shall maintain in its files a receipt executed by such ~~foreign~~
3564 personal representative which itemizes in detail all property so
3565 delivered.
3566 (3) Notwithstanding the provisions of subsection (1), after
3567 the death of a lessee of a safe-deposit box, the lessor shall

3568 permit the initial opening of the safe-deposit box and the
3569 removal of the contents of the safe-deposit box in accordance
3570 with s. 733.6065.
3571 (4) A lessor is not liable for damages or penalty by reason
3572 of any delivery made pursuant to this section.
3573 Section 67. Section 655.937, Florida Statutes, is amended
3574 to read:
3575 655.937 Access to safe-deposit boxes leased in two or more
3576 names.--
3577 (1) Unless ~~When~~ specifically provided in the lease or
3578 rental agreement to the contrary, if ~~covering~~ a safe-deposit box
3579 is ~~heretofore or hereafter~~ rented or leased in the names of two
3580 or more lessees, ~~that~~ access to the safe-deposit box will be
3581 granted to either lessee, or to ~~either or the survivor, access to~~
3582 ~~the safe deposit box shall be granted to~~:
3583 (a) Either or any of such lessees, regardless of whether or
3584 not the other lessee or lessees or any of them are living or
3585 competent.~~; or~~
3586 (b) Subject to s. 655.933, those persons named in s.
3587 655.933.
3588 (c) Subject to s. 655.935, those persons named in s.
3589 655.935.
3590 (d)~~(b)~~ Subject to s. 773.6065, the personal representative
3591 of the estate of either or any of such lessees who is deceased,
3592 or the guardian of the property of either or any of such lessees
3593 who is incapacitated.
3594 (2) In all cases described in subsection (1),~~; and, in~~
3595 ~~either such case, the provisions of s. 655.933 apply, and~~ the
3596 signature on the safe-deposit entry or access record, ~~(~~or the

3597 receipt or acquittance, in the case of property or documents
3598 otherwise held for safekeeping,~~)~~ is a valid and sufficient
3599 release and discharge to the lessor for granting access to such
3600 safe-deposit box or for the delivery of such property or
3601 documents otherwise held for safekeeping.
3602 (3) ~~(2)~~ A lessor may not be held liable for damages or
3603 penalty by reason of any access granted or delivery made pursuant
3604 to this section.
3605 (4) The right of access by a co-lessee is separate from the
3606 rights and responsibilities of other persons who may be granted
3607 access to a safe-deposit box after the death or incapacity of
3608 another co-lessee and such right of access is not subject to the
3609 provisions of s. 655.935 or s. 733.6065 or other requirements
3610 imposed upon personal representatives, guardians, or other
3611 fiduciaries.
3612 (5) After the death of a co-lessee, the surviving co-lessee
3613 or any other person who is granted access to the safe-deposit box
3614 pursuant to this section may make a written inventory of the box,
3615 which must be conducted by the person making the request in the
3616 presence of one other person as specified in this section. Each
3617 person present shall verify the contents of the box by signing a
3618 copy of the inventory under penalty of perjury.
3619 (a) If the person making the written inventory is the
3620 surviving co-lessee, the other person may be any other person
3621 granted access pursuant to this section, an employee of the
3622 institution where the box is located, or an attorney licensed in
3623 this state.
3624 (b) If the person making the written inventory is not a
3625 surviving co-lessee, the other person may be a surviving co-

3626 lessee, an employee of the institution where the box is located,
3627 or an attorney licensed in this state.
3628 Section 68. Section 733.6065, Florida Statutes, is amended
3629 to read:
3630 733.6065 Opening safe-deposit box.--
3631 (1) Subject to the provisions of s. 655.936(2), the initial
3632 opening of a ~~the decedent's~~ safe-deposit box that is leased or
3633 co-leased by the decedent shall be conducted in the presence of
3634 any two of the following persons: an employee of the institution
3635 where the box is located, the personal representative, or the
3636 personal representative's attorney of record. Each person who is
3637 present must verify the contents of the box by signing a copy of
3638 the inventory under penalties of perjury. The personal
3639 representative shall file the safe-deposit box inventory,
3640 together with a copy of the box entry record from a date which is
3641 6 months prior to the date of death to the date of inventory,
3642 with the court within 10 days after the box is opened. Unless
3643 otherwise ordered by the court, this inventory and the attached
3644 box entry record is subject to inspection only by persons
3645 entitled to inspect an inventory under s. 733.604(1). The
3646 personal representative may remove the contents of the box.
3647 (2) The right to open and examine the contents of a safe-
3648 deposit box leased by a decedent, or any documents delivered by a
3649 decedent for safekeeping, and to receive items as provided for in
3650 s. 655.935 are separate from ~~in addition to~~ the rights provided
3651 for in subsection (1).
3652 Section 69. For the 2006-2007 fiscal year, the recurring
3653 sum of $700,515 is appropriated from the Regulatory Trust Fund to
3654 the Office of Financial Regulation for the purpose of

3655 implementing the provisions of s. 494.0033(2)(b), Florida
3656 Statutes, for third-party administration of the mortgage broker
3657 test.
3658 Section 70. This act shall take effect October 1, 2006.
3659

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB EDTB 06-04 Registration & Protection of Trademarks Act
SPONSOR(S): Economic Development, Trade & Banking Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Economic Development, Trade & Banking Committee		Carlson	Carlson MWC
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

Florida's trademark law[1] was enacted in 1967.[2] The law is based on the International Trademark Association's ("INTA") 1964 Model State Trademark Bill ("MSTB"), as amended and updated from time to time.

This bill is based upon the MSTB with input from the Intellectual Property Committee of the Business Law Section of the Florida Bar and the Department of State, Division of Corporations. The bill modernizes and harmonizes Florida's trademark law consistent with federal law and the revised MSTB where appropriate.

In particular, the bill:

- Provides a popular name;
- Clarifies definitions consistent with federal law;
- Creates an application review process and provides a right to administrative hearing for affected parties;
- Reduces the duration of a registered mark from 10 to 5 years;
- Allows a person to file a change of name with the Department of State and clarifies that security interests in a mark may be created and perfected under the Uniform Commercial Code;
- Conforms the Florida classification system for goods and services to the International Trademark Classification System;
- Authorizes an award of attorney's fees to a prevailing party according to the circumstances of a case;
- Revises provisions allowing the owner of a famous mark to prevent the dilution of the mark by enjoining the use of the mark by another person or seek additional remedies in the case of willful use of the mark by another person; and
- Locates all fees applicable to trademark registrations and related activities in one section of law.

The bill appears not to have a fiscal impact. See **Part II, Fiscal Analysis and Economic Impact Statement**.

The bill has an effective date of January 1, 2007.

[1] ss. 495.011-495.181, F.S.
[2] s. 1, ch. 67-58, L.O.F.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Background

Florida's trademark law[3] was enacted in 1967.[4] The law is based on the International Trademark Association's ("INTA") 1964 Model State Trademark Bill ("MSTB"). The law was last amended substantively in 1990, when the Legislature added a name reservation provision to the law.[5]

In September 1992, INTA's Board of Directors approved a proposal revising the 1964 MSTB to reflect what the organization felt were the "current needs of intrastate and regional commerce while harmonizing state trademark practices with recent changes in federal trademark law." INTA subsequently amended the dilution provision of the MSTB to make it consistent with the Federal Trademark Dilution Act of 1996. INTA reports that the MSTB has been adopted in 26 states.

In early 2005, Senator Campbell and Representative Galvano introduced SB 678 and HB 845, which incorporated the MSTB in most respects. On March 9, 2005, a subcommittee of the Florida Bar Business Law Section, Intellectual Property Law Committee provided Senator Campbell and Representative Galvano with a Technical Input Memorandum, highlighting many issues that the committee felt warranted attention before adopting the bills as law. This bill is based on federal law, the revised MSTB, the comments contained in the Technical Input Memorandum and input from the Department of State, Division of Corporations.

Effect of Proposed Changes

Popular Name The bill titles chapter 495 as the "Registration and Protection of Trademarks Act."

