

STETSON BUSINESS LAW REVIEW

DEMOCRATIZING THE FAMILY TRUST COMPANY

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TABLE OF CONTENTS

Introduction.....	24
I. Formation.....	30
A. Overview.....	30
B. Organization.....	33
1. Governing Articles.....	33
2. Governing Board.....	35
3. Capitalization	36
4. Minimum Contacts	36
C. Registration Application	37
D. License Application	38
1. The Licensed Family Trust Company	38
2. Application for License; Investigation of License Applicant.....	40
II. Management	42
A. Scope of Authority.....	42
1. Powers.....	42
2. Prohibitions	44
B. Investments	45
C. State Examination	48
D. Confidential Books and Records	50
E. Annual Renewal.....	53
F. Discontinuing Operations	55
1. Voluntary Dissolution.....	55
2. Cease and Desist Orders; Involuntary Dissolution	55
III. Federal Considerations.....	57
A. Tax	57

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B. Securities Regulation	60
Conclusion	62

INTRODUCTION

Banking law generally prohibits legal entities from exercising fiduciary powers, unless chartered as a bank or trust company.¹ Consequently, by way of common illustration, if Parent appoints Child as successor trustee of Parent's revocable trust estate,² Child cannot limit personal liability by acting through a corporate form.³ Considering trustees are fiduciaries who must perform myriad duties with utmost care and may be held personally liable for acts and omissions of mere negligence,⁴ Parent may lawfully insulate and exculpate Child, but only to an extent.⁵ Accordingly, a normatively risk-averse Parent may rationally decide to appoint a corporate trustee instead, especially when sensitive family dynamics or complex assets elevate fiduciary risk.⁶ Institutional trustees, operating at an economy of scale to dissipate and

1. FLA. STAT. § 658.16(1) (2024).

2. In estate planning practice, a revocable trust, sometimes called a living trust or declaration of trust, is a private express trust utilized as a substitute for a traditional last will and testament. Upon one's death, property held by a revocable trust passes to beneficiaries through a private process, as opposed to the public probate process governing the transfer of property by will. Accordingly, revocable trusts promote privacy and efficiency goals and are commonly used as the primary testamentary instrument. UNIF. TR. CODE §§ 505, 507, 601 (UNIF. L. COMM'N 2010).

3. FLA. STAT. § 658.12(21) (defining "trust business" as the activity of acting as a fiduciary by banks, state or federal associations, trust companies, or any other business entity that performs fiduciary duties for a fee deemed significant by the office); UNIF. TR. CODE §§ 505, 507, 601 (UNIF. L. COMM'N 2010).

4. Fiduciary duty is "[a] duty of *utmost* good faith, trust, confidence, and candor owed by a fiduciary (such as . . . a trustee) to the beneficiary (such as . . . the beneficiaries of the trust); . . . a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person . . ." *Fiduciary Duty*, BLACK'S LAW DICTIONARY (12th ed. 2024) (emphasis added); James A. Goldsmith, *A Trustee Checklist: Deciding Who Should Serve, What They Do and How They Are Paid*, 20 OHIO PROB. L.J. 195 (2010).

5. See FLA. STAT. § 736.1011(1)(a) (2024) (permitting exculpatory clauses in trusts, except to the extent of "bad faith or with reckless indifference to the . . . interests of the beneficiaries").

6. Even if Parent appoints Child, there is no guarantee Child will act on the appointment upon Parent's incapacity or death. When one's own personal assets are exposed to liability in civil suits brought by a disgruntled beneficiary, one thinks twice about putting themselves in harm's way. Fearing liability (or for any other reason), Child may decline the appointment from the outset or resign afterward. *Id.* §§ 736.0701, .0705.

minimize idiosyncratic risk, standby willing to fill the vacancy.⁷ And so, time and again, Parent hands control of family property, lock and key, to an outsider, rather than to Parent's own descendants. Ultimately, incumbent financial institutions benefit from positive law that limits competition as banking law's paternalism⁸ raises barriers that effectively redirect the stewardship of family legacies to public-facing banks and trust companies which by their nature have personal interests other than those held by any one client-family.⁹

A growing minority of states has shifted the paradigm with legislation creating the so-called *family trust company* (FTC).¹⁰ The FTC is a relatively niche solution with significant broader potential. In short, an FTC is a domestic corporation or limited liability company with authority to act as a trustee under a more accommodative regulatory regime, so long as its services are only provided to a defined class of family members.¹¹ An FTC may help mitigate Parent and Child's concerns about personal liability, ongoing asset management, and even privacy. This policy update appears to be politically fair and reasonable.

FTCs may create more economic utility for families compared to traditional corporate fiduciaries. Market activity suggests FTCs may be increasing in demand as many law firms now offer legal services to family offices. The growth in this segment of the legal market suggests that families are becoming more sophisticated and more innovative in their approach to family financial management.¹² Still, whether FTCs provide a net economic benefit

7. Serving dutifully as trustee is a nuanced, difficult job. *See* Goldsmith, *supra* note 4.

8. The purpose of the financial institution codes includes "[t]he protection of the interests of the public in the proper conduct of fiduciary functions." FLA. STAT. § 655.001(2)(e) (2024).

9. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 968, 989 (2005).

10. Alaska, Arkansas, Colorado, Delaware, Louisiana, Mississippi, Missouri, Nevada, New Hampshire, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, and Wyoming have also enacted specific legislation for family trust companies.

11. *See* FLA. STAT. § 662.102.

12. As an alternative to contracting with third-party institutional money managers, family offices employ a team of professionals to manage the family's financial affairs, including bill pay, accounting and taxes, research, and trading and portfolio management. Unfortunately, there is little if any reliable data on FTCs. Florida's Office of Financial Regulation, for example, does not publish data on FTCs because of the special privacy protections FTCs enjoy under the law. As to supply of services, a quick scan of AmLaw 100

to client families more broadly is difficult to prove empirically. Such a study would involve tangible and intangible inputs the value of which derive from personal preferences and facts and circumstances unique to each client-family. At this stage in the development and use of FTCs, this article provides a brief discussion of their potential costs and benefits.

Beginning with tangible costs, compensation paid to traditional corporate fiduciaries is substantial.¹³ Banks and trust companies layer fees throughout their value chains of affiliated products and services. Generally, financial institutions charge trustee fees as a percentage of the value of assets under management, supervision, or custody (as the case may be). This is in addition to fees for commercial banking; securities trading; portfolio management; private equity placements; and structured notes.¹⁴ The duty of loyalty's strict prohibition against any form of self-dealing is a remnant of the past, for better or worse;¹⁵ nonetheless, investment costs are material both short and long-term,¹⁶ and in aggregate shorten the generational timeline that family resources last.¹⁷

Granted, FTCs have their own costs. Some investment management fees will be incurred regardless, but other costs arise only because of the FTC, including: expenses associated with organizing the company; crafting and implementing governance policies and procedures; funding capital accounts; maintaining books and records; creating and filing reports and tax returns; upkeeping insurance and fidelity bonds; complying with state regulatory requirements and periodic examinations;¹⁸ and

websites shows that fifty-seven (57) list private wealth law (or some derivation thereof) with most of those expressly offering services to family offices. Chambers & Partners maintains a separate ranking for private wealth law given its size and nuance.

13. See William J. Turnier & Jeffrey L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 VA. TAX REV. 779, 792 (2009).

14. See *id.* at 792–93, 792 n.31.

15. See UNIF. TR. CODE § 802(f) (UNIF. L. COMM'N 2023); FLA. STAT. § 736.0802(5) (2024); Langbein, *supra* note 9, at 960, 962, 968.

16. Mitigating fee erosion on capital growth is the business premise and consumer value-add of the now ubiquitous low-cost index fund popularized by John Bogle and his company Vanguard, and others.

17. See Turnier & Harrison, *supra* note 13, at 793–95.

18. If there is a bright spot, FTCs may avoid triggering federal regulatory oversight and all its attendant costs. The Investment Advisers Act of 1940 authorizes the U.S. Securities & Exchange Commissions to regulate the business of advising others regarding the

everything else that sprouts from operating as a going concern. As they stand, FTCs are not inexpensive.

Neither are FTCs for the faint of heart. Centralizing operations in an FTC introduces new risks to family dynamics. People disagree, and disagreements may be costly. Concentrating control without effective checks and balances may foreseeably lead to less transparency, disparate treatment of beneficiaries, and abuse of power. Aside from litigation expenses, a family at odds with itself suffers utility-decreasing disharmony from fractured familial bonds. Even if factions are reasonably justified in their differing positions, family discord is a tremor to happiness with the power to reverberate for generations. As a consolation, FTCs provide tremendous privacy protection to family members during disputes. Cases and controversies involving FTCs are deemed confidential and are exempt from public records disclosure.¹⁹ That is quite a privilege. Immeasurable value may be derived from keeping names out of the news (though some believe no news is bad news). Still, justifying an FTC's existence becomes more difficult when relatives turn into adversaries. For some, understandably, that risk is intolerable and reason enough to reject the FTC's prospective benefits and appoint an independent trustee to oversee management of the family's assets.

On the other hand, one might imagine how the abdication of responsibility for managing family property to non-family members could have unintended consequences. Founding Father Benjamin Franklin summarizes the notion well: "Keep thy shop, and thy shop will keep thee;" thus, "[i]f you would have your business done, go; if not; send."²⁰ Those who agree with Mr. Franklin may not weigh possible infighting as the deciding factor; instead, the potential benefits of family-led legacy management are determinative. The opportunity to promote virtues of prudence and care among children and descendants through a more

purchase and sale of securities. Among other regulatory requirements, investment advisers are required to file forms with the SEC and are subject to SEC examinations. However, an FTC may be exempt from federal securities regulation under the "family office" exception and "state regulation" exception to the Advisers Act. See discussion *infra* Section III.B.

