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MEMORANDUM

TO: Dan Krassner, Ben Wilcox (Integrity Florida)

FROM: Phil Claypool

DATE: March 9, 2013

RE: Senate Bill 2 (e1 version)

Thanks for listening to my concerns about Senate Bill 2, in its current form. My 35-years of experience with Florida's ethics laws leads me to believe that, while there are several aspects to the bill that would protect the public and improve governmental ethics in Florida, there are several others that serve only to protect the interests of public officials and would take steps backward.

One step forward but two steps back does not make progress.

If you agree with me, I would appreciate it if you would share my concerns with others, so we can work with the Legislature and enable all Floridians to be proud of this legislation. (I apologize for the length of this memo, but the bill is 63 pages long.)

First, the good:

[Dual Public Positions]

Regarding elected public officers being offered public employment, the bill would create an entirely new ethical standard to address situations like that involving former Speaker Sansom. It would prohibit an elected public officer (state or local), and even persons who have qualified to run for public office, from being employed with either State or local government in Florida, IF the employment was being offered because of the official's office or candidacy. It would limit public employment that could be accepted by an elected officer to positions that were open and advertised to others who might be interested. Finally, it would "grandfather in" persons who currently hold both elected public office and public employment, but would prohibit their promotion or advancement

if it is given because of the elected position.

Over the years, the Ethics Commission has reviewed several situations where an elected official was offered new employment that might have caused a conflict of interest. The public response to these situations varied, with the public being most upset where it appeared that the job was offered primarily because of the advantages that could be conveyed through the official's office. This new prohibition would be a significant improvement to existing ethics standards.

[Shutting the "Revolving Door"]

The bill would enlarge the two-year "revolving door" prohibition for former members of the Legislature in two ways. First, it extends the current prohibition against legislators personally representing clients before State agencies (for example, executive branch agencies) while in office, until two years after leaving office.

Secondly, it plugs a loophole in the current two-year "revolving door" prohibition against personally representing clients before the Legislature after leaving office. As it is now, the prohibition is only against personally doing the representation before the Legislature; one can be compensated to counsel or advise other people who actually make the appearance, on how to effectively lobby, based on one's recent experience in the Legislature. Under the bill, members would be prohibited from becoming a partner, principal, or employee of a firm, or acting as a consultant, if it is for the purpose of advising or working on matters that would come before the Legislature, or even to provide networking services with sitting member of the Legislature.

A former Legislator could become employed with a firm whose primary purpose is lobbying the Legislature only if he or she got an opinion from the Ethics Commission that the employment would not violate this standard.

The original prohibition against appearing before State agencies while in office was intended to limit the opportunity for legislators who would be able to take advantage of their legislative positions over the budgets and laws governing agencies in order to benefit clients. Continuing this prohibition for two years after leaving office would preclude even the appearance that one's clients after leaving office were secured because of one's legislative position during the last year in office.

The new limitations against making money by being involved in legislative lobbying matters for two years after leaving office would go a long way toward plugging a long-acknowledged loophole in the "revolving door" prohibition.

[Ethics training]

The bill would require constitutional officers to complete 4 hours of ethics training annually on the State ethics laws, public record laws, and public meeting laws. The Ethics Commission would establish minimum course content. House and Senate rules would provide for ethics training for their members.

The Ethics Commission has provided training and education for public officials and years, even online. Requiring more familiarity with these laws will help public officials set the best example, and starting at the top will begin to shift the attitudes of their entire organizations.

[Electronic Filing of Full Disclosure Forms]

The bill would require the Commission to put all the financial disclosure Form 6's (for elected constitutional officers) online, scanned and searchable.

This would be a cost issue, as getting all these forms online, timely, will require staff and training in public records law exemptions. Each form would have to be reviewed in order to redact, for example, social security numbers, before the form is posted online.

This also would require the Commission to submit a proposal by 2015 for mandatory, electronic filing of Form 6's.

This is an idea whose time has come. But it will take a lot of time and money, as well as some statutory changes, to realize.

[Unpaid Fines & Collections]

Before sending a financial disclosure fine to the Department of Financial Services for collection, this would require the Commission to attempt to determine whether the individual is a current public officer or current public employee. If in one of these categories, the CFO or the governing body of the political subdivision is required to withhold money from the agency's payments to the individual.

If the Commission determines that the individual is not a current public officer or employee, or if it can't tell, the Commission would be allowed to record the final order as a judgment lien on real property or seek garnishment of wages. The statute of limitations for a financial disclosure fine would be extended to 20 years.

There are good, practical changes here. However, there will be a cost to the Commission in trying to collect fines this way. I would be concerned about costs, as the Commission does not have staff to handle this and does not have statutory authority or regular funding to hire anyone to handle collections.

Next, the not-so-good:

[Blind Trusts]

For the first time in Florida, the bill would provide for "blind trusts," an ethics concept from the federal government and many other states that the Ethics Commission has recommended for several years. In these other jurisdictions, this allows a public official to create a trust for his or her assets, to hand off responsibility for investing those assets to a trustee, and then to "blind" the official to what he or she owns by prohibiting the trustee from telling what is owned or sold. If an official doesn't know what he or she owns, then the official should not be influenced in his or her public decisions by considering personal gain or loss.

Unfortunately, the bill as currently written takes the Ethics Commission's recommendations regarding blind trusts and eliminates most of the parts that would protect the public. In effect, the proposal stands the concept of a "blind trust" on its head. Instead of protecting the public from conflicts of interest that a public official may have through "blinding" the official to what he or she owns, the proposed law would allow

officials to use their positions for private gain while "blinding" the public to what's going on.