Definitions The bill revises many of the definitions in the present statute to conform to the definitions contained in the Federal Trademark Act (the "Lanham Act").[6] In contrast to the MSTB, which does not provide for the protection of collective and certification marks, the proposed bill retains the definitions for such marks. The bill also follows the federal standard for determining abandonment, namely nonuse for three consecutive years as opposed to two years, as provided for in the MSTB. The bill creates or substantially revises the following terms:

- The bill defines "Abandoned" as applying to a mark when its use has been discontinued with intent not to resume such use and when any when any course of conduct of the owner cause the mark to lose its significance as a mark. The bill provides that intent may be inferred from circumstances. It also provides that nonuse for three consecutive years is prima facie evidence of abandonment.

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[3] ss. 495.011-495.181, F.S.
[4] s. 1, ch. 67-58, L.O.F.
[5] s. 3, ch. 90-220, L.O.F.
[6] 15 U.S.C. ss. 1051 et seq.

- The bill defines "Department" to mean the Department of State.
- The bill defines "Dilution" to mean the lessening of the capacity of a mark to identify and distinguish goods or services, regardless of the presence or the absence of: (a) competition between the owner of the mark and other parties and (b) likelihood of confusion, mistake or deception.
- The bill defines the term "Mark" to mean any trademark, service mark, certification mark, or collective mark entitled to registration under ch. 495, whether or not registered.
- The bill clarifies that the term "Person" to include a juristic person, such as a firm, partnership, corporation, union, association, or other entity capable of suing and being sued in a court of law, as well as a natural person.
- The bill defines the term "Service mark" to mean any word, name, symbol, or device, or any combination thereof, used by a person to identify and distinguish the services of such person, including a unique service, from the services of others, and to indicate the source of the services, even if that source is unknown. It provides that titles, character names and other distinctive features of radio or television programs may be registered as service marks notwithstanding that the person or the programs may advertise the goods of the sponsor.
- The bill defines the term "Trade name" to mean any name used by a person to identify a business or vocation of such person.
- The bill defines the term "Trademark" to mean any word, name, symbol, or device, or any combination thereof, used by a person to identify and distinguish the goods of such person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown.

Registrability The bill revises the registrability provisions of the statute to be more consistent with the Lanham Act. It includes among the marks that may not be registered those that consist of or comprises a name, signature or portrait identifying a particular living individual, except by his or her written consent, and includes the name, signature or portrait of a deceased President of the United States during the lifetime of his widow or her widower, if any, except by the written consent of the widow or widower. It clarifies that the exclusion from registration for marks used on or in connection with the goods of the applicant applies when the mark is merely descriptive or deceptively misdescriptive; primarily geographically descriptive or misdescriptive; or comprises a matter that is functional. It also excludes marks that are primarily geographically misdescriptive of goods or that are functional from the exemption from the exclusion from registration for marks that have become distinctive of goods or services.

Reservation The bill deletes the name reservation provision contained in the current statute. This provision was an attempt to provide protection similar to the protection afforded under the federal intent-to-use law, except that the state provision did not offer substantive rights. As a result, certain practitioners feel that the provision may create more of a burden than a benefit, and accordingly the act omits it.

Application for Registration The bill clarifies that an application for registration of a mark must be filed with the department in a manner and form complying with the requirements of the department. It also clarifies that if the applicant is a business entity, it must identify the place of incorporation or organization. It requires that the applicant state that it is the owner of the mark, that the mark is in use, and that to the best of the applicant's knowledge, no other person except a related company has registered the mark in Florida or that has a right to use an identical mark or one that, as applied to the goods or services of another person, would be likely to cause confusion, mistake or to deceive. The bill authorizes the department to demand a drawing of a collective mark, and requires an applicant to provide three specimens of the mark as actually used.

Filing of Applications The bill creates a process for review of applications by the department and allows for amendments to be made to applications, the disclaimer of unregistrable components of a mark by an applicant, and for a three month period in which an applicant who's application has been denied to reply to the department or amend its application. It allows the department to extend this period of time

for good cause shown. It provides a right to an administrative hearing under ss. 120.569 and 120.57, F.S., for applicants whose applications have been denied by the department. Finally, it provides that the department will review applications in the order of receipt.

Use By Related Companies The bill revises the provision of the statute regarding use of a mark by related companies to be consistent with Section 5 of the Lanham Act, 15 U.S.C. s. 1055. The bill provides that first use of a mark inures to the benefit of the registrant or applicant for registration if the registrant or applicant controls the first use of the mark by another person.

Certificates of Registration The bill makes conforming changes regarding the identification of a business entity and requires a description of the goods or services to be shown on a certificate. It also deletes the provision applicable to the name reservation section, which is repealed.

Duration and Renewal Consistent with the MSTB, the bill shortens the renewal period of a registration from 10 years to 5 years. The purpose of this change is to "reduce the number of 'deadwood' registrations." It also clarifies that the application for registration must be in a manner and form complying with the requirements of the department. It allows a registration in effect on January 1, 2007, to remain in effect for the unexpired term and requires that any renewal of such a registration be applied for and the fee paid for within six months of the expiration of the registration. It also requires a renewal application to include a verified statement that the mark is still in use in Florida and include a specimen showing actual use.

Assignments; Change of Name; Security Interests The bill provides that a photocopy of an assignment will be accepted for recording if certified by any of the parties to the assignment or their successors as being a true and correct copy. It allows a registrant or applicant to record a certificate of change of name with the department upon payment of a fee of $50.00 and provides that the failure to record a name change will not affect a person's substantive rights in the mark or registration. It also provides that acknowledgement will be prima facie evidence of the execution of a document and when recorded, the record will be prima facie evidence of execution. Finally, the bill clarifies that security interests in a mark shall be created and perfected according to chapter 679, Florida Statutes, the Uniform Commercial Code.

Records The bill requires the department to keep for public inspection the assignment and change of name records filed with it under s. 495.181, F.S.

Cancellation The bill makes technical changes to the language of s. 495.101, F.S., regarding the basis for cancellation of a registration consistent with the Lanham Act. It removes the definition of "abandoned" to conform with the revised definition in s. 495.011, F.S. It requires the department to cancel a mark that has become the generic name for goods or services, or a portion thereof, for which the mark has been registered. It also clarifies that a registrant may use a certification mark in advertising or promoting recognition of the certification program or of goods or services meeting the certification standards of the registrant even if the mark is cancelled.

Classification The bill expressly adopts the updated International Trademark Classification System. It also adopts the United States Patent and Trademark Office's system for classifying certification and collective membership marks.

Infringement The bill conforms the infringement provisions of the law to the Lanham Act and clarifies that the basis for infringement is use of a mark or an imitation or copy of a mark, without the consent of the registrant, in a manner that is likely to cause confusion, to cause mistake or to deceive.

Remedies The bill adds a prevailing party attorney's fee provision which would give the court discretion to award attorney's fees to the prevailing party "according to the circumstances of the case."

Forum for Actions Regarding Registrations The bill creates a new provision specifying the venue for cancellation actions in any court of competent jurisdiction in Florida and clarifying that the Department of State cannot be made a party to such actions. This provision is intended to clear up confusion among applicants and practitioners concerning the procedure in cancellation proceedings.

Dilution The bill creates a new standard for actions seeking to prevent the dilution of a registered mark. It allows the owner of a mark that is "famous" in the state to seek to enjoin or obtain other relief against a person's commercial use of a mark or trade name if such use begins after the mark has become famous and is likely to cause dilution of the mark. The bill sets, without limitation, some criteria that a court may use in determining whether a mark has become distinctive and famous, which include:

- The degree of inherent or acquired distinctiveness of the mark in Florida;
- The duration and extent of use of the mark in connection with the goods and services with which the mark is used;
- The duration and extent of advertising and publicity of the mark in Florida;
- The geographical extent of the trading area in which the mark is used;
- The channels of trade for the goods or services with which the mark is used;
- The degree of recognition of the mark in the trading areas and channels of trade in this state used by the mark's owner and the person against whom the injunction is sought;
- The nature and extent of the use of the same or similar mark by third parties; and
- Whether the mark is subject to a state registration in Florida or federal registration under a federal trademark act.

The bill limits relief to an injunction unless the person against whom the injunction is sought willfully intended to trade on the owner's reputation or to cause dilution of the famous mark. In the case where willful intent is proven and the affected mark is registered in Florida, the owner of the mark will be entitled to damages and attorney's fees as provided in s. 495.141, F.S.