19. Goldsmith, *supra* note 4.

20. Benjamin Franklin, *The Way to Wealth - and a Plan by Which Every Man May Pay His Taxes*, printed by Daniel Humphreys, in Spruce-street, near the Drawbridge. Philadelphia, 1785. Retrieved from the Library of Congress at <https://www.loc.gov/item/2005577132/>.

disciplined approach to stewarding family resources is arguably the FTC's most compelling prospect. Though the hands-off approach of entrusting management to traditional banks and trust companies shifts a burden away from the family, the hands-on approach of an FTC presents a path to foster leadership and promote core values by accepting responsibility for, and actively participating in, long-term management.²¹ And as perpetual entities, FTCs may serve such purposes in perpetuity with perhaps more predictability than other governance structures.²²

If a family owns interests in closely-held operating businesses or real estate, an FTC may offer greater benefit.²³ Public-facing trust companies are risk-averse and prefer to invest conservatively by holding a highly liquid and diversified portfolio of publicly-traded stocks and bonds, whereas families are able to express a different risk-return preference through an FTC and invest aggressively by holding a less liquid and more concentrated portfolio.²⁴ Doing so may even promote modern portfolio theory diversification goals if expected returns from riskier assets are not correlated with the expected returns of other assets in the trust portfolio.²⁵ Pooling resources from separate family trusts to invest through a common fund²⁶ may increase access to alternative assets (such as private equity, venture capital, and hedge funds) which might otherwise be unavailable to, or unsuitable for, each trust

21. To a degree, this may be achieved without an FTC, with assets managed through family-owned and controlled investment vehicles, commonly structured as LPs, LLPs, or LLCs. Additionally, family members may be appointed as trust directors (also known as trust advisors) and trust protectors in a fiduciary or non-fiduciary capacity. The FTC introduces a level of formality and flexibility that other structures may not.

22. At any time, non-family individual and corporate trustees may become unable or unwilling to serve. New trustees must then become familiar with the trust instruments, the family assets, and the family dynamics. Climbing this learning curve may cause inefficiencies, misunderstandings, and general instability.

23. For example, family members might be more knowledgeable than an institutional trustee about how to maintain a business and its culture and values, and thus be in a better position to vote for or against resolutions and other corporate matters.

24. Entrepreneurs typically offer a different view on risk and reward than traditional money managers. This raises concerns regarding the trustee's duty to invest prudently. *See C. Boone Schwartzel, Is the Prudent Investor Rule Good for Texas?*, 54 BAYLOR L. REV. 701, 716, 721, 734 (2002).

25. *See id.* at 718, 732.

26. To accomplish this, the family trust company creates a common trust fund in which the separate trusts purchase shares. Then, the common trust fund invests in a portfolio of securities. For state law related to common trust funds, see FLA. STAT. §§ 660.42, .43, .431, .44, .45 (2024).

standing alone.²⁷ Shielded by the FTC's corporate veil, family members should feel more confident making such riskier but nonetheless prudent capital allocations. Here, the FTC may prove itself useful in preventing dilution in control and value of special assets, or in producing a higher risk-adjusted total rate of return.

In practice, predicting whether an FTC has a worthwhile chance at increasing any one family's economic utility is an exercise in good judgment, weighing possible benefits and costs in light of a family's particular preferences, facts, and circumstances.²⁸ All else equal, practically speaking, families who prefer simple legal structures and minimal involvement in asset management may be more likely to suffer an incremental decrease in utility by pursuing an FTC, while families who are less averse to complexity, who prefer to play a highly active role in stewarding the family legacy, and who place a high value on privacy, may be more likely to realize an incremental benefit.

For now, though, assuming real or theoretical benefits exist, the benefits remain out of reach for all but the very wealthiest of families. Aspects of the existing framework are still too burdensome for many families who might otherwise avail themselves of it. Participants in the political economy of trusts and estates should consider whether more constituents would utilize FTCs if the law was more accommodating. Taking only the public records exemption, most people presumably would desire the same deference to familial privacy. Surely the interests of less-wealthy citizens are not less-important. Providing significantly more relaxed regulatory restraints, if not absolute freedom from regulation, for, say, a "small family trust company," could reduce costs, incentivize FTC adoption, and democratize benefits. Catalyzing the formation of resident FTCs could also contribute to innovation and growth in professional services industries, leading

27. Access to private investment funds is typically limited to persons who qualify as accredited investors under federal securities law. A trust may qualify if it owns at least \$5 million of assets and its trustee is a sophisticated person. 17 C.F.R. § 230.501(a)(7) (2024). Meanwhile, private funds generally require a minimum capital commitment, with top-tier funds often requiring \$5 million or more. Thus, it may be legally impossible or economically impracticable for separate family trusts to invest in even a single private investment. A common trust fund, however, may be large enough to qualify and thereby allocate capital to another space in the market.

28. For a discussion on the trustee appointment decision (excluding family trust companies), see Goldsmith, *supra* note 4.

to increased economic product while mitigating systemic inequities in private wealth management, and enhancing intergenerational economic mobility. Until then, however, the exclusionary regime remains, by and large, status quo.

The remainder of this article offers an approachable review of the Florida Family Trust Company Act as a case study, and addresses related federal issues in tax and securities law, organized in the practical context of forming and managing a Florida FTC, for the purpose of catching up the uninitiated and raising issues for future discussion and possible legislative change.

I. FORMATION

A. Overview

The Florida Family Trust Company Act (FFTCA), codified as new Chapter 662 of the Florida Statutes, provides the first legal framework for establishing FTCs in Florida and sets the scope of oversight to be provided by the Florida Office of Financial Regulation (OFR).²⁹ Fundamentally, a Florida FTC must be: (1) “a corporation or limited liability company . . . organized or qualified to do business in” Florida; (2) “exclusively owned by one or more ‘family members;’” (3) that acts as a fiduciary to serve such family members; and (4) “[d]oes not serve as a fiduciary for a[n]y person . . . not [considered] a family member.”³⁰ The FFTCA describes OFR’s role not as guarantor of the financial safety and soundness of any FTC, but as the regulatory body charged with ensuring FTCs limit services to family members.³¹ Unlike with traditional banks and trust companies, FTCs are not open for business to the general population,³² and so it follows that sweeping public interest protections should not be imposed. This policy of limited state intrusion reflects a reasonable appreciation for individual freedom.

The definition of family member is broader and more inclusive than one might presume. A family member includes the *designated relative* and individuals within the fourth degree of *lineal kinship*

29. FLA. STAT. § 662.102.

30. *Id.* § 662.111(12).

31. *Id.*

32. *Id.* § 662.102(3)(b).

and seventh degree of *collateral kinship* to the designated relative, and the current (and former) spouse of any such individual, and individuals who are within the fifth degree of lineal kinship to such spouse.³³ The designated relative is a common family ancestor, living or deceased,³⁴ named in the FTC's registration³⁵ or license application.³⁶ "Degrees of kinship [are] calculated by adding the number of steps from [the] designated relative through each person to the family member [in question], directly in the case of lineal kinship, or through the common ancestor in the case of collateral kinship."³⁷ Deceased individuals appear to be counted in the degrees of kinship, though clarification would be helpful.³⁸ But that's not all.

33. *Id.* § 662.111(9), (11). Selecting the designated representative is a strategic decision. For example, if a parent were the designated relative, the parent's children (and own parents) would be the first degree of kinship, grandchildren would be of the second degree, great-grandchildren would be of the third degree of kinship, and so on. In the same example, a sibling of the parent would be of the second degree (counted collaterally through their common parent), a niece or nephew would be of the third degree of kinship, and a first cousin of the parent would be of the fourth degree of kinship (counted collaterally through their common grandparent). Choosing a child as the designated relative could change the example by extending FTC family members to more distant generations of grandchildren and is therefore a useful strategy.

34. *Id.* § 662.111(9).

35. *See infra* Section I.B.

36. *See infra* Section I.C.

37. FLA. STAT. § 662.112.

38. The definition of degrees of kinship does not specify whether (pre)deceased family members are counted. Section 662.112 states that steps are counted "from a designated relative through *each person* to the family member" (emphasis added)—not that steps are counted "from a designated relative through *each generation* to the family member" (as is the procedure in the federal generation-skipping transfer tax regime. *See* I.R.C. §§ 2631(a), 2651. Therefore, the question is whether the language "through each person" includes or excludes deceased persons. If deceased persons were excluded from the count, future generations would continually become one degree of kinship closer to the designated relative upon the passing of the previous generation. The effect is that FTCs would be able to advise family members in perpetuity. From a corporate law perspective, this is a sensible interpretation because companies can exist forever. However, that interpretation makes less sense from a statutory construction perspective. As discussed in discussion *infra* Section I.D., the FFTCA provides for Licensed FTCs (LFTCs) which are distinct from standard, unlicensed FTCs in two relevant ways: (1) LFTCs can have two designated relatives (and thereby advise two families); and (2) the definition of "family" allows six degrees of lineal kinship (and nine degrees of collateral kinship) as opposed to only four degrees of lineal kinship (and seven degrees of collateral kinship) for unlicensed FTCs. FLA. STAT. § 662.111(11). Thus, if FTCs were meant to advise future generations in perpetuity, there would be little purpose for allowing additional degrees of kinship to LFTCs. It is more likely that the legislature intended for FTCs to exist for about four future generations and LFTCs to exist for about six future generations. The fact that Florida had limited the life of trusts to 360 years at the time the FFTCA was passed supports that interpretation as well.

Family members also include certain family affiliates, trusts, and charitable organizations. A *family affiliate* includes any business entity (corporations, etc.) “in which one or more family members own, control, or have the power to directly or indirectly vote more than 50 percent of a class of voting securities of that company or other entity.”³⁹ A *trust* is deemed a family member if it is established and “funded exclusively by one or more family members”;⁴⁰ though if a trust is established by a non-family member, and all of its “noncharitable qualified beneficiaries . . . are family members,” then that trust is deemed a family member.⁴¹ If a trust is established by a non-family member and is “composed exclusively of nonindividual qualified beneficiaries,” which are all charitable foundations or other charitable entities in which a majority of the governing body is composed of family members, the trust is deemed a family member.⁴² Along the same lines, if a majority of the governing body of a charitable foundation or other charitable entity is composed of family members, such charitable entity is deemed a family member.⁴³

The definition of family member includes the probate estate of family members too.⁴⁴ Even the probate estate of a non-family member is included “if all of the noncharitable beneficiaries of the estate are family members.”⁴⁵ Mirroring the logic for trusts, if the “estate [is] composed exclusively of nonindividual [qualified] beneficiaries,” which are all “charitable foundations or other charitable entities” in which a majority of the governing body is composed of family members, the estate is deemed a family member.⁴⁶ Finally, though not blood relatives, the FTC “may serve as a fiduciary for up to 35 individuals who are . . . current or former

(though Florida has since increased its perpetuities period for trusts to 1,000 years). Therefore, it is reasonable to conclude deceased persons should be counted when calculating degrees of kinship.

39. FLA. STAT. § 662.111(10).

40. A trust to which property has been transferred as a result of a family member’s “exercise of a power of appointment shall be deemed established by that family member if all qualified beneficiaries of the appointee trust are family members.” *Id.* § 662.111(11)(f).

41. *Id.* § 662.111(11)(g). “Qualified beneficiary” has the same meaning as provided in s 736.0103.” *Id.* § 662.111(20).

42. *Id.* § 662.111(11)(g).

43. *Id.* § 662.111(11)(j).

44. *Id.* § 662.111(11)(h).