Effective Date; Repeal of Prior Acts The bill would expressly repeal ss. 506.06 – 506.13, F.S., the remaining provisions of Florida's Stamped or Marked Containers and Baskets Law on the effective date of the law, January 1, 2007, and provides that the law will not affect actions or proceedings pending on that date.

Construction of chapter The bill notes that since the intent of the chapter is to provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection, construction given the federal act should be examined as persuasive authority for interpreting and construing this chapter.

Fees The bill locates all applicable trademark filing fees in one section. Such fees would remain at their current level. The fees are:

- Application filing fee: $87.50 per class.
- Renewal application fee: $87.50 per class.
- Assignment filing fee: $50.00 per class.
- Certificate of name change filing fee: $50.00.
- Voluntary cancellation filing fee: $50.00.
- Certificate of registration under seal: $8.75.
- Certified copy of application file: $52.50.

C. SECTION DIRECTORY:

Section 1. Creates s. 495.001, F.S.; providing a popular name.
Section 2. Amends s. 495.011, F.S.; providing definitions.
Section 3. Amends s. 495.021, F.S.; relating to the registrability of a mark.
Section 4. Repeals s. 495.027, F.S.; relating to the reservation of a mark.

Section 5. Amends s. 495.031, F.S.; relating to applications for registration.
Section 6. Creates s. 495.035, F.S.; providing for the filing of applications for registration.
Section 7. Amends s. 495.041, F.S.; relating to use of a mark by related companies.
Section 8. Amends s. 495.061, F.S.; relating to certificates of registration.
Section 9. Amends s. 495.071, F.S.; relating to the duration of a registered mark and renewal.
Section 10. Amends s. 495.081, F.S.; relating to assignments, changes of name and security interests.
Section 11. Amends s. 495.091, F.S.; relating to records retention by the Department.
Section 12. Amends s. 495.101, F.S.; relating to the cancellation of a mark.
Section 13. Amends s. 495.111, F.S.; relating to the classification of goods and services.
Section 14. Amends s. 495.131, F.S.; relating to liability for the infringement of a registered mark.
Section 15. Amends s. 495.141, F.S.; providing remedies for violation of the trademark law.
Section 16. Creates s. 495.145, F.S.; providing a forum for actions regarding registrations.
Section 17. Amends s. 495.151, F.S.; relating to the dilution of a mark.
Section 18. Amends s. 495.161, F.S.; relating to common-law rights.
Section 19. Amends s. 495.171, F.S.; relating to the effective date of the act and repeal of conflicting provisions.
Section 20. Amends s. 495.181, F.S.; providing for construction of the trademark law consistent with the federal trademark law.
Section 21. Creates s. 495.191, F.S.; providing for fees relating to applications and other documents.
Section 22. Repeals ss. 506.06-506.13, F.S.
Section 23. Provides an effective date of January 1, 2007.

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:

According to the Department of State, Division of Corporations, which oversees the trademark law, the primary effect of the bill will be to require approximately 500 persons or entities to pay the $50 fee each year for renewal of a registered mark, roughly doubling the number of renewal applications because of the shortened term of registration. However, the experience of the Division is that most marks have a life span of approximately three years, so the fiscal impact of the renewals required by the shortened term of registration will be insignificant.

The Division also reports that records maintenance will be significantly improved, since records will be purged on a five-year cycle, not a ten-year cycle. This will result in more up-to-date records in the trademark and service mark database, benefiting consumers who search it.

The bill also maintains fees applicable to trademark registrations and related activities at their current level.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not require a municipality or county to expend funds or to take any action requiring the expenditure of funds. The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate. The bill does not reduce the percentage of state tax shared with municipalities or counties.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

1 A bill to be entitled
2 An act relating to trademarks; creating s. 495.001, F.S.;
3 providing a short title; amending s. 495.011, F.S.;
4 providing definitions; amending s. 495.021, F.S.;
5 precluding registration of certain marks; repealing s.
6 495.027, F.S., relating to reservation of a mark; amending
7 s. 495.031, F.S.; providing requirements for information
8 to be contained in an application for registration of a
9 mark; authorizing the Department of State to require
10 certain information in an application; requiring that the
11 application be signed and verified by any of certain
12 persons; requiring that the application be accompanied by
13 three specimens showing the mark; requiring that the
14 application be accompanied by a fee; creating s. 495.035,
15 F.S.; providing filing guidelines for applications;
16 providing for disclaimers of unregistrable components;
17 providing for amendment and judicial review; providing for
18 priority of registrations; amending s. 495.041, F.S.;
19 providing that first use shall inure to the benefit of the
20 registrant or applicant under certain circumstances;
21 amending s. 495.061, F.S.; providing for the issuance of a
22 certificate of registration by the department; removing a
23 provision relating to reservation of a mark; amending s.
24 495.071, F.S.; providing guidelines for the renewal of
25 marks; revising duration of effectiveness of a
26 registration; amending s. 495.081, F.S.; providing for the
27 assignability of marks; authorizing a photocopy of an
28 assignment to be acceptable for recording; providing for
29 change of name certificates for registrants; authorizing
30 recordation of certain instruments; providing

31 acknowledgment of recording as prima facie evidence of the
32 execution of an assignment or other instrument; specifying
33 requirements for creation and perfection of security
34 interests in marks; amending s. 495.091, F.S.; requiring
35 the department to record all marks registered with the
36 state; amending s. 495.101, F.S.; requiring the department
37 to cancel certain marks; amending s. 495.111, F.S., which
38 establishes a classification of goods and services;
39 providing that a single application for registration of a
40 mark may include any or all goods upon which, or services
41 with which, the mark is actually being used comprised in
42 one or more of the classes listed; amending s. 495.131,
43 F.S.; revising infringement provisions to include an
44 element of lack of consent by the registrant; conforming
45 language; amending s. 495.141, F.S.; providing additional
46 remedies for the unauthorized use of a mark; creating s.
47 495.145, F.S.; providing a forum for actions regarding
48 registration; providing for service of process on
49 nonresident registrants; amending s. 495.151, F.S.;
50 providing for an injunction in cases of dilution of a
51 famous mark; providing factors to be considered in
52 determining that a mark is famous; providing damages in
53 certain circumstances of dilution; amending s. 495.161,
54 F.S.; deleting language relating to the diminishing of
55 certain common law rights; amending s. 495.171, F.S.;
56 providing effective date of changes to ch. 495, F.S., as
57 amended by the act; providing for repeal of conflicting
58 acts; providing application to pending actions; amending
59 s. 495.181, F.S.; providing construction and legislative
60 intent; creating s. 495.191, F.S.; providing certain fees;

61 repealing s. 506.06, F.S., relating to unlawful to
62 counterfeit trademark, to conform; repealing s. 506.07,
63 F.S., relating to filing of trademark or other form of
64 advertisement for record with Department of State, to
65 conform; repealing s. 506.08, F.S., relating to fee for
66 filing, to conform; repealing s. 506.09, F.S., relating to
67 civil remedies, to conform; repealing s. 506.11, F.S.,
68 relating to unlawful use of trademark, to conform;
69 repealing s. 506.12, F.S., relating to procuring the
70 filing of trademark or other form of advertisement by
71 fraudulent representations, to conform; repealing s.
72 506.13, F.S., relating to using the name or seal of
73 another, to conform; providing an effective date.
74
75 Be It Enacted by the Legislature of the State of Florida:
76
77 Section 1. Section 495.001, Florida Statutes, is created to
78 read:
79 495.001 Short title.--This chapter may be cited as the
80 "Registration and Protection of Trademarks Act."
81 Section 2. Section 495.011, Florida Statutes, is amended to
82 read:
83 (Substantial rewording of section. See
84 s. 495.011, F.S., for present text.)
85 495.011 Definitions.--As used in this chapter:
86 (1) "Abandoned" applies to a mark when either of the
87 following occurs:
88 (a) When its use has been discontinued with intent not to
89 resume such use. Intent not to resume use may be inferred from
90 circumstances. Nonuse for 3 consecutive years shall constitute

91 prima facie evidence of abandonment.
92 (b) When any course of conduct of the owner, including acts
93 of omission or commission, causes the mark to lose its
94 significance as a mark.
95 (2) "Applicant" means the person filing an application for
96 registration of a mark under this chapter and the legal
97 representatives, successors, or assigns of such person.
98 (3) "Certification mark" means any word, name, symbol, or
99 device, or any combination thereof, used by a person other than
100 the owner of the mark to certify regional or other origin,
101 material, mode of manufacture, quality, accuracy, or other
102 characteristics of such person's goods or services or that the
103 work or labor on the goods or services was performed by members
104 of a union or other organization.
105 (4) "Collective mark" means a trademark or service mark
106 used by the members of a cooperative, an association, or other
107 collective group or organization, and includes marks used to
108 indicate membership in a union, an association, or other
109 organization.
110 (5) "Department" means the Florida Department of State or
111 its designee charged with the administration of this chapter.
112 (6) "Dilution" means the lessening of the capacity of a
113 mark to identify and distinguish goods or services, regardless of
114 the presence or absence of:
115 (a) Competition between the owner of the mark and other
116 parties.
117 (b) Likelihood of confusion, mistake, or deception.
118 (7) "Mark" includes any trademark, service mark,
119 certification mark, or collective mark entitled to registration
120 under this chapter, whether or not registered.

121 (8) "Person," and any other word or term used to designate
122 the applicant or other party entitled to a benefit or privilege
123 or rendered liable under the provisions of this chapter, means a
124 juristic person as well as a natural person. "Juristic person"
125 includes a firm, partnership, corporation, union, association, or
126 other organization capable of suing and being sued in a court of
127 law.
128 (9) "Registrant" means the person to whom the registration
129 of a mark under this chapter is issued and the legal
130 representatives, successors, or assigns of such person.
131 (10) "Related company" means any person whose use of a mark
132 is controlled by the owner of the mark with respect to the nature
133 and quality of the goods or services on or in connection with
134 which the mark is used.
135 (11) "Service mark" means any word, name, symbol, or
136 device, or any combination thereof, used by a person to identify
137 and distinguish the services of such person, including a unique
138 service, from the services of others, and to indicate the source
139 of the services, even if that source is unknown. Titles,
140 character names, and other distinctive features of radio or
141 television programs may be registered as service marks
142 notwithstanding that the person or the programs may advertise the
143 goods of the sponsor.
144 (12) "Trade name" means any name used by a person to
145 identify a business or vocation of such person.
146 (13) "Trademark" means any word, name, symbol, or device,
147 or any combination thereof, used by a person to identify and
148 distinguish the goods of such person, including a unique product,
149 from those manufactured or sold by others, and to indicate the
150 source of the goods, even if the source is unknown.

151 (14) "Use" means the bona fide use of a mark in the
152 ordinary course of trade and not used merely for the purpose of
153 reserving a right in a mark. For purposes of this chapter, a mark
154 is deemed to be in use:
155 (a) On goods when:
156 1. The mark is placed in any manner on the goods, their
157 containers or the displays associated therewith, or on the tags
158 or labels affixed thereto, or, if the nature of the goods makes
159 such placement impracticable, on documents associated with the
160 goods or their sale; and
161 2. The goods are sold or transported in this state.
162 (b) On services when the mark used or displayed in the sale
163 or advertising of services and the services are rendered in this
164 state.
165 Section 3. Subsection (1) of section 495.021, Florida
166 Statutes, is amended to read:
167 495.021 Registrability.--
168 (1) A mark by which the goods or services of any applicant
169 for registration may be distinguished from the goods or services
170 of others shall not be registered if it:
171 (a) Consists of or~~,~~ comprises ~~or includes~~ immoral,
172 deceptive, or scandalous matter; ~~or~~
173 (b) Consists of or~~,~~ comprises ~~or includes~~ matter which may
174 disparage or falsely suggest a connection with persons, living or
175 dead, institutions, beliefs, or national symbols, or bring them
176 into contempt, or disrepute; ~~or~~
177 (c) Consists of or ~~,~~ comprises ~~or includes~~ the flag or coat
178 of arms or other insignia of the United States, or of any state
179 or municipality, or of any foreign nation, or any simulation
180 thereof; ~~or~~

181 (d) Consists of or ~~,~~ comprises a ~~or includes the~~ name,
182 signature, or portrait identifying a particular ~~of any~~ living
183 individual, except by ~~with~~ her or his written consent, or the
184 name, signature, or portrait of a deceased President of the
185 United States during the lifetime of his widow or her widower, if
186 any, except by the written consent of the widow or widower; ~~or~~
187 (e) Consists of a mark which:
188 1. When used on or in connection with ~~applied to~~ the goods
189 ~~or services~~ of the applicant, is merely descriptive or
190 deceptively misdescriptive of the goods; ~~them,~~
191 2. When used on or in connection with ~~applied to~~ the goods
192 ~~or services~~ of the applicant, is primarily geographically
193 descriptive ~~or deceptively misdescriptive~~ of the goods; ~~them or~~
194 ~~their source or origin, or~~
195 3. When used on or in connection with the goods of the
196 applicant, is primarily geographically misdescriptive of the
197 goods;
198 4.~~3.~~ Is primarily merely a surname; or~~,~~
199 5. Comprises any matter that, as a whole, is functional.
200
201 Except as expressly excluded in subparagraphs 3. and 5.,
202 ~~provided, however, that~~ nothing in this paragraph shall prevent
203 the registration of a mark used ~~in this state~~ by the applicant
204 which has become distinctive of the applicant's goods or services
205 ~~in this state or elsewhere~~. The ~~Department of State~~ department
206 may accept as prima facie evidence that the mark has become
207 distinctive, as used on or in connection with ~~applied to~~ the
208 applicant's goods or services, proof of substantially exclusive
209 and continuous use thereof as a mark by the applicant in this

210 state or elsewhere for the 5 years before ~~next preceding~~ the date
211 on which the claim of distinctiveness is made; or
212 (f) Consists of or comprises a mark which so resembles a
213 mark registered in this state or a mark or trade name previously
214 used in this state by another and not abandoned, as to be likely,
215 when applied to the goods or services of the applicant, to cause
216 confusion or mistake or to deceive. Registration shall not be
217 denied solely on the basis of reservation or registration by
218 another of a corporate name or fictitious name that is the same
219 or similar to the mark for which registration is sought.
220 Section 4. Section 495.027, Florida Statutes, is repealed.
221 Section 5. Section 495.031, Florida Statutes, is amended to
222 read:
223 495.031 Application for registration.--
224 (1) Subject to the limitations set forth in this chapter,
225 any person who ~~adopts and~~ uses a trademark or service mark in
226 this state may file with the department ~~Department of State~~, in a
227 manner and ~~on a~~ form complying with the requirements of ~~to be~~
228 ~~furnished by~~ the department, an application for registration of
229 that ~~trademark or service~~ mark setting forth, but not limited to,
230 the following information:
231 (a) The name and business address of the person applying
232 for such registration, and, if a business entity, the place
233 ~~corporation, the state~~ of incorporation or organization;
234 (b) The goods or services on or in connection with which
235 the mark is used and the mode or manner in which the mark is used
236 in connection with such goods or services and the class or
237 classes in which such goods or services fall;
238 (c) The date ~~when~~ the mark was first used anywhere and the
239 date ~~when~~ it was first used in this state by the applicant, the

240 applicant's ~~or her or his~~ predecessor in interest, ~~business~~ or a
241 related company of the applicant ~~or the applicant's predecessor~~;
242 and
243 (d) A statement that the applicant is the owner of the
244 mark, that the mark is in use, and that, to the best of the
245 applicant's knowledge, no other person except a related company
246 has registered such mark in this state, or has the right to use
247 such mark in this state, either in the identical form thereof or
248 in such near resemblance thereto as to be likely when, applied to
249 the goods or services of such other person, to cause confusion,
250 to cause mistake, or to deceive ~~or confuse or to be mistaken~~
251 ~~therefor~~.
252 (2) Every applicant for registration of a certification
253 mark in this state shall file with the department ~~Department of~~
254 ~~State~~, in a manner and ~~on a~~ form complying with the requirements
255 of ~~to be furnished by~~ the department ~~Department~~, an application
256 setting forth, but not limited to, the following information:
257 (a) The information required by paragraph (1)(a);
258 (b) The date when the certification mark was first used
259 anywhere and the date when it was first used in this state under
260 the authority of the applicant;
261 (c) The manner in which and the conditions under which the
262 certification mark is used in this state; and
263 (d) A statement that the applicant is exercising control
264 over the use of the mark, that the applicant is not herself or
265 himself engaged in the production or marketing of the goods or
266 services to which the mark is applied, and that no person except
267 the applicant or persons authorized by the applicant, or related
268 companies thereof, has the right to use such mark in this state
269 either in the identical form thereof or in such near resemblance

thereto as to be likely to deceive or confuse or to be mistaken therefor.