45. *Id.* § 662.111(11)(i).

46. *Id.*

employees of the [FTC],” or of “trusts, companies, or other entities that are [defined as] family members.”⁴⁷

Although the definition of family member includes some probate estates, the FFTCA prohibits FTCs from “[s]erv[ing] as a personal representative or a copersonal representative of a probate estate administered in” Florida.⁴⁸ FTCs may, however, serve as sole or co-personal representatives of an estate administered outside of Florida.⁴⁹

In its present form, the definition of family member casts a very wide net. For that reason, substantial oversight of FTCs may still be warranted. However, if democratizing FTC benefits to a broader constituent base becomes a policy goal, then perhaps FTCs serving a narrower class of family members could justifiably receive an exempt status or at least be afforded a significantly lighter regulatory burden.

B. Organization

The FFTCA introduces subtle but important distinctions from the general law of corporations and limited liability companies. These differences affect formation,⁵⁰ governance,⁵¹ capitalization,⁵² and minimum contacts.⁵³ All are sensible.

1. Governing Articles

An FTC’s articles differ materially from ordinary template forms for standard corporations and limited liability companies. The FTC’s articles must set forth a unique legal name,⁵⁴ a tailored statement of purpose,⁵⁵ and two express affirmations of compliance.⁵⁶

47. *Id.* § 662.111(12)(d).

48. *Id.* § 662.131(3). *See* discussion *infra* Section II.A.2.

49. FLA. STAT. § 662.130(1)(a). *See infra* Section II.A.1.

50. FLA. STAT. § 662.123.

51. *Id.* § 662.125.

52. *Id.* § 662.124.

53. *Id.* § 662.1225. *See* discussion *infra* Section I.B.4.

54. FLA. STAT. § 662.123(1)(a).

55. *Id.* § 662.123(1)(b).

56. *Id.* § 662.123(1)(c), (1)(d).

The FTC must have a name distinguishable from other trust companies organized or engaged in business in Florida.⁵⁷ The rule fairly balances interests in privacy and public protection. Toward privacy and anonymity, an FTC's legal name does not have to include any of the words *family*, *trust*, or *company*. However, so as not to mislead the unsuspecting public, if the word *trust* is included anywhere in the FTC's name, the word *family* must immediately precede it.⁵⁸ Practically, families concerned about privacy avoid referencing their name and the word "trust company" in the entity's legal name.

The articles must include a statement of purpose tailored to the FTC.⁵⁹ Broad language, often the default in simple template forms for standard corporations and limited liability companies, such as "for any lawful purpose" or "to engage in any lawful business activity," is insufficient. To suffice, the articles must clearly identify the activities permissible for FTCs in the state.⁶⁰ Though an incorporator may need to seek counsel at this point, the rule is fair. The power to serve as a fiduciary is a privilege deserving of respect and requiring clarity in the articles about the limited activities in which an FTC may lawfully engage is eminently reasonable.

Finally, the articles must include two express affirmations: first, that the FTC "will not offer its services to the general public,"⁶¹ i.e., anyone other than a family member; and second, that its articles will not be amended without submitting prior written notice to the OFR.⁶² "A proposed amendment to the articles . . . must be submitted to the [OFR] for review at least 30 days before it is filed [with the state] or [becomes] effective."⁶³ "[I]f the [OFR] issues a notice of disapproval with respect to the proposed amendment," the amendment is deemed to have never been filed

57. *Id.* § 662.123(1)(a).

58. *Id.* For example, acceptable names would include "DeStefano Family Trust Company," "DeStefano Family Trust, LLC," or "XYZ Company," but not "DeStefano Trust Company," "XYZ Trust, LLC," or "DeStefano/XYZ Family Holdings & Trust, Inc."

59. *Id.* § 662.123(1)(b).

60. *Id.*

61. *Id.* § 662.123(1)(c).

62. *Id.* § 662.123(1)(d). FTCs must also register with the OFR by filing an application. *Id.* § 662.122(1).

63. *Id.* § 662.123(2).

with the state and is *void ab initio*.⁶⁴ Implicitly, OFR reviews the proposed changes for objective administrative compliance only.

2. Governing Board

Florida's approach to FTC board composition is fairly flexible, though it might do more to support adequate checks and balances. "[A]uthority to manage a[n] [FTC] . . . is vested in a board of directors" (if structured as a corporation), or a board of managers (if structured as a limited liability company).⁶⁵ In both forms, the board must be comprised of at least three individuals, at least one of whom is a Florida resident.⁶⁶ For practical flexibility, the articles do not need to name initial board members.⁶⁷ It should suffice to either state the exact number of board members the FTC will have, or state that the board shall be comprised of no less than three individuals.⁶⁸ Board members may then be appointed at an appropriate time.⁶⁹ The number of board seats may be increased or decreased (but not below three) at a later time as well.⁷⁰

Requiring at least three board members helps mitigate control risks and is in line with other leading FTC jurisdictions.⁷¹ Query, however, whether requiring an independent board member, or representative member from each family branch, would promote fairness and inclusive communication in key decisions.

64. *Id.*

65. *Id.* § 662.125(1).

66. *Id.* § 662.125(2).

67. *See id.*; *see also* FLA. STAT. § 607.0202(2)(a) (2024) ("[t]he articles of incorporation may set forth . . . [t]he names . . . of the individuals who are to serve as the initial directors.") (emphasis added).

68. FLA. STAT. § 607.0803(1). The statute states: "A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws."

69. *See id.* § 607.0803(3) ("Directors are elected at the first annual shareholders' meeting and at each annual shareholders' meeting thereafter . . . unless their terms are staggered under s. 607.0806.").

70. *See id.* § 607.0803(2) ("The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the bylaws.").

71. South Dakota requires at least three directors. S.D. CODIFIED LAWS § 51A-6A-13 (2024). Wyoming requires five directors but allows for three in certain circumstances. WYO. STAT. ANN. §13-5-518 (2024). Nevada does not specify a minimum number, which for lack of clarity is not a preferred approach. NEV. REV. STAT. § 669A (2023).

3. Capitalization

The FFTCA lowers the financial barrier to entry by allowing FTCs to maintain a smaller capital account than must be maintained by traditional banks and trust companies, but the hurdle is still too high for most families. FTCs must be organized and operated with a capital account value of at least \$250,000, which must be funded with cash or U.S. Treasury obligations.⁷² “[A]ssets forming the minimum capital account . . . must . . . [h]ave an aggregate market value of at least 100 percent of the [FTC’s] required capital account”⁷³ If at any time the aggregate market value falls below the \$250,000 threshold, “the [FTC] has 5 business days to bring [the] capital account” back up to the required minimum amount.⁷⁴ Here, funding the capital account in cash avoids capital infusions later if the fluctuation in the market value of U.S. Treasuries owned by the FTC causes the capital account to decrease below the required minimum. Among very wealthy families, requiring constant liquidity of at least \$250,000 may be *de minimis*. For others, it is prohibitive. To promote broader FTC adoption, the capital requirement should be decreased considerably, and perhaps calculated in proportion to the assets under management (as determined on a periodic basis), up to a ceiling. Whatever the solution, this barrier to entry should be lowered for FTCs to gain broader appeal.

4. Minimum Contacts

Florida FTCs must have a sufficient connection, a so-called nexus, to the state of Florida to be organized there and remain in good standing. FTCs must satisfy four requirements to support nexus. All are reasonable. First, FTCs must maintain “[a] principal office physically located in” Florida.⁷⁵ Branch offices outside of Florida are permitted, but they are not adequate

72. FLA. STAT. §§ 662.124(1), .132(1)(a). This amount is higher than the requirement in South Dakota (\$200,000) but lower than in Nevada (\$300,000) and Wyoming (\$500,000). S.D. CODIFIED LAWS § 51A-6A-19 (2024); NEV. REV. STAT. § 669A.160 (2023); WYO. STAT. ANN. § 13-5-605 (2024).

73. FLA. STAT. § 662.132(1)(b).

74. *Id.*

75. *Id.* § 662.1225(1)(a).

substitutes.⁷⁶ The FTC’s Florida office must maintain the “original or true copies of all records and accounts of the” FTC,⁷⁷ which must be “access[ible] and . . . readily available for examination by the” OFR.⁷⁸ Second, FTCs must maintain a registered agent having an office in Florida.⁷⁹ Third, FTCs must maintain a deposit account with a state-chartered or national financial institution that has a principal or branch office in Florida.⁸⁰ Fourth, FTCs must maintain “[a]ll applicable state and local business licenses, charters, and permits.”⁸¹ These are fair requirements that do not discriminate against families with lower net worth, as the requirements are fairly easy to satisfy.

C. Registration Application

Before commencing operations, FTCs must register with the OFR by filing an application.⁸² A special filing is reasonable given the entity is seeking special permission from the state. The registration fee is \$5,000, nonrefundable, and must accompany the registration application.⁸³ The OFR is charged with creating the registration application form⁸⁴ and posting the form on its website.⁸⁵ Of course, the more onerous the barrier to entry, the more applicants may be turned away.

The Florida application is fairly straightforward. At a minimum, registration must call for the name of the FTC’s designated relative,⁸⁶ the registered agent’s name and current Florida address,⁸⁷ and “the current telephone number and street address of the physical location . . . of [the FTC’s] principal place of operations [in Florida] where its books and records will be

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* § 662.1225(1)(b).

80. *Id.* § 662.1225(1)(d).

81. *Id.* § 662.1225(1)(c).

82. *Id.* § 662.122(1).

83. *Id.* § 662.122(3). Fees collected by the OFR will be used for the purpose of fulfilling OFR’s obligations in the family trust company statutes. *See id.* § 662.122(5).

84. *Id.* § 662.122(4).

85. FLORIDA OFFICE OF FINANCIAL REGULATION, <http://flofr.gov/sitePages/FamilyTrustCompanies.htm> (last visited Sep. 16, 2024).

86. FLA. STAT. § 662.122(1)(a); *see* designated relative discussion *supra* Section I.A.

87. FLA. STAT. § 662.122(1)(d).

maintained.”⁸⁸ The person completing the application must affirm that the FTC satisfies the statutory definition,⁸⁹ “and that its operations will comply with”⁹⁰; sections 662.1225 (referring to FTC general requirements);⁹¹ 662.125 (referring to FTC directors and managers);⁹² 662.131 (referring to prohibited activities);⁹³ and 662.134 (referring to prohibition on public advertising of FTC services)⁹⁴.⁹⁵ When complete, the application must be “signed, under penalty of perjury, by an officer or director if the [FTC] is organized as a corporation, or by a manager, officer, or member if the FTC is organized as a limited liability company.”⁹⁶

D. License Application

1. *The Licensed Family Trust Company*

The FFTCA provides an option for a standard FTC to become a Licensed Family Trust Company (LFTC).⁹⁷ An FTC is not required to be licensed,⁹⁸ and Florida Statutes Chapter 662 is constructed such that its provisions are applicable to all FTCs, unless otherwise expressly limited to either standard (unlicensed) FTCs or LFTCs.⁹⁹

Obtaining a license offers two primary benefits. First, LFTCs “may have up to two designated relatives,”¹⁰⁰ allowing the provisions of fiduciary services to two independent family lineages,¹⁰¹ as opposed to unlicensed FTCs which may only have one designated relative and provide services to one family lineage.¹⁰² Second, LFTCs can serve additional future generations from each designated relative. The family member definition

88. *Id.* § 662.122(1)(c).

89. *See* discussion *supra* Section I.A.

90. FLA. STAT. § 662.122(1)(b).

91. *See* discussion *supra* Section I.B.4.

92. *See* discussion *supra* Section I.B.2.

93. *See* discussion *infra* Section II.A.2.

94. *See* discussion *infra* Section II.A.2.

95. FLA. STAT. § 662.122(1)(b).

96. *Id.* § 662.122(4).

97. *Id.* § 662.121.

98. *Id.* § 662.114.

99. *Id.* § 662.115(1)–(2).

100. *Id.* § 662.120(2).

101. *Id.*

102. *Id.* § 662.120(1).

expands for LFTCs to include individuals “within the sixth degree of lineal kinship to a designated relative”¹⁰³ and “within the ninth degree of collateral kinship to a designated relative.”¹⁰⁴

Licensure involves weightier regulations and higher costs. Additional government oversight begins with the LFTC’s governing board. If the LFTC “[h]as been licensed for less than two years” or “[h]as undergone a change in control within the preceding 2 years,” it is required to notify the OFR at least 60 days before the effective appointment of any person to the FTC’s board and before the effective appointment or employment of any person as an officer, manager, or in a similar managerial capacity.¹⁰⁵ If the OFR issues a notice of disapproval, then the LFTC may not appoint or employ such individual to that position.¹⁰⁶ The OFR must deny an individual who¹⁰⁷ “had a professional license suspended or revoked within . . . 10 years”;¹⁰⁸ served as a director or officer of a foreign or domestic financial institution which had its license suspended or revoked within 10 years;¹⁰⁹ or “has been convicted of, or pled guilty or [no contest] . . . to a violation of the financial institutions codes, . . . or to a crime involving fraud, misrepresentation, or moral turpitude.”¹¹⁰ It remains to be seen whether the OFR will issue a notice of disapproval for a reason other than those provided by statute.

LFTCs are required to maintain a larger minimum capital account than unlicensed FTCs if the LFTC names two designated relatives in its license application or annual license renewal.¹¹¹ In such case, the minimum capital account is increased from \$250,000 to \$350,000.¹¹²

“[T]o indemnify the company against loss because of a dishonest, fraudulent, or criminal act or omission,” LFTCs must “maintain fidelity bonds on all active officers, directors, managers, members acting in a managerial capacity, and employees of the

103. *Id.* § 662.111(11)(b).

104. *Id.* § 662.111(11)(c).

105. *Id.* § 662.125(3).

106. *Id.* § 662.125(4).

107. *Id.* § 662.125(5).

108. *Id.* §§ 662.121(10)(d), .1215(2)(a)4.

109. *Id.* § 662.121(10)(b).

110. *Id.* § 662.121(10)(c).

111. *Id.* § 662.124(1).

112. *Id.*

company, regardless of whether they receive a salary or other compensation” for services.¹¹³ “Each fidelity bond shall be issued in an amount of at least \$1 million.”¹¹⁴ However, “[i]n lieu of the fidelity bonds required,” LFTCs may increase their required minimum capital account by \$1 million to at least \$1.25 million if there is one designated relative or to at least \$1.35 million if there are two designated relatives.¹¹⁵ Fidelity bonds are expressly optional for unlicensed FTCs.¹¹⁶

LFTCs are also required to maintain certain insurance, whereas insurance is expressly optional for unlicensed FTCs.¹¹⁷ Unlike with fidelity bonds, there is no exception for fiduciary insurance. Licensed FTCs must maintain an errors and omissions insurance policy of at least \$1 million.¹¹⁸ The policy must list as the insured all “officers, directors, managers, and members acting in a managerial capacity, regardless of whether . . . compensation” is received in exchange for services.¹¹⁹ Though only errors and omissions insurance is required, LFTCs may maintain other types of insurance, like casualty insurance, if desired.¹²⁰

2. Application for License; Investigation of License Applicant

FTCs looking to obtain license status must apply for one by a separate application in lieu of the registration required for standard, unlicensed FTCs.¹²¹ The nonrefundable licensing fee of \$10,000 must be paid at the time the license application is submitted.¹²² The OFR is tasked with creating the license application form, which is posted on its website.¹²³

The license application is more burdensome and intrusive than standard registration. At a minimum, “[t]he application must

113. *Id.* § 662.126(1).

114. *Id.* § 662.126(2).

115. *Id.* § 662.126(3).

116. *Id.* § 662.126(6).

117. *Id.* § 662.126(4)–(5), (7).

118. *Id.* § 662.126(4).

119. *Id.*

120. *Id.* § 662.126(5).

121. *Id.* § 662.121.

122. *Id.* Fees collected by the OFR will be used for the purpose of fulfilling OFRs obligations in the family trust company statutes.

123. FLORIDA OFFICE OF FINANCIAL REGULATION, <http://flofr.gov/sitePages/FamilyTrustCompanies.htm> (last visited Sept. 7, 2024).

contain or be accompanied by: . . . [t]he name of the proposed” LFTC;¹²⁴ “[a] copy of the articles of incorporation or articles of organization and the bylaws or operating agreement of the proposed” LFTC;¹²⁵ the physical address of the LFTC’s Florida office;¹²⁶ “[a] statement describing in detail the services that will be provided to family members”;¹²⁷ “[t]he name and biographical information of each individual who will initially serve as a director, officer, manager, or member acting in a managerial capacity”;¹²⁸ “[t]he name and biographical information of each individual who owns or has the ability or power to directly or indirectly vote at least 10 percent or more of the outstanding shares, membership interest, or membership units”;¹²⁹ “the names of the designated relatives”;¹³⁰ “[t]he amount of the initial capital account . . . and the form in which the capital was paid and will be maintained”;¹³¹ and “[t]he type and amount of bonds or insurance that will be procured and maintained.”¹³² Beyond the specific items, the applicant must provide “additional information [as] reasonably required by the” OFR.¹³³

The license applicant must sign “[a] statement . . . under penalty of perjury, affirming that . . . [the prospective LFTC] is not currently transacting business with the general public” (i.e., only doing business with family members),¹³⁴ and that “[n]o director, officer, manager, or member acting in a managerial capacity has had a professional license suspended or revoked within the [past] 10 years,”¹³⁵ or served in a managerial capacity of a foreign or domestic financial institution which had its license suspended or revoked within the past 10 years,¹³⁶ or “has been convicted of, or pled guilty or [no contest] . . . to a violation of the financial

124. FLA. STAT. § 662.121(1).

125. *Id.* § 662.121(2).

126. *Id.* § 662.121(3).

127. *Id.* § 662.121(4).

128. *Id.* § 662.121(5).

129. *Id.* § 662.121(6).

130. *Id.* § 662.121(7).

131. *Id.* § 662.121(8).

132. *Id.* § 662.121(9).

133. *Id.* § 662.121(11).

134. *Id.* § 662.121(10)(a); *see id.* § 662.111(11) for definition of “family member”; *see also* discussion *supra* Section I.A.

135. FLA. STAT. § 662.121(10)(d).

136. *Id.* § 662.121(10)(b).

institutions codes,” or “a crime involving fraud, misrepresentation, or moral turpitude.”¹³⁷ The applicant must affirm that all information in the application is true and correct to the best of the applicant’s knowledge.¹³⁸

After the license application is completed and submitted, the OFR conducts an investigation.¹³⁹ The purpose of the investigation is to confirm that the information and affirmative representations in the license application are true, and that the prospective LFTC is in compliance with all statutory requirements.¹⁴⁰

If the investigation confirms that the applicant satisfies all requirements, the OFR issues a license authorizing the FTC to operate as an LFTC.¹⁴¹ However, if the OFR determines that any criteria has not been met, the OFR “serve[s] notice of its intent to deny the [license] application,”¹⁴² at which point the applicant has an opportunity to request a hearing pursuant to Florida Statutes sections 120.569 and 120.57.¹⁴³ Though the license application is more involved, it is not so much more burdensome than standard registration. Unlicensed FTCs are still a more viable and simpler option, and likely suffice for most families.

II. MANAGEMENT

A. Scope of Authority

1. Powers

The FFTCA authorizes FTCs to exercise special powers compared to general business entities.¹⁴⁴ FTCs are expressly authorized to act inside or outside of Florida as a sole fiduciary or co-fiduciary to family members and other eligible individuals.¹⁴⁵

137. *Id.* § 662.121(10)(c).

138. *Id.* § 662.121(10)(e).

139. *Id.* § 662.1215(2).

140. *Id.*; see discussion *supra* Section I.D.1.

141. FLA. STAT. § 662.1215(3).

142. *Id.* § 662.1215(4).

143. *Id.*

144. *Id.* § 662.130(1)(d).

145. *Id.* § 662.130(1)(c). FTCs are also authorized to act as an “advisory agent, assignee, assignee for the benefit of creditors, authenticating agent, bailee, bond or indenture trustee, conservator, conversion agent, custodian, escrow agent, fiscal or paying agent, financial

The scope of this authority includes, chiefly, the authority to act as a trustee, financial advisor, and investment advisor or manager, and the power to hold, “purchase, sell, invest, reinvest, safekeep, or otherwise manage . . . real or personal property.”¹⁴⁶ FTCs are permitted to “[a]ct as an attorney in fact or agent under a power of attorney, other than a power of attorney governed by chapter 709” (referring to powers of appointment over property).¹⁴⁷ FTCs may serve as a “copersonal representative, executor, or curator for probate estates being administered in a state or jurisdiction *other than*” Florida.¹⁴⁸

Like other trustees, FTCs are expressly authorized to prudently delegate duties and powers. FTCs may delegate trustee powers in accordance with Florida Statutes Chapter 736 and investment functions in accordance with Florida Statutes section 518.112.¹⁴⁹ FTCs may also “retain agents, attorneys, accountants, investment advisers, or other individuals or entities,” including “a bank trust department, or a public trust company,” “to advise or assist the [FTC] . . . in the exercise of its powers and duties” arising under the FFTCA and under the Florida Trust Code,¹⁵⁰ but may not retain another FTC, or LFTC, whether or not it is organized in Florida.¹⁵¹ The delegation of powers and duties requires good faith due diligence.¹⁵² FTCs should implement internal policies and procedures to prudently hire, review, and monitor agents, advisers, and consultants, within a clear scope of authority. What might be dismissed as more paperwork is truly the family’s opportunity to institutionalize decision-making procedures to promote discipline and good stewardship. Documenting a thought

advisor, guardian, investment advisor or manager, managing agent, purchase agent, receiver, registrar, safekeeping or subscription agent, transfer agent, except for public companies, warrant agent, or [in] similar capacities generally performed by corporate trustees.” *Id.*

146. *Id.* For a discussion of who FTCs may serve, see discussion *supra* Section I.A.