(3) Every applicant for registration of a collective mark in this state shall file with the department ~~Department of State~~, in a manner and ~~on a~~ form complying with the requirements of ~~to be furnished by~~ the department ~~Department~~, an application setting forth, but not limited to, the following information:

(a) The information required by paragraphs (1)(a) and (b);

(b) The date when the collective mark was first used anywhere and the date when it was first used in this state by any member of the applicant or a related company of such member;

(c) The class of persons entitled to use the mark, indicating their relationship to the applicant, and the nature of the applicant's control over the use of the mark; and

(d) A statement that no person except the applicant or members of the applicant, or related companies thereof, has the right to use such mark in this state either in the identical form thereof or in such near resemblance thereto as to be likely to deceive or confuse or to be mistaken therefor.

(4) The department may also require that a drawing of the mark, complying with the requirements of the department, accompany the application.

(5) ~~(4)~~ Every application under this section shall be signed and verified by the applicant or by a member of the firm or an officer or other authorized representative of the business entity ~~of the corporation, association, union or other organization~~ applying.

(6) ~~(5)~~ Every application under this section shall be accompanied by three specimens showing the mark as actually used ~~a specimen or facsimile of such mark in triplicate~~.

300 (7) ~~(6)~~ Every application under this section shall be
301 accompanied by a filing fee ~~of $87.50,~~ payable to the department
302 ~~Department of State~~ in accordance with s. 495.191~~, for each class~~
303 ~~of goods or services as specified in s. 495.111, in connection~~
304 ~~with which the mark is used~~.
305 Section 6. Section 495.035, Florida Statutes, is created to
306 read:
307 495.035 Filing of applications.--
308 (1) Upon the receipt of an application for registration and
309 payment of the application fee, the department may cause the
310 application to be examined for conformity with this chapter.
311 (2) The applicant shall provide any additional pertinent
312 information requested by the department, including a description
313 of a design mark, and may make, or authorize the department to
314 make, such amendments to the application as may be reasonably
315 requested by the department or deemed by applicant to be
316 advisable to respond to any rejection or objection.
317 (3) The department may require the applicant to disclaim an
318 unregistrable component of a mark otherwise registrable, and an
319 applicant may voluntarily disclaim a component of a mark sought
320 to be registered. No disclaimer shall prejudice or affect the
321 applicant's or registrant's rights then existing or thereafter
322 arising in the disclaimed matter, or the applicant's or
323 registrant's rights of registration on another application, if
324 the disclaimed matter is or has become distinctive of the
325 applicant's or registrant's goods or services.
326 (4) Amendments may be made by the department upon the
327 application submitted by the applicant upon the applicant's
328 agreement, or a new application may be required to be submitted.
329 Amendments to an otherwise properly filed application shall not

330 affect the application filing date for purposes of determining
331 the applicant's or registrant's filing priority rights.
332 (5) If the applicant is found not to be entitled to
333 registration, the department shall advise the applicant of the
334 rejection and of the reasons for rejection. The applicant shall
335 have 3 months in which to reply or amend the application, in
336 which event the application shall be reexamined. This procedure
337 may be repeated until:
338 (a) The department makes final its refusal to register the
339 mark; or
340 (b) The applicant fails to reply or amend the application
341 within the specified period, whereupon the application shall be
342 abandoned.
343
344 For good cause shown, such as the pendency of litigation
345 involving the mark, the department may extend the period of time
346 in which to respond to the rejection or suspend examination of
347 the application.
348 (6) If the department makes its final refusal to register
349 the mark, the applicant may seek review of such decision in
350 accordance with ss. 120.569 and 120.57.
351 (7) In the event of multiple applications concurrently
352 being processed by the department which seek registration of the
353 same or confusingly similar marks for the same or related goods
354 or services, the department shall grant priority to the
355 applications in order of receipt. If a prior-received application
356 is granted a registration, the other application or applications
357 shall then be rejected. The applicant of a rejected application
358 may bring an action for cancellation of the registration upon

359 grounds of prior or superior rights to the mark, in accordance
360 with the provisions of s. 495.101(3).
361 Section 7. Section 495.041, Florida Statutes, is amended to
362 read:
363 495.041 Use by related companies.--Where a mark registered
364 or unregistered is or may be used legitimately by related
365 companies, such use shall inure to the benefit of the owner of
366 the mark, and such use shall not affect the validity of such mark
367 or of its registration, provided such mark is not used in such
368 manner as to deceive the public. If first use of a mark by a
369 person is controlled by the registrant or applicant for
370 registration of a mark with respect to the nature and quality of
371 the goods or services, such first use shall inure to the benefit
372 of that registrant or applicant, as the case may be.
373 Section 8. Section 495.061, Florida Statutes, is amended to
374 read:
375 495.061 Certificate of registration.--
376 (1) Upon compliance by the applicant with the requirements
377 of this chapter, the department ~~Department of State~~ shall cause a
378 certificate of registration to be issued and delivered to the
379 applicant. The certificate of registration shall be issued under
380 the signature of the Secretary of State and the seal of the
381 state, and it shall show the name and business address and, if a
382 business entity ~~corporation~~, the place ~~state~~ of incorporation or
383 organization, of the person claiming ownership of the mark in
384 this state, the date claimed for the first use of the mark
385 anywhere and the date claimed for the first use of the mark in
386 this state, the class or classes of goods or services and a
387 description of the goods or services on or in connection with ~~on~~

388 which the mark is used, a reproduction of the mark, the
389 registration date and the term of the registration.
390 (2) Any certificate of registration issued by the
391 department ~~Department of State~~ under the provisions hereof or a
392 copy thereof duly certified by the department ~~Department of State~~
393 shall be admissible in evidence as competent and sufficient proof
394 of the registration of such mark in any action or judicial
395 proceedings in any court of this state, and shall be prima facie
396 evidence of the validity of the registration, registrant's
397 ownership of the mark, and of registrant's exclusive right to use
398 the mark in this state on or in connection with the goods or
399 services specified in the certificate, subject to any conditions
400 and limitations stated therein.
401 ~~(3) Contingent on the registration of a mark under this~~
402 ~~chapter, the reservation of such mark based on intent to use, as~~
403 ~~provided in this chapter, shall be prima facie evidence of~~
404 ~~priority of ownership of such mark within this state on or in~~
405 ~~connection with the goods or services specified in the~~
406 ~~reservation against any other person, except for a person whose~~
407 ~~mark has not been abandoned and who, prior to such reservation,~~
408 ~~has used the mark within this state on or in connection with such~~
409 ~~goods or services.~~
410 Section 9. Section 495.071, Florida Statutes, is amended to
411 read:
412 495.071 Duration and renewal.--
413 (1) Registration of a mark hereunder shall be effective for
414 a term of 5 ~~10~~ years from the date of registration and, upon
415 application filed within 6 months prior to the expiration of such
416 term, in a manner and ~~on a~~ form complying with the requirements
417 of ~~to be furnished by~~ the department ~~Department of State~~, the