147. FLA. STAT. § 662.130(1)(b).

148. *Id.* § 662.130(1)(a) (emphasis added). Whether the FTC is actually permitted to serve in such a capacity within another state is a question of that state’s law.

149. *Id.* § 662.130(1)(e).

150. *Id.*; see FLA. STAT. ch. 736 (2024).

151. FLA. STAT. § 662.130(1)(e).

152. See Alan V. Ytterberg & James P. Weller, *Managing Family Wealth Through a Private Trust Company*, 36 ACTEC L.J. 623, 624, 631, 639 (2010) (while good faith and due diligence are best practices for prudent management of any asset, some states apply a more limited standard of review when directors of an FTC make decisions in subjective good faith, among other factors).

process before important decisions are made is helpful to deter breach of trust claims, but more so because those making decisions in the future might glean some understanding and wisdom. FTCs are secretive in nature, but the benefits of transparency should not be overlooked.

2. Prohibitions

The FFTCA appropriately restricts and prohibits certain business activities. Violating any of the enumerated prohibitions jeopardizes the FTC's good standing with the state.¹⁵³ Most importantly, FTCs are expressly prohibited from performing any services for the public.¹⁵⁴ This is critical. The policies supporting the FFTCA,¹⁵⁵ the definition of an FTC,¹⁵⁶ the registration and license application requirements,¹⁵⁷ the express prohibition on advertising services to the public,¹⁵⁸ and the primary focus of OFRs examinations combine to make it abundantly clear that FTCs are *not* to perform any services for the non-family members. FTCs are prohibited from “[s]erv[ing] as a personal representative . . . of a probate estate administered in” Florida,¹⁵⁹ although FTCs may serve in such capacity in jurisdictions other than Florida (if so permitted in that jurisdiction).¹⁶⁰ FTCs are also prohibited from acting “as an attorney in fact or agent, including as a co-attorney in fact or co-agent, under a power of attorney pursuant to chapter 709” (referring to powers of appointment over property).¹⁶¹ Though a financial institution of sorts, FTCs are prohibited from carrying on commercial banking activities.¹⁶² Here, commercial banking includes “the business of receiving . . . deposits, paying checks, or lending money to the public.”¹⁶³ FTCs may, however, “establish

153. The OFR has the authority to issue cease and desist orders, remove the FTC as trustee, and revoke the license from LFTCs. *See* discussion *infra* Section II.F.2.

154. FLA. STAT. § 662.131(2) (stating “a family trust company . . . may not . . . [e]ngage in fiduciary services with the public”).

155. *Id.* § 662.102(1)-(3). *See also* discussion *supra* Section I.A.

156. *Id.* § 662.111(12); *see also* discussion *supra* Section I.A.

157. *See* discussion *supra* Sections I.C., I.D.

158. FLA. STAT. § 662.134.

159. *Id.* § 662.131(3).

160. *Id.* § 662.130(1)(a).

161. *Id.* § 662.131(4).

162. *Id.* § 662.131(1).

163. *Id.* § 662.111(6).

accounts at financial institutions for [their] own purposes or on behalf of family members to whom [they] provide[] services” without running afoul of the prohibition.¹⁶⁴

Preventing mishaps takes effort. FTCs should implement policies and procedures that ensure none of its directors, officers, managers, members, or employees engage in a prohibited activity. Such policies should provide a procedure for confirming the FTC only serves eligible persons and does not unintentionally advertise information on its website or other publicly accessible media that describes its services or indicates in any way that the FTC is a public trust company. If an FTC maintains a website, it should consider limiting content to its contact information and include a conspicuous disclaimer that the company is a private family trust company not available to serve the public.

B. Investments

The FFTCA provides FTCs with wide latitude over investment strategy. Only the FTC’s capital account must be maintained in cash or U.S. Treasuries.¹⁶⁵ Beyond that, FTCs are permitted to invest in virtually any risky asset, including those which may be affected by conflicts of interest and raise presumptions of self-dealing.¹⁶⁶

For its own account, an FTC “may invest . . . in any type or character of equity securities, debt securities, or other assets.”¹⁶⁷ Practically, FTCs “may purchase or rent real or personal property for use in the . . . business.”¹⁶⁸ FTCs may also purchase, for example, common stock and preferred stock (type of equity) that pays a dividend or does not pay a dividend (characteristic of equity).¹⁶⁹ FTCs could also purchase, for example, an interest in closely-held businesses, or an interest in private investment funds pursuing a venture capital, leveraged-buyout, long-short public equity, or other investment strategy. Just the same, FTCs could purchase structured debt products and “exotic” financial

164. *Id.* § 662.131(1).

165. *Id.* § 662.132(1)(a).

166. *Id.* § 662.132(6).

167. *Id.* § 662.132(3).

168. *Id.* § 662.132(2).

169. *Id.* § 662.132(8)(g).

instruments.¹⁷⁰ The statute grants FTCs the freedom to invest across virtually any asset when investing for its own account.

Acting in a fiduciary capacity, FTCs “may invest in every kind of property and type of investment,” same as other trustees.¹⁷¹ However, that authority is subject to the duties imposed on fiduciaries and other state laws governing trustees.¹⁷² For example, the law imposes on trustees a duty to invest prudently,¹⁷³ to diversify trust assets,¹⁷⁴ and to pursue an investment strategy that produces income while preserving capital.¹⁷⁵ Likewise, the FTC should consider adopting particular investment policies for managing fiduciary assets.

Family trust companies owe a duty of loyalty when serving as trustee of a trust whose administration is subject to Florida Statutes Chapter 736.¹⁷⁶ However, “while acting as a fiduciary,” FTCs are “authorized, without limiting any powers otherwise conferred on fiduciaries by law, to do any of the following, which are *not* presumed to be affected by a conflict” of interest¹⁷⁷:

- (a) Make an equity investment in a closely held entity that may or may not be marketable and that is directly or indirectly owned or controlled by one or more family members.
- (b) Place a security transaction using a broker who is a family member.
- (c) Enter into an agreement with a family member who is the settlor or a qualified beneficiary of a trust with respect to the appointment of the [FTC] . . . as a fiduciary of the trust
- (d) Transact business with a family member.
- (e) Transact business with or invest in any asset of another trust, estate, guardianship, or conservatorship for which the

170. *Id.* § 662.132(3).

171. FLA. STAT. § 518.11(1)(b) (2024).

172. *See, e.g., id.* § 518.11 (explaining rules of investments by fiduciaries including the prudent investor rule).

173. *Id.* § 518.11(1)(a)–(b).

174. *Id.* § 518.11(1)(c).

175. *Id.* § 518.11(1)(e).

176. FLA. STAT. § 662.132(9) (2024).

177. *Id.* § 662.132(8) (emphasis added).

[FTC] . . . is a fiduciary or in which a family member has an interest.

(f) Deposit trust assets in a financial institution that is owned, controlled, or operated by one or more family members.

(g) Purchase, sell, hold, own, or invest in a security, bond, real or personal property, stock, or other asset of a family member.

(h) With or without adequate security, lend money to or borrow money from a family member or a trust, estate, or guardianship for which the [FTC] . . . serves as a fiduciary.¹⁷⁸

The FFTCA further permits the FTC, while acting as a fiduciary, to engage in two types of transactions that would ordinarily raise a presumption of a conflict of interest, subject to some conditions.¹⁷⁹ First, the FTC may, in its fiduciary capacity, purchase bonds or other securities underwritten or distributed by the FTC, a family affiliate, or a syndicate, which includes the FTC or family affiliate, whether purchased directly or in the secondary market.¹⁸⁰ Second, the FTC can purchase, in its fiduciary capacity, “[s]ecurities of an investment company, including a mutual fund, closed-end fund, or unit investment trust, as defined under the federal Investment Company Act of 1940, for which the” FTC is an adviser or manager.¹⁸¹ Nothing in these permissions reduces the degree of prudence the FTC must exercise under its fiduciary duties.¹⁸²

178. *Id.* § 662.132(8)(a)–(h).

179. *See id.* § 662.132(5)–(6). The FTC may only engage in these transactions if not “expressly prohibited by the instrument . . . or order establishing the fiduciary relationship,” § 662.132(5)(a), the FTC obtains written “consent of any cofiduciaries with discretionary investment powers to the investment,” § 662.132(5)(b), and the FTC provides written disclosure to the person for whom it is acting as a fiduciary which describes the nature of the FTC’s interest in and relationship with others in the transaction and the nature and amount of any compensation received by the FTC in connection with the transaction or relationship, § 662.132(5)(c)1–4.

The transaction “is not presumed to be affected by a conflict . . . [of] interests if such purchase . . . [i]s negotiated at a fair price,” § 662.132(6)(a), “[i]s in accordance with . . . [t]he interest of the qualified beneficiaries,” § 662.132(6)(b)(1), and “[t]he purpose of the trust,” § 662.132(6)(b)2, and “complies with . . . [t]he prudent investor rule, . . . unless such compliance is waived,” § 662.132(6)(c)1, and the trust instrument, § 662.132(6)(c)2.

180. *Id.* § 662.132(4)(a).

181. *Id.* § 662.132(4)(b). “[A]ct[ing] as an advisor, custodian, distributor, manager, registrar, shareholder servicing agent, sponsor, or transfer agent” is acceptable as well. *Id.*

182. *Id.* § 662.132(6).