418 registration may be renewed for a like term beginning at the end
419 of the expiring term. Every application under this section shall
420 be accompanied by a filing fee ~~A renewal fee of $87.50 for each~~
421 ~~class of goods or services with respect to which such renewal is~~
422 ~~sought~~, payable to the department ~~Department of State~~, in
423 accordance with s. 495.191 ~~shall accompany the application for~~
424 ~~renewal of the registration~~.
425 (2) A ~~mark~~ registration may be renewed for successive
426 periods of 5 ~~10~~ years in like manner.
427 (3) Any registration in effect on January 1, 2007, shall
428 continue in effect for the unexpired term thereof and may be
429 renewed by filing an application for renewal with the department
430 in a manner and form complying with the requirements of the
431 department and paying the renewal fee therefor within 6 months
432 prior to the expiration of the registration. ~~The Department of~~
433 ~~State shall notify registrants of marks hereunder of the~~
434 ~~necessity of renewal within the year next preceding the~~
435 ~~expiration of the 10 years from the date of registration by~~
436 ~~writing to the last known address of the registrants. The~~
437 ~~department shall prescribe the forms on which to make the~~
438 ~~required notification and the renewal called for in subsection~~
439 ~~(1) and may substitute the uniform business report, pursuant to~~
440 ~~s. 606.06, as a means of satisfying the requirement of this part.~~
441 (4) All applications for renewal ~~renewals~~ under this
442 chapter, whether of registrations made under this act or of
443 registrations made under any prior acts, shall include a verified
444 statement that the mark is still in use in this state, and shall
445 include a specimen showing actual use of the mark on or in
446 connection with the goods or services subject to the renewal
447 application, or shall state that its nonuse is due to special

448 circumstances which excuse such nonuse and is not due to any
449 intention to abandon the mark.
450 Section 10. Section 495.081, Florida Statutes, is amended
451 to read:
452 495.081 Assignments; changes of name; security interests
453 ~~Assignment~~.--
454 (1) A registered mark or a mark for which an application
455 for registration has been filed ~~Any mark and its registration~~
456 ~~hereunder~~ shall be assignable with the goodwill ~~good will~~ of the
457 business in which the mark is used or with that part of the
458 goodwill ~~good will~~ of the business connected with the use of and
459 symbolized by the mark. Assignments ~~Assignment~~ shall be by an
460 instrument ~~instruments~~ in writing duly executed and may be
461 recorded with the department ~~Department of State~~ upon the payment
462 of the applicable ~~a~~ fee. A photocopy of an assignment shall be
463 accepted for recording if it is certified by any of the parties
464 thereto, or their successors, to be a true and correct copy of
465 the original. Upon recording of the assignment, ~~of $50, payable~~
466 ~~to~~ the department ~~Department of State~~ ~~which, upon recording of~~
467 ~~the assignment,~~ shall issue in the name of the assignee a new
468 certificate for the remainder of the term of the registration or
469 of the last renewal thereof.
470 (2) An assignment of any registration under this chapter
471 shall be void ~~as~~ against any subsequent purchaser for valuable
472 consideration without notice, unless such assignment is recorded
473 with the department ~~Department of State~~ within 3 months after the
474 date of the assignment or prior to the subsequent purchase
475 ~~thereof or at any time after the expiration of such 3 month~~
476 ~~period, unless an assignment given in connection with any~~

477 ~~subsequent purchase is recorded with the Department of State~~
478 ~~prior to or within 10 days after such assignment is recorded~~.
479 (3) A registrant or applicant for registration effecting a
480 change of the name may record a certificate of change of name of
481 the registrant or applicant with the department upon the payment
482 of the recording fee payable to the department in accordance with
483 s. 495.191. In the case of a pending application for a mark that
484 becomes approved for registration, the department shall issue a
485 certificate of registration in the registrant's new name. In the
486 case of a registered mark, the department shall issue a new
487 certificate of registration in the registrant's new name for the
488 remainder of the term of the registration or last renewal
489 thereof. A person's failure to record a name change in accordance
490 with this subsection shall not affect the person's substantive
491 rights in the mark or its registration.
492 (4) Acknowledgment shall be prima facie evidence of the
493 execution of an assignment or other instrument and, when recorded
494 by the department, the record shall be prima facie evidence of
495 execution.
496 (5) Security interests in marks shall be created and
497 perfected in accordance with chapter 679.
498 Section 11. Section 495.091, Florida Statutes, is amended
499 to read:
500 495.091 Records.--The department ~~Department of State~~ shall
501 keep for public examination a record of all marks registered or
502 renewed under this chapter, including all documents recorded
503 under s. 495.081.
504 Section 12. Section 495.101, Florida Statutes, is amended
505 to read:
506 495.101 Cancellation.--The department ~~Department of State~~

507 shall cancel from the register:

508 ~~(1) After 1 year from the effective date of this chapter,~~
509 ~~all registrations under prior laws which are more than 10 years~~
510 ~~old and not renewed in accordance with this chapter.~~

511 (1)~~(2)~~ Any registration for ~~concerning~~ which the department
512 ~~Department of State~~ has received ~~shall receive~~ a voluntary
513 request for cancellation by the registrant, which request shall
514 be in a manner and form complying with the requirements of the
515 department ~~thereof from the registrant~~.

516 (2)~~(3)~~ All registrations granted under this chapter and not
517 renewed in accordance with the provisions hereof.

518 (3)~~(4)~~ Any registration for ~~concerning~~ which a court of
519 competent jurisdiction finds ~~shall find~~ that:

520 (a) The registered mark has been abandoned. ~~A mark shall be~~
521 ~~deemed to be "abandoned" when either of the following occurs:~~

522 ~~1. When its use has been discontinued with intent not to~~
523 ~~resume such use. Intent not to resume may be inferred from~~
524 ~~circumstances. Nonuse for 2 consecutive years shall be prima~~
525 ~~facie evidence of abandonment.~~

526 ~~2. When any course of conduct of the owner, including acts~~
527 ~~of omission as well as commission, causes the mark to become the~~
528 ~~generic name for the goods or services on or in connection with~~
529 ~~which it is used, or otherwise to lose its significance as a~~
530 ~~mark. Purchaser motivation shall not be a test for determining~~
531 ~~abandonment under this paragraph.~~

532 (b) The registrant ~~of a trademark or service mark~~ is not
533 the owner of the mark.

534 (c) The registration was granted improperly.

535 (d) The registration was obtained fraudulently.

536 (e) The mark is or has become the generic name for the

537 goods or services, or a portion thereof, for which the mark has
538 been registered.
539 (f) ~~(e)~~ The registered mark is so similar, as to be likely
540 to cause confusion or mistake or to deceive, to a mark registered
541 by another person in the United States Patent and Trademark
542 Office, prior to the date of the filing of the application for
543 registration by the registrant hereunder, and not abandoned;
544 ~~provided,~~ however, ~~that~~ should the registrant prove that the
545 registrant ~~she or he~~ is the owner of a concurrent registration of
546 a ~~her or his~~ mark in the United States Patent and Trademark
547 Office covering an area including this state, the registration
548 hereunder shall not be canceled.
549 (g) ~~(f)~~ In the case of a certification mark, that the
550 registrant does not control or is not able to exercise control
551 over the use of such mark; or engages in the production or
552 marketing of any goods or services to which the certification
553 mark is applied; or the registrant permits the use of the
554 certification mark for purposes other than to certify; or the
555 registrant discriminately refuses ~~refused~~ to certify or ~~to~~
556 continue to certify the goods or services of any person who
557 maintains the standards or conditions which such mark certifies.
558 Nothing in this paragraph shall be deemed to prohibit the
559 registrant from using its certification mark in advertising or
560 promoting recognition of the certification program or of the
561 goods or services meeting the certification standards of the
562 registrant.
563 (4) ~~(5)~~ When a court of competent jurisdiction shall order
564 cancellation of a registration on any ground.
565
566 Section 13. Section 495.111, Florida Statutes, is amended

567 to read:
568 (Substantial rewording of section. See
569 s. 495.111, F.S., for present text.)
570 495.111 Classification.--
571 (1) The following general classes of goods and services,
572 conforming to the classification adopted by the United States
573 Patent and Trademark Office, are established for convenience of
574 administration of this chapter:
575 (a) Goods:
576 1. Class 1 Chemicals used in industry, science, and
577 photography; agriculture, horticulture, and forestry; unprocessed
578 artificial resins and, unprocessed plastics; manures; fire
579 extinguishing compositions; tempering and soldering preparations;
580 chemical substances for preserving foodstuffs; tanning
581 substances; and adhesives used in industry.
582 2. Class 2 Paints, varnishes, lacquers; preservatives
583 against rust and against deterioration of wood; colorants;
584 mordants; raw natural resins; and metals in foil and powder form
585 for painters, decorators, printers, and artists.
586 3. Class 3 Bleaching preparations and other substances for
587 laundry use; cleaning, polishing, scouring, and abrasive
588 preparations; soaps; perfumery, essential oils, cosmetics, and
589 hair lotions; and dentifrices.
590 4. Class 4 Industrial oils and greases; lubricants; dust
591 absorbing, wetting, and binding compositions; fuels (including
592 motor spirit) and illuminants; and candles and wicks for
593 lighting.
594 5. Class 5 Pharmaceuticals and veterinary preparations;
595 sanitary preparations for medical purposes; dietetic substances
596 adapted for medical use and food for babies; plasters and

597 materials for dressings; material for stopping teeth and dental
598 wax; disinfectants; preparations for destroying vermin; and
599 fungicides and herbicides.
600 6. Class 6 Common metals and their alloys; metal building
601 materials; transportable buildings of metal; materials of metal
602 for railway tracks; nonelectric cables and wires of common metal;
603 ironmongery and small items of metal hardware; pipes and tubes of
604 metal; safes; goods of common metal not included in other
605 classes; and ores.
606 7. Class 7 Machines and machine tools; motors and engines
607 (except for land vehicles); machine coupling and transmission
608 components (except for land vehicles); agricultural implements
609 other than hand-operated; incubators for eggs.
610 8. Class 8 Hand tools and hand-operated implements;
611 cutlery; side arms; and razors.
612 9. Class 9 Scientific, nautical, surveying, photographic,
613 cinematographic, optical, weighing, measuring, signaling,
614 checking (supervision), and life-saving and teaching apparatus
615 and instruments; apparatus and instruments for conducting,
616 switching, transforming, accumulating, regulating, or controlling
617 electricity; apparatus for recording, transmission, or
618 reproduction of sound or images; magnetic data carriers and
619 recording discs; automatic vending machines and mechanisms for
620 coin-operated apparatus; cash registers, calculating machines,
621 and data processing equipment and computers; and fire-
622 extinguishing apparatus.
623 10. Class 10 Surgical, medical, dental, and veterinary
624 apparatus and instruments, artificial limbs, eyes, and teeth;
625 orthopedic articles; and suture materials.
626 11. Class 11 Apparatus for lighting, heating, steam

627 generating, cooking, refrigerating, drying, ventilating, water
628 supply, and sanitary purposes.
629 12. Class 12 Vehicles; apparatus for locomotion by land,
630 air, or water.
631 13. Class 13 Firearms; ammunition and projectiles;
632 explosives; and fireworks.
633 14. Class 14 Precious metals and their alloys and goods in
634 precious metals or coated therewith (not included in other
635 classes); jewelry and precious stones; and horological and
636 chronometric instruments.
637 15. Class 15 Musical instruments.
638 16. Class 16 Paper, cardboard, and goods made from these
639 materials (not included in other classes); printed matter;
640 bookbinding material; photographs; stationery; adhesives for
641 stationery or household purposes; artists' materials; paint
642 brushes; typewriters and office requisites (except furniture);
643 instructional and teaching material (except apparatus); plastic
644 materials for packaging (not included in other classes);
645 printers' type; and printing blocks.
646 17. Class 17 Rubber, gutta-percha, gum, asbestos, mica,
647 and goods made from these materials and not included in other
648 classes; plastics in extruded form for use in manufacture;
649 packing, stopping, and insulating materials; and flexible pipes
650 not of metal.
651 18. Class 18 Leather and imitations of leather and goods
652 made of these materials and not included in other classes; animal
653 skins and hides; trunks and traveling bags; umbrellas, parasols,
654 and walking sticks; and whips, harness, and saddlery.
655 19. Class 19 Building materials (nonmetallic); nonmetallic
656 rigid pipes for building; asphalt, pitch, and bitumen;

657 nonmetallic transportable buildings; monuments, not of metal.
658 20. Class 20 Furniture, mirrors, and picture frames; goods
659 (not included in other classes) of wood, cork, reed, cane,
660 wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-
661 pearl, and meerschaum and substitutes for all these materials, or
662 of plastics.
663 21. Class 21 Household or kitchen utensils and containers
664 (not of precious metal or coated therewith); combs and sponges;
665 brushes (except paint brushes); brush-making materials; articles
666 for cleaning purposes; steel wool; unworked or semiworked glass
667 (except glass used in building); and glassware, porcelain, and
668 earthenware not included in other classes.
669 22. Class 22 Ropes, string, nets, tents, awnings,
670 tarpaulins, sails, sacks, and bags (not included in other
671 classes); padding and stuffing materials (except of rubber or
672 plastics); and raw fibrous textile materials.
673 23. Class 23 Yarns and threads for textile use.
674 24. Class 24 Textiles and textile goods not included in
675 other classes and bed and table covers.
676 25. Class 25 Clothing, footwear, and headgear.
677 26. Class 26 Lace and embroidery, ribbons, and braid;
678 buttons, hooks and eyes, pins, and needles; and artificial
679 flowers.
680 27. Class 27 Carpets, rugs, mats and matting, linoleum,
681 and other materials for covering existing floors; and wall
682 hangings (nontextile).
683 28. Class 28 Games and playthings; gymnastic and sporting
684 articles not included in other classes; and decorations for
685 Christmas trees.
686 29. Class 29 Meat, fish, poultry, and game; meat extracts;

687 preserved, dried, and cooked fruits and vegetables; jellies,
688 jams, and compotes; eggs, milk, and milk products; and edible
689 oils and fats.
690 30. Class 30 Coffee, tea, cocoa, sugar, rice, tapioca,
691 sago, and artificial coffee; flour and preparations made from
692 cereals, bread, pastry and confectionery, and ices; honey and
693 treacle; yeast, baking powder; salt, and mustard; vinegar and
694 sauces (condiments); spices; and ice.
695 31. Class 31 Agricultural, horticultural, and forestry
696 products and grains not included in other classes; live animals;
697 fresh fruits and vegetables; seeds, natural plants, and flowers;
698 foodstuffs for animals and malt.
699 32. Class 32 Beers; mineral and aerated waters and other
700 nonalcoholic drinks; fruit drinks and fruit juices; and syrups
701 and other preparations for making beverages.
702 33. Class 33 Alcoholic beverages except beers.
703 34. Class 34 Tobacco; smokers' articles; and matches.
704 (b) Services:
705 1. Class 35 Advertising; business management; business
706 administration; and office functions.
707 2. Class 36 Insurance; financial affairs; monetary
708 affairs; and real estate affairs.
709 3. Class 37 Building construction; repair; and
710 installation services.
711 4. Class 38 Telecommunications.
712 5. Class 39 Transport; packaging and storage of goods; and
713 travel arrangements.
714 6. Class 40 Treatment of materials.
715 7. Class 41 Education; providing of training;
716 entertainment; and sporting and cultural activities.

717 8. Class 42 Scientific and technological services and
718 research and design relating thereto; industrial analysis and
719 research services; design and development of computer hardware
720 and software; and legal services.
721 9. Class 43 Services for providing food and drink; and
722 temporary accommodation.
723 10. Class 44 Medical services; veterinary services;
724 hygienic and beauty care for human beings or animals; and
725 agriculture, horticulture, and forestry services.
726 11. Class 45 Personal and social services rendered by
727 others to meet the needs of individuals; and security services
728 for the protection of property and individuals.
729 (c) Certification and collective membership marks:
730 1. Class 200 Collective membership marks.
731 2. Class A Certification marks for goods.
732 3. Class B Certification marks for services.
733 (d) The goods and services recited in collective trademark
734 and collective service mark applications are assigned to the same
735 classes that are appropriate for those goods and services in
736 general.
737 (2) The establishment of the classes of goods and services
738 set forth in subsection (1) is not for the purpose of limiting or
739 extending the rights of the applicant or registrant. A single
740 application for registration of a mark may include any or all
741 goods upon which, or services with which, the mark is actually
742 being used comprised in one or more of the classes listed, but in
743 the event that a single application includes goods or services in
744 connection with which the mark is being used which fall within
745 different classes of goods or services, a fee equaling the sum of
746 the fees for registration in each class shall be payable.