When acting in its fiduciary capacity, and purchasing a bond or security issued by the FTC or an affiliate, the FTC must have express authorization by either: “[t]he terms of the [trust] instrument”; “[a] court order”; “[t]he written consent of the trust settlor”; or “[t]he written consent of every adult qualified beneficiary of the trust who, at the time of such purchase, is entitled to receive income under the trust or who would be entitled to receive a distribution of principal if the trust were terminated.”¹⁸³ Additionally, the purchase must be “at a fair price and compl[y] with . . . [t]he prudent investor rule,” unless waived, and “the terms of the instrument . . . establishing the fiduciary relationship.”¹⁸⁴

The deference on investments is welcomed, but it comes with responsibility.¹⁸⁵ Given the principles of modern portfolio theory and capital markets as sophisticated as those in the United States, investment parameters are best left to private actors on the ground, not public servants in government. Trustees are in the unique position, however, of having to manage funds in the best interest of the trust beneficiaries (not themselves), so limitations are appropriate. For example, maintaining a concentrated, illiquid position in a family business through an FTC may very well benefit family members who work for and draw a salary from the business, but perhaps not as much for family members who do not. There may not be a clear breach of fiduciary duty, but the interests of some family members may not be weighed impartially.

C. State Examination

Although the FFTCA relieves the OFR from responsibility for ensuring the safety and soundness of FTCs, the FFTCA nevertheless vests the OFR with investigative authority and directs it to conduct periodic examinations.¹⁸⁶ The examinations are not inconsequential. The OFR is empowered to examine or investigate FTCs “at any time it deems necessary to determine whether [an FTC] . . . has engaged in any act prohibited under s. 662.131 or s. 662.134 and, if [an FTC] . . . has engaged in such act,

183. *Id.* § 662.132(7)(a).

184. *Id.* § 662.132(7)(b).

185. *E.g., id.* § 662.1225.

186. *Id.* § 662.141(2)–(3)◊.

to determine whether any applicable provision of the financial institutions codes has been violated.”¹⁸⁷

In addition to discretionary investigative authority, the OFR must examine LFTCs “at least once every 36 months.”¹⁸⁸ The FFTCA directs the OFR to examine the LFTC’s books and records it deems necessary to determine whether LFTCs are in compliance.¹⁸⁹ Specifically, the statute sets the scope of the examination to include Florida Statutes section 662.1225 (referring to general FTC requirements), section 662.125 (referring to FTC directors or managers), and sections 662.131 and 662.134 (referring to prohibited activities), as applicable.¹⁹⁰ In place of such an examination, the OFR may accept “a certificate of trust, trust summary, or written statement from the [FTC] which identifies the qualified beneficiaries of any trust or estate for which [the FTC] . . . serves as a fiduciary” and proves that the FTC is actually permitted to provide fiduciary services to such persons.¹⁹¹ The Florida Financial Services Commission is authorized to expand the scope of these examinations and establish additional rules governing the maintenance of books and records and the requirements for conformity with the FFTCA.¹⁹²

Examinations are expensive. Internal recordkeeping costs aside, FTCs are obligated to pay fees to the OFR in connection with examinations.¹⁹³ If only a few dozen families have an FTC, it is appropriate for them to shoulder the cost, not the state. The fees collected are intended to cover the salary and travel expenses of field staff, supervisory staff, and support staff, which are directly attributable to the examination of FTCs.¹⁹⁴ Once the FTC receives notice of the fee due, it must pay or postmark payment within thirty days.¹⁹⁵ If payment is not timely postmarked or received, the

187. *Id.* § 662.141.

188. *Id.* § 662.141(2).

189. *Id.*

190. *Id.* § 662.141; see discussion *supra* Section I.B.2. (discussing directors and managers); discussion *supra* Section I.B.4. (general FTC requirements); discussion *supra* Section II.A.2 (prohibited activities).

191. FLA. STAT. § 662.141(1).

192. See *id.* § 662.140.

193. *Id.* § 662.141(4).

194. *Id.* Public trust companies have the same obligation to pay costs of the examination under section 660.265, *Florida Statutes*.

195. FLA. STAT. § 662.141(4).

OFR charges \$100 per day the payment remains overdue.¹⁹⁶ If the FTC intentionally avoids timely payment, the OFR may fine the FTC up to \$1,000 per day until the fee is paid.¹⁹⁷

Proactive recordkeeping hopefully saves money in the form of a smoother examination. At the very least, an FTC should maintain updated versions of organizational charts; board member biographies; a list of names, addresses, and ownership percentages of each shareholder or member;¹⁹⁸ copies of the FTC's governing documents, policies and procedures; copies of trust instruments, transactional documents, financial statements and audits, investment holdings, fiduciary trust accounts; and information on banking and third-party advisor relationships. But good recordkeeping extends beyond this list.

D. Confidential Books and Records

In a boon to privacy, a 2022 amendment to the FFTCA expanded the public records exemption for FTCs.¹⁹⁹ Generally, public access to court records is presumed,²⁰⁰ and family matters are typically treated no differently.²⁰¹ Now, if an FTC is a party to litigation, the clerk is prohibited from releasing court records to anyone but the trust settlor, co-trustees and trust directors (if any), and counsel for other parties.²⁰² The legislature believes, as a matter of public policy, such a high degree of privacy is necessary to protect vulnerable family members from being targeted and exploited, given there is likely to be an eye-popping dollar amount at issue.²⁰³ Presumably, less wealthy citizens may prefer to keep private family matters between themselves and the court, rather than subject themselves to public scrutiny or humiliation from an airing of family laundry, dirty or not.

In the context of FTCs, confidentiality is taken seriously. Books and records of FTCs are confidential,²⁰⁴ and any person who

196. *Id.*

197. *Id.*

198. Required by *id.* § 662.147(1).

199. Fla. S. B. 1304, § 1 (2022).

200. FLA. CONST. art. I, § 24(a).

201. See FLA. FAM. L. R. P. 12.400(a).

202. Fla. S. B. 1304, § 1 (2022).

203. Fla. S. B. 1304, § 2 (2022).

204. FLA. STAT. § 662.146(1) (2024).

willfully and unlawfully discloses such information commits a third-degree felony.²⁰⁵ For these purposes, “books and records” includes, but is not limited to, the initial registration application or license application and documents pertaining thereto (including OFR investigations and determinations), annual renewals,²⁰⁶ documents submitted to OFR in connection with a licensed FTC discontinuing business,²⁰⁷ and any other documents related to FTC customers and shareholders or members (i.e., family members).²⁰⁸ Disclosure is permitted only to a limited class of persons, in limited circumstances. “Each customer and stockholder, . . . or member [of the FTC], . . . has the right to inspect [the FTC’s] books and records . . . as they pertain to [such person’s] accounts or . . . voting rights.”²⁰⁹ The FTC may also disclose its books and records to the OFR, to persons authorized to act for the FTC, to federal or state law enforcement investigating criminal activity pursuant to a subpoena or as otherwise compelled by a court-issued subpoena, or as authorized by the board of directors or managers.²¹⁰ The public records exemption does not, however, extend to the publication of

205. *Id.* § 662.146(2)(c). The felony is “punishable as provided in s. 775.082, s. 775.083, or s. 775.084.” *Id.* A third-degree felony may carry up to a five-year term of imprisonment and a fine up to \$5,000. FLA. STAT. §§ 775.082(3)(e), (9)(a)3.d., 775.083(1)(c).

206. *See* FLA. STAT. § 662.128; *see also* discussion *infra* Section II.E.

207. *See* FLA. STAT. § 662.129; *see also* discussion *infra* Section II.F.1.

208. *See* FLA. STAT. § 662.146(2)(b). “However, information may be released, without the authorization of a customer, member, or shareholder in a manner prescribed by the board of directors, if a corporation, or managers, if a limited liability company, to verify or corroborate the existence or amount of a customer’s account . . . to meet the needs of commerce and to ensure accurate credit information.” *Id.* Information may also be released pursuant to an exception contained in 15 U.S.C. § 6802. *Id.*

209. *Id.* § 662.146(2)(a).

210. *Id.* § 662.146(1)(a)–(e). “Before the production of the books and records . . . , the party seeking production must reimburse the [FTC] for the reasonable costs and fees incurred in compliance with the production. If the parties disagree regarding the amount of reimbursement, the party seeking the records may request the court having jurisdiction to set the amount of reimbursement.” *Id.* § 662.146(1)(c).

Furthermore, “[o]rders issued by courts or administrative law judges for the production of confidential records or information must provide for inspection in camera by the court or the administrative law judge. If the court or administrative law judge determines that the documents requested are relevant or would likely lead to the discovery of admissible evidence, the documents shall be subject to further orders by the court or the administrative law judge to protect the confidentiality thereof. An order directing the release of information shall be immediately reviewable, and a petition by the office for review of the order shall automatically stay any further proceedings in the trial court or the administrative hearing until the disposition of the petition by the reviewing court. If any other party files a petition for review, it will operate as a stay of the proceedings only upon order of the reviewing court.” *Id.* § 662.147(4).

the name of the FTC or the name and address of the FTC's registered agent.²¹¹

FTC documents are also confidential in the OFR's hands. Information provided by an FTC to the OFR is exempt from public records disclosure.²¹² Personally identifying information contained in records relating to registrations and license applications; annual renewals; examinations or reports from examinations; operations or conditions of the FTC,²¹³ including working papers, books, and records;²¹⁴ and any portion of a list of names of the FTC's shareholders or members, as well as cease and desist orders,²¹⁵ are all confidential and exempt from the public records disclosure otherwise mandated by Florida Statutes section 119.07(1) and section 24(a), Art. I of the Florida Constitution.²¹⁶

The OFR is required to keep, for at least ten years, all of the FTC's examination reports, investigatory records, FTC registration or license applications and accompanying documents and responses, annual renewals, documents related to the discontinuation of FTC operations, and any related information compiled by the OFR.²¹⁷ Additionally, "A copy of any document on file with the [OFR] which is certified by the [OFR] as being a true copy may be introduced in evidence as if it were the original."²¹⁸ If the FTC's board requests in writing, the OFR may release confidential information to other parties, including to the FTC's authorized representative during examination, a fidelity insurance company, an independent auditor, and a liquidator, receiver, or

211. *Id.* § 662.148(4)(b).

212. *See id.* § 662.148(2)(a)–(f).

213. *Id.* § 662.148(1)(a) ("Reports of examinations, operations, or conditions' means records submitted to or prepared by the office as part of the office's duties performed pursuant to s. 655.012 or s. 655.045(1).").

214. *Id.* § 662.148(1)(b) ("Working papers' means the records of the procedure followed, the tests performed, the information obtained, and the conclusions reached in an examination under s. 655.032 or s. 655.045. The term also includes books and records.").

215. "[E]mergency cease and desist order[s]" remain exempt from public records "until the emergency order is made permanent" except if "the office finds that such confidentiality will result in substantial risk of financial loss to the public." *Id.* § 662.148(2)(f); *see also* discussion *infra* Section II.F.2.

216. FLA. STAT. § 662.148(2)(a)–(f).

217. *Id.* § 662.147(2)(a)–(f).

218. *Id.* § 662.147(3).

conservator if one is so appointed.²¹⁹ The OFR may disclose confidential information without FTC board approval only “[t]o any other state, federal, or foreign agency responsible for the regulation or supervision of [the FTC], . . . [t]o a law enforcement agency in the furtherance of the agency’s official duties and responsibilities,” “[t]o the appropriate law enforcement or prosecutorial agency for the purpose of reporting any suspected criminal activity,” and “[p]ursuant to a legislative subpoena.”²²⁰ All told, disclosure is permitted only to a small group.

The information at stake is certainly sensitive. Though the FFTCA does not provide an exhaustive list of information to be maintained in FTC books and records (such determinations are made by the Financial Services Commission),²²¹ it does establish minimal requirements, which, practically, should be required by the FTC’s governing documents. The FTC must maintain, in its Florida office, “original or true copies of all [its] records and accounts,”²²² which themselves must contain “the names and residences of all the shareholders or members of the [FTC] and the number of shares or membership units held by each, . . . [and] the ownership percentage of each shareholder or member.”²²³ FTCs must keep “fiduciary books and records separate and distinct from” all other books and records.²²⁴ In doing so, the FTC must “segregate all assets held in any fiduciary capacity from [all] other assets of the” FTC.²²⁵ In all likelihood, FTC records will include trust financial statements, payment and distribution ledgers, tax returns, correspondence with beneficiaries, advisors and counsel, meeting notes, and resolutions.

E. Annual Renewal

The annual renewal process is not immaterial. All FTCs must complete, sign under penalty of perjury, and file with the OFR an

219. *See id.* § 662.148(3)(a)–(d). “However, any portion of the information which discloses the identity of a bondholder, customer, family member, member, or stockholder must be redacted by the [OFR] before releasing such portion to the liquidator, receiver, or conservator.” *Id.* § 662.148(3)(d).

220. *Id.* § 662.148(3)(e)–(h).

221. *See generally* CS/HB 825 (Fla. 2015); CS/SB 568 (Fla. 2015).

222. FLA. STAT. § 662.1225(1)(a).

223. *Id.* § 662.147(1).

224. *Id.* § 662.127(1).

225. *Id.*

annual renewal application within “45 days after the anniversary of the filing of either the initial application or the prior year’s renewal application.”²²⁶ The annual renewal fee is \$750 for FTCs and \$1,500 for LFTCs, and the fee must be submitted with the renewal application form.²²⁷ Failure to timely file the annual renewal subjects the FTC to a fine of up to \$100 per day the form is overdue,²²⁸ but failure to file the annual renewal within sixty days of its due date will result in automatic termination of FTC’s registration or LFTC’s license.²²⁹ In those cases, the company must “wind up its affairs on or before November 30 of the calendar year in which such failure occurs.”²³⁰

Unlicensed FTCs must file a registration renewal application that includes a statement verified by an officer of the FTC, which affirms that the FTC is a family trust company as defined, and that its operations are in compliance with Florida Statutes section 662.1225 (referring to general FTC requirements),²³¹ section 662.125 (referring to FTC directors or managers),²³² sections 662.131 and 662.134 (referring to prohibited activities),²³³ and Florida Statutes Chapter 896 (referring to money laundering and other financial crimes).²³⁴ The statement must recite “[t]he name of the [FTC’s] designated relative . . . and the street address for its principal place of business.”²³⁵ In addition to the standard requirements, license renewal applications for LFTCs must include proof that the LFTC satisfies the definition of a family trust company, and “[d]escribe[] any material changes to [the LFTC’s] operations, principal place of business, directors, officers, managers, members acting in a managerial capacity, and designated relatives since the end of the preceding calendar year.”²³⁶ Altogether, annual renewal is not a simple one-pager. Officers and directors are repeatedly reminded, perhaps overly so,

226. *Id.* § 662.128(1).

227. *Id.* § 662.128(6).

228. *Id.* § 662.144.

229. *Id.*

230. *Id.*

231. *See* discussion *supra* Section I.B.4.

232. *See* discussion *supra* Section I.B.2.

233. *See* discussion *supra* Section II.A.2.

234. *See* FLA. STAT. § 662.128(2)(a).

235. *Id.* § 662.128(3)(b).

236. *Id.* § 662.128(2)(b).

of the gravity of the FTC’s fiduciary role and its conditional permission to exist.

F. Discontinuing Operations

1. Voluntary Dissolution

Family trust companies may cease to exist as a going concern and wind up their affairs just as any ordinary company.²³⁷ LFTCs, however, must send the OFR a certified copy of the board resolution authorizing dissolution.²³⁸ Then, upon relief of all fiduciary duties it previously accepted, LFTCs must “provide [the OFR with] certification of such discharge and voluntarily relinquish its license to operate.”²³⁹ Thereafter, the LFTC may be released from its fidelity bonds.²⁴⁰

2. Cease and Desist Orders; Involuntary Dissolution

The OFR wields a broad regulatory stick. If an FTC is not operating in compliance with the FFTCA or other state law, the OFR is authorized to issue cease and desist orders which can direct corrective action, remove certain individuals from the FTC, suspend or revoke an LFTC’s license, or compel the company to cease operations altogether.²⁴¹ If the OFR has reason to believe that misconduct is taking place or has taken place,²⁴² the OFR may draft a complaint stating the charges and the facts supporting the charges, offer an opportunity for a hearing, then after the hearing,

237. See FLA. STAT. § 605.0709(1)–(2) (2024).

238. FLA. STAT. § 662.129.

239. *Id.*

240. *Id.*

241. See *id.* § 662.143(1), (3); *id.* § 662.145(1), (3); *id.* § 662.142(3).

242. See *id.* § 662.143(1)(a)–(i); *id.* § 662.145(1)(a)–(i); see also *id.* § 662.142(1)–(2). Alleged misconduct may include (1) “[a]n act of commission or omission that . . . is a breach of trust or fiduciary duty” (which is grounds for immediate revocation of a license), or (2) a failure to: operate as a family trust company as defined, meet the organizational requirements, properly segregate fiduciary assets and fiduciary books and records, file an annual renewal application, refrain from advertising to the public or engage in a prohibited activity, or provide information or documents to the OFR upon written request, or (3) a violation of: any rule of the Financial Services Commission, any order of the OFR or in breach of a written agreement with the OFR, chapter 896 (relating to money laundering and financial crimes) or similar state or federal law involving fraud or a crime of moral turpitude, or any related rule or regulation. *Id.* § 662.142(1)–(2). Specific rules apply to situations involving criminal activity. See *id.* § 662.145(6)–(8).

serve the complaint on the FTC or an affiliated party.²⁴³ If the FTC does not request a hearing within the allotted time,²⁴⁴ “or if a hearing is held and the [OFR] finds that any of the charges are” proven, the OFR “may enter an order directing” the FTC or affiliated party to stop the misconduct and take corrective action.²⁴⁵

Alternatively, if the OFR finds that the misconduct is “likely to cause substantial prejudice to [the FTC’s] members, shareholders, or beneficiaries of the fiduciary accounts,” then the OFR may issue an emergency order before allowing an opportunity for a hearing.²⁴⁶ Emergency orders are effective immediately upon service and remain effective for ninety days, or until the end of nonemergency cease and desist proceedings.²⁴⁷ “The [FTC’s] chief executive officer, or the person holding the equivalent office,” must disclose to the OFR any actual knowledge that an affiliated party has been “charged with a felony in a state or federal court.”²⁴⁸ If the charge involves a felony “relating to fraud, currency transaction reporting, money laundering, theft, or moral turpitude,” the OFR may enter an emergency order suspending, restricting, or prohibiting the party’s participation in the FTC’s activities.²⁴⁹ If so entered, the order must also provide an opportunity for a hearing, but unless otherwise modified by the OFR, the order remains in effect until the criminal charges are dismissed or the individual is acquitted.²⁵⁰ The cease and desist order becomes final upon a conviction or plea of guilt or *nolo contendere*.²⁵¹

In any case, if an order removes, restricts, or prohibits an affiliated party’s participation in the FTC, that person may petition the OFR for modification or termination of the removal, restriction, or prohibition, but is not eligible for reelection to office,

243. See *id.* § 662.143(1)–(2).

244. See FLA. STAT. §§ 120.569(1), 120.57 (2024). Failure to respond within the time allotted constitutes a default judgement, and the OFR may enter a cease and desist order. FLA. STAT. § 662.143(4) (2024).

245. *Id.* §§ 662.143(3), 662.143(5).

246. *Id.* § 662.143(6).

247. *Id.*

248. *Id.* § 662.145(6).

249. *Id.* § 662.145(6)(a).

250. *Id.* § 662.145(6)(b).

251. *Id.*

or to any official position in the FTC, without the OFR's written consent.²⁵²

The OFR may also issue a cease-and-desist order directing the FTC to cease operations as a family trust company.²⁵³ In that case, and the case of an order revoking an LFTC's license,²⁵⁴ the company must wind up its affairs within ninety days after entry and service of the order.²⁵⁵ If the company is still operating after ninety days, the OFR may seek an order from the appropriate state circuit court directing the FTC to dissolve.²⁵⁶

III. FEDERAL CONSIDERATIONS

A. Tax

Appointing the FTC as trustee of family trusts may cause undesirable income tax and wealth transfer tax (i.e., estate, gift, and generation-skipping (GST) tax) consequences if not structured and operated within safe-harbor guidance. Needing to do so adds a thick layer of complexity and administrative red tape. Fortunately, individuals with a net worth less than the estate tax exemption may not be affected, but those with a requisite net worth (above the estate tax exempt amount) must contend with a litany of additional operating procedures.²⁵⁷

Comprehensive federal tax guidance related to family trust companies is contained in Internal Revenue Service (IRS) Notice 2008-63 (Notice). The "notice sets forth . . . a proposed revenue ruling concerning the income, estate, gift, and generation-skipping transfer tax consequences [for] situations in which" an FTC acts as trustee of family trusts.²⁵⁸ Fortunately the Notice indicates that appointing an FTC as trustee will not trigger negative federal income and transfer tax consequences in certain circumstances.²⁵⁹

252. *Id.* § 662.145(7).

253. *Id.* § 662.143(3).

254. *Id.* § 662.142(3).

255. *Id.* § 662.143(7).

256. *Id.*

257. See *Estate Taxes: Who Pays, How Much and When*, U.S. BANK: WEALTH MGMT, <https://www.usbank.com/wealth-management/financial-perspectives/trust-and-estate-planning/estate-taxes.html> (last visited Jul. 5, 2024).