747 Section 14. Section 495.131, Florida Statutes, is amended
748 to read:
749 495.131 Infringement.--Subject to the provisions of s.
750 495.161, any person who shall, without the consent of the
751 registrant:
752 (1) Use~~, without the consent of the registrant,~~ any
753 reproduction, counterfeit, copy, or colorable imitation of a mark
754 registered under this chapter ~~on any goods or~~ in connection with
755 the sale, offering for sale, distribution, or advertising of any
756 goods or services on or in connection with which such use is
757 likely to cause confusion, ~~or~~ to cause mistake, or to deceive ~~as~~
758 ~~to the source or origin of such goods or services~~; or
759 (2) Reproduce, counterfeit, copy, or colorably imitate a
760 ~~any such~~ mark registered under this chapter and apply such
761 reproduction, counterfeit, copy, or colorable imitation to
762 labels, signs, prints, packages, wrappers, receptacles, or
763 advertisements intended to be used upon or in connection
764 ~~conjunction~~ with the sale, ~~offering for sale,~~ distribution, or
765 advertising ~~in this state~~ of goods or services on or in
766 connection with which such use is likely to cause confusion, to
767 cause mistake, or to deceive;
768
769 shall be liable in a civil action by the owner of such registered
770 mark for any or all of the remedies provided in s. 495.141,
771 except that under subsection (2) hereof the registrant shall not
772 be entitled to recover profits or damages unless the acts have
773 been committed with knowledge that such mark is intended to be
774 used to cause confusion or mistake or to deceive.
775 Section 15. Section 495.141, Florida Statutes, is amended
776 to read:

777 495.141 Remedies.--
778 (1) Any owner of a mark registered under this chapter may
779 proceed by suit to enjoin the manufacture, use, display, or sale
780 of any counterfeits or imitations thereof and any court of
781 competent jurisdiction may grant injunctions to restrain such
782 manufacture, use, display or sale as may be by the said court
783 deemed just and reasonable, and may require the defendants to pay
784 to such owner all profits derived from and/or all damages
785 suffered by reason of such wrongful manufacture, use, display, or
786 sale and to pay the costs of the action; and such court may also
787 order that any such counterfeits or imitations in the possession
788 or under the control of any defendant in such case be delivered
789 to an officer of the court, or to the complainant, to be
790 destroyed. In assessing profits the plaintiff shall be required
791 to prove defendant's sales only; defendant must prove all
792 elements of cost or deduction claimed. In assessing damages the
793 court may enter judgment, according to the circumstances of the
794 case, for any sum above the amount found as actual damages, not
795 exceeding three ~~3~~ times such amount. If the court shall find that
796 the amount of the recovery based on profits is either inadequate
797 or excessive the court may in its discretion enter judgment for
798 such sum as the court shall find to be just, according to the
799 circumstances of the case. Such sum in either of the above
800 circumstances shall constitute compensation and not a penalty.
801 The court may also award reasonable attorney's fees to the
802 prevailing party according to the circumstances of the case.
803 (2) The enumeration of any right or remedy herein shall not
804 affect a registrant's right to prosecute under any penal law of
805 this state.
806 Section 16. Section 495.145, Florida Statutes, is created

807 to read:
808 495.145 Forum for actions regarding registration.--An
809 action seeking cancellation of a registration of a mark
810 registered under this chapter may be brought in any court of
811 competent jurisdiction in this state. Service of process on a
812 nonresident registrant may be made in accordance with s. 48.181.
813 The department shall not be made a party to cancellation
814 proceedings.
815 Section 17. Section 495.151, Florida Statutes, is amended
816 to read:
817 (Substantial rewording of section. See
818 s. 495.151, F.S., for present text.)
819 495.151 Dilution.--
820 (1) The owner of a mark that is famous in this state shall
821 be entitled, subject to the principles of equity and upon such
822 terms as the court deems reasonable, to an injunction and to
823 obtain such other relief against another person's commercial use
824 of a mark or trade name if such use begins after the mark has
825 become famous and is likely to cause dilution of the distinctive
826 quality of the famous mark, as provided in this section. In
827 determining whether a mark is distinctive and famous, a court may
828 consider factors, including, but not limited to:
829 (a) The degree of inherent or acquired distinctiveness of
830 the mark in this state.
831 (b) The duration and extent of use of the mark in
832 connection with the goods and services with which the mark is
833 used.
834 (c) The duration and extent of advertising and publicity of
835 the mark in this state.
836 (d) The geographical extent of the trading area in which

837 the mark is used.
838 (e) The channels of trade for the goods or services with
839 which the mark is used.
840 (f) The degree of recognition of the mark in the trading
841 areas and channels of trade in this state used by the mark's
842 owner and the person against whom the injunction is sought.
843 (g) The nature and extent of use of the same or similar
844 mark by third parties.
845 (h) Whether the mark is the subject of a state registration
846 in this state or a federal registration under the Federal
847 Trademark Act of March 3, 1881, or the Federal Trademark Act of
848 February 20, 1905, or a principal register registration under the
849 Federal Trademark Act of July 5, 1946.
850 (2) In an action brought under this section, the owner of a
851 famous mark shall be entitled only to injunctive relief in this
852 state unless the person against whom the injunctive relief is
853 sought willfully intended to trade on the owner's reputation or
854 to cause dilution of the famous mark. If such willful intent is
855 proven, and the mark is registered in this state, the owner shall
856 also be entitled to all remedies set forth in this chapter,
857 subject to the discretion of the court and the principles of
858 equity.
859 (3) The following shall not be actionable under this
860 section:
861 (a) Fair use of a famous mark by another person in
862 comparative commercial advertising or promotion to identify the
863 competing goods or services of the owner of the famous mark.
864 (b) Noncommercial use of the mark.
865 (c) All forms of news reporting and news commentary.

866 Section 18. Section 495.161, Florida Statutes, is amended
867 to read:
868 495.161 Common-law rights.--Nothing herein shall adversely
869 affect ~~or diminish~~ the rights or the enforcement of rights in
870 marks acquired in good faith at any time at common law.
871 Section 19. Section 495.171, Florida Statutes, is amended
872 to read:
873 495.171 Effective date; repeal of conflicting ~~prior~~ acts.--
874 (1) This chapter, as amended by this act, shall be in force
875 and take effect January ~~October~~ 1, 2007 ~~1967~~, ~~after its~~
876 ~~enactment,~~ but shall not affect any suit, proceeding, or appeal
877 then pending.
878 (2) Sections 506.06-506.13 ~~Former ss. 495.01-495.14~~ are
879 repealed on January 1, 2007 ~~the effective date of this act~~,
880 provided that as to any suit, proceeding or appeal, and for that
881 purpose only, pending at the time this chapter, as amended by
882 this act, takes effect such repeal shall be deemed not to be
883 effective until final determination of said pending suit,
884 proceeding or appeal.
885 Section 20. Section 495.181, Florida Statutes, is amended
886 to read:
887 (Substantial rewording of section. See
888 s. 495.181, F.S., for present text.)
889 495.181 Construction of chapter.--The intent of this
890 chapter is to provide a system of state trademark registration
891 and protection substantially consistent with the federal system
892 of trademark registration and protection under the Trademark Act
893 of 1946, as amended. To that end, the construction given the
894 federal act should be examined as persuasive authority for
895 interpreting and construing this chapter.

896 Section 21. Section 495.191, Florida Statutes, is created
897 to read:
898 495.191 Fees.--Filing and other applicable fees payable to
899 the department under this chapter shall be as follows:
900 (1) Application filing fee: $87.50 per class.
901 (2) Renewal application fee: $87.50 per class.
902 (3) Assignment filing fee: $50.00 per class.
903 (4) Certificate of name change filing fee: $50.00.
904 (5) Voluntary cancellation filing fee: $50.00.
905 (6) Certificate of registration under seal: $8.75.
906 (7) Certified copy of application file: $52.50.
907 Section 22. Sections 506.06, 506.07, 506.08, 506.09,
908 506.11, 506.12, and 506.13, Florida Statutes, are repealed.
909 Section 23. This act shall take effect January 1, 2007.