258. See I.R.S. Notice 2008-63, 2008-31 I.R.B. 261, available at <http://www.irs.gov/pub/irs-drop/n-08-63.pdf>.

259. See *id.*

A decade later, the IRS has not issued a final revenue ruling, and until then, FTCs will have to operate in a somewhat uncertain environment regarding income and transfer taxes. Nonetheless, the Notice states that “[t]he IRS and the Treasury Department intend that the [final] revenue ruling, once issued, will confirm certain tax consequences of” using a family trust company “that are not more restrictive than the consequences that could have been achieved by a taxpayer directly.”²⁶⁰ However, the revenue ruling will not permit a taxpayer to achieve beneficial tax consequences “that could not have been achieved had the taxpayer acted directly” without using an FTC.²⁶¹ Therefore, the Notice provides a worthwhile look at the tax treatment FTCs can expect.

The Notice addresses five specific tax issues. First, will appointing the FTC as trustee over a family trust cause the trust assets to be included in the grantor’s gross estate under Internal Revenue Code (I.R.C.) § 2036(a) or § 2038(a)?²⁶² Second, if the FTC serves as trustee, “will the value of the trust assets be included in [the] beneficiary’s gross estate under [I.R.C.] § 2041?”²⁶³ Third, if the FTC “serves as the trustee of a trust that provides the [FTC] with the discretionary power to distribute income and/or principal to the grantor’s child[ren] or descendants, will the grantor’s transfer [of property] to that trust constitute a completed gift” for gift tax purposes?²⁶⁴ Fourth, does appointing the FTC as trustee “affect the exempt status of a trust that is otherwise exempt from the [GST] tax under [I.R.C.] § 2601, or change the inclusion ratio of a trust?”²⁶⁵ Finally, if the FTC is appointed trustee, is the grantor or any beneficiary treated as the owner of the trust for income tax purposes under the grantor trust rules in the IRC sections 671 through 678?²⁶⁶

260. *Id.*

261. *Id.*

262. *See id.*; *see also* I.R.C. §§ 2036(a), 2038(a); Treas. Reg. § 20.2036-1(b)(2)-(3) (as amended in 2023); Rev. Rul. 70-348, 1970-2 C.B. 193.

263. *See* I.R.S. Notice 2008-63, 2008-31 I.R.B. 261; *see also* I.R.C. § 2041(a)(2), (b)(2); Treas. Reg. § 20.2041-1(b)(1) (as amended in 1961).

264. *See* IRS Notice 2008-63, 2008-31 I.R.B. 261; *see also* I.R.C. §§ 2501, 2511; Treas. Reg. §§ 25.2511-1(g)(1), 25.2511-2(b), (c), (e) (as amended in 2020).

265. *See* I.R.S. Notice 2008-63, 2008-31 I.R.B. 261; *see also* I.R.C. § 2601; Treas. Reg. § 26.2601-1(b)(1)(v)(B), (b)(4) (as amended in 2004).

266. *See* I.R.S. Notice 2008-63, 2008-31 I.R.B. 261; *see also* I.R.C. §§ 671, 672(a), 672(c), 674(c), 675, 677(a)(1); Treas. Reg. § 1.677(a)-1(d), (b)-1(a) (as amended in 1996).

All five issues turn on the existence of a discretionary distribution committee (DDC) within the FTC as well as the governing policies of the FTC and the DDC.²⁶⁷ To avoid undesirable tax in each of the five issues presented, the FTC and the DDC must have the following policies, whether required by state law or outlined by the FTC's governing documents: (1) the DDC must have exclusive authority to make all discretionary distribution decisions; (2) "no family member serving on the DDC may participate in making discretionary distribution decisions [for] any trust of which that [family member] or his or her spouse is either a grantor or a beneficiary";²⁶⁸ (3) "no family member serving on the DDC may participate in making discretionary distribution decisions . . . [for] any trust of which the beneficiary is a person to whom the family member or his or her spouse owes a[] [legal] obligation of support";²⁶⁹ (4) "no family member may enter into any [express or implied] reciprocal agreement regarding discretionary distributions from any trust for which the FTC . . . serv[es] as trustee";²⁷⁰ (5) "only officers and managers of the [FTC] may participate in . . . personnel . . . (including the hiring, discharge, promotion and compensation of employees)";²⁷¹ and (6) "nothing . . . in the [FTC's] governing documents may override a more restrictive provision in the trust instrument of a trust for which the FTC is acting as [a] trustee."²⁷²

Furthermore, if the FTC is organized in a state that does not have statutes mandating the previously mentioned policies (such as Florida, for example), then the FTC's governing documents should also create an Amendment Committee to prevent family members from retaining the power to revise the FTC's governing

267. See I.R.S. Notice 2008-63, 2008-31 I.R.B. 261; see also I.R.C. § 2041(a)(2), (b)(2); Treas. Reg. § 20.2041-1(b)(1) (as amended in 1961).

268. Brian M. Malec & Scott A. Bowman, *Florida Family Trust Companies: Tax and Nontax Considerations*, 89 FLA. BAR J. 45 (2015); I.R.S. Notice 2008-63, 2008-31 I.R.B. 261. This provision may be overly restrictive in that, had the beneficiary been appointed trustee directly rather than a member of the DDC, the beneficiary could distribute income or principal under an ascertainable standard. For more commentary on this topic, see Malec & Bowman, *supra* note 268.

269. I.R.S. Notice 2008-63, 2008-31 I.R.B. 261; Malec & Bowman, *supra* note 268, at 45. This provision may be overly restrictive as well.

270. Malec & Bowman, *supra* note 268, at 45; I.R.S. Notice 2008-63, 2008-31 I.R.B. 261.

271. I.R.S. Notice 2008-63, 2008-31 I.R.B. 261; Malec & Bowman, *supra* note 268, at 45.

272. Malec & Bowman, *supra* note 268, at 45; I.R.S. Notice 2008-63, 2008-31 I.R.B. 261.

documents and the DDC's membership and policies.²⁷³ Therefore, a majority of the members on the Amendment Committee should be individuals who are neither family members nor persons related to or subordinate to any of the FTC's shareholders or members.²⁷⁴ The Amendment Committee should have "sole authority to make any changes to [F]TC's governing documents regarding the creation, function, or membership of the DDC" as well as the Amendment Committee itself, and to the provisions delegating authority to officers and managers.²⁷⁵

The FFTCA, appropriately, does not contain any provisions related to a DDC, Amendment Committee, or any of the aforementioned safe harbors. Therefore, it is essential for those leading the FTC to ensure its governing documents, policies and procedures comply with the Notice *before* the FTC is appointed as trustee over any family trusts. If all of the elements described above are incorporated into the FTC's governing documents, appointing the FTC as trustee of family trusts should not: (1) cause the trusts to be treated as grantor trusts for income tax purposes;²⁷⁶ (2) cause the trusts to be included in either the grantor's or beneficiary's estate for estate tax purposes; (3) cause transfers to be treated as incomplete gifts for gift tax purposes; or (4) alter the exempt status or inclusion ratio for GST tax purposes.

B. Securities Regulation

Whether the FTC is subject to oversight by the U.S. Securities and Exchange Commission (SEC) and its accompanying periodic reporting and examination requirements depends on whether the FTC qualifies for one of two exemptions.²⁷⁷ Most do.

The Investment Advisers Act of 1940 (Advisers Act) charges the SEC with regulating investment advisers.²⁷⁸ All investment advisers must register with the SEC unless otherwise exempt.²⁷⁹ An investment adviser is any person who, for compensation,

273. See I.R.S. Notice 2008-63, 2008-31 I.R.B. 261.

274. See *id.*

275. See *id.*

276. Uncertainty over grantor trust attribution under I.R.C. section 674 still exists. For more on this issue, see Malec & Bowman, *supra* note 268, at 46.

277. See 15 U.S.C. § 80b-2(a)(11).

278. See *id.* § 80b-1.

279. See *id.* § 80b-3(a).

engages in the business of advising others as to the advisability of investing in, purchasing, or selling securities.²⁸⁰ FTCs that provide investment advisory services in connection with trustee services (as most do) presumptively fall within SEC purview.

Fortunately, the Advisers Act provides an exception to the definition of investment adviser for family offices.²⁸¹ “A family office is a company (including its directors, members, managers, trustees, and employees acting within the scope of their position or employment) that (1) has no clients other than family clients; (2) is wholly owned by family clients and is exclusively controlled (directly or indirectly) by one or more family members and/or family entities; and (3) does not hold itself out to the public as an investment adviser.”²⁸² FTCs should be exempt from SEC registration under the family office exemption, but LFTCs having two designated relatives and serving two family lines may not be.²⁸³ In effect, such LFTCs would have to register with the SEC or find another exemption.

Another exemption exists. The definition of investment adviser also excludes a bank.²⁸⁴ As defined by the Advisers Act, a bank includes:

[A] trust company, whether incorporated or not, doing business under the laws of any State . . . , a substantial portion of the business of which consists of . . . exercising fiduciary powers similar to those permitted to national banks . . . and which is supervised and examined by State . . . authority having supervision over banks or savings associations, and which is not operated for the purpose of evading the provisions of [the Advisers Act]²⁸⁵

Unlicensed FTCs qualify by definition, and LFTCs failing to qualify as a family office may be exempt from SEC registration

280. *See id.* § 80b-2(a)(11).

281. *See id.* § 80b-2(a)(11)(G).

282. *See* 17 C.F.R. § 275.202(a)(11)(G)-1(b).

283. *See* Family Offices, Investment Advisers Act Release No. 3220 (June 22, 2011), 76 FR 37983 (June 29, 2011) (“The [family office] exclusion we are adopting today does not extend to family offices serving multiple families In a multifamily office, these clients would be without the protections of the Advisers Act or family relationships for preventing or handling any discriminatory or fraudulent treatment of different families.”).

284. 15 U.S.C. § 80b-2(a)(11)(A).

285. *See id.* § 80b-2(a)(2)(C).

under this exception.²⁸⁶ Altogether, federal securities laws are not much of an imposition on FTCs.

CONCLUSION

Family trust companies return some freedom and privacy to families as they manage their private property in a very public world. But the law falls short in its accessibility. If families derive a real or theoretical benefit from the family-led stewardship, limited liability, and confidentiality that FTCs offer, then FTCs should be made accessible to a broader base. Policymakers should consider a more accommodative solution with considerably lighter regulatory burdens or even partial or full exemptions for a “small family trust company.” Creating a “small family trust company” that serves only a very narrow group of family members might come with exemption from state examination, partial exemption from annual state reporting, relaxed liquidity and bonding requirements commensurate with the value of the assets involved, and so forth. Otherwise, the benefits of FTCs remain attainable only by the very wealthiest.

286. For more discussion on this topic, see Malec & Bowman, *supra* note 268, at 44.