Safeguards that have been removed from the Commission's recommendations are:

1) The trustee should be prohibited from investing trust assets in business entities that the trustee knows are regulated by or do a significant amount of business with the official's agency;

2) The trust should contain only readily-marketable assets, so that the trustee is able to sell the assets originally put in the trust by the official. How could a conflict be eliminated if the official knows that that particular piece of land or partnership interest is still owned by the trust (and thus still benefits the official)?

3) Does not require that the terms of the trust be reviewed and approved by the Commission, as meeting the requirements of the law.

4) Does not require that the public be informed of what assets were placed in the trust;

5) Does not require the trustee to provide any guarantee that he or she is aware of the requirements of the blind trust law and will comply with them (thus eliminating any possibility that the public could enforce the law against a trustee who passes information to the official).

We have to wonder why the bill has adopted the Commission's proposal, but has written out the parts of the Commission's recommendation that protect the public.

[Financial Disclosure; Fines; Amendments; Investigations]

The bill requires the Commission to treat an amended disclosure form as if it were the original, so long as the form is filed by Sept. 1st. The intent is to allow an official to file an incorrect disclosure, be notified of the error when a citizen has investigated and files a complaint, and then correct the filing without consequence if he or she can by Sept. 1st.

Someone is being protected here! And it isn't the public. Shouldn't officials take personal responsibility for their actions? Already, officials can amend their forms at any time to fix mistakes. Shouldn't they treat financial disclosure – which they file under oath and make only because they hold the public trust – as seriously as their income tax returns?

The bill also prohibits the Commission from acting on a complaint if (1) the complaint is filed after August 25th and (2) the complaint alleges an immaterial, inconsequential OR de minimus error or omission, so long as (3) the filer has been given 30 days to amend his form and correct any errors. Presumably, if the filer corrects the form, the Commission could not act, but that is not clearly written.

Again, someone is being protected here! And it isn't the public. Further, who among the public and press believe that the Commission has been overreacting on inconsequential matters? And "inconsequential" is usually in the eye of the beholder, of course.

The bill also would give the filer 60 days to amend their final disclosure form (that is filed within 60 days after leaving office), even if a citizen has investigated and files a complaint alleging that the form was incorrect. In other words, the official has 120 days to file correctly. Also, the Commission could not act if a complaint is filed that alleges an immaterial, inconsequential OR de minimus error or omission, so long as the filer has been given 30 days to amend his form and correct any errors.

Again, someone is being protected here. And it isn't the public.

The bill defines immaterial, inconsequential, or de minimis as being those cases where "the original filing provided sufficient information for the public to identify potential conflicts of interest."

How is the Commission, or anyone, to know what is sufficient for the public to identify potential conflicts of interest without investigating to determine exactly what was "sufficient"? Also, what if the error is in valuation – such as listing one's net worth as $1M when it's really negative? That deprives the public of important information, but that information has nothing to do with potential conflicts of interest.

Finally, the bill would allow officials to have an attorney or CPA file their disclosure form; elected officials could use campaign funds or office account monies to pay the attorney or CPA. If the attorney or CPA fails to properly disclose information on the form that was provided by the official, it would not violate the Code of Ethics. Also, it appears that the official would no longer have to file their Form 6 under oath.

Who is it that needs protection – the public or public officials?

There are a lot of proposed changes to the financial disclosure laws in the bill. Unfortunately, most of them are steps backward, guaranteed to protect only public officials and not the public. My understanding is that the public views the Ethics Commission as overly-protecting officials, not overly-prosecuting them.

[Ethics Commission Investigative Authority]

Part of the bill would allow the Ethics Commission to investigate possible violations when referred by one of several different officials, thus not requiring those officials to file a complaint with the Commission (and allege that they believe there has been a violation) if they believe a situation should be investigated.

This has been one of the Commission's recommendations and would be a positive step forward, although still a step short of allowing the Commission to initiate investigations on its own.

However, the bill also would limit the Commission's jurisdiction to investigate if the complaint or referral is filed within 30 days of an election against a candidate. This extends the 5-day limitation that is in the current law to 30 days.

This appears to take a step backward – why do public officials need even greater protection?

Further, the Commission would be required to dismiss any complaint or referral if

it determines that the violation is a "de minimis violation attributable to inadvertent or unintentional error." It defines "de minimis" as "unintentional and not material in nature."

Once again, who is being protected? What problem is being remedied by this law – that the Commission is perceived as over-zealous? In my tenure, the Commission dismissed many cases on the basis that the public interest would not be served by proceeding further, as it currently has the authority to do.

Also, Article II, Section 8(f) of the Florida Constitution requires that Florida have an independent commission to investigate and report on "all complaints concerning breach of public trust." How can the Legislature then limit which complaints the Commission can proceed on?

The Commission would have to dismiss a complaint if it is unintentional. Well, most of the ethics laws do not require the official to have acted with any particular intent, so now the law would become more complex. Not to mention the problem of deciding how and when a violation could be "immaterial."

Finally, this gives a clever defense lawyer another method to stymie or slow the Commission from acting on a complaint – does Florida really need this?

[Voting Conflicts of Interest]

This is a very technical subject, one that I spent hours lecturing on at various seminars. Currently, State-level officers (as opposed to local government officials) can vote on measures in which they have a conflict of interest, but are required to disclose the conflict within 15 days of the vote (if an elected official), or prior to the vote (if an appointed official). A conflict is created when the measure under consideration would inure to the special private gain or loss of the official, of a principal by whom the official is retained, or of a relative or business partner of the official.

The bill would prohibit State-level officers from voting on a measure that would inure to their special private gain or loss. That is a change in the law. They still would be allowed to vote on matters benefiting their principals, relatives, and business partners but would have to disclose the conflict within 15 days.

It also would amend the law on when State and local officials have a conflict requiring them to abstain and/or disclose the conflict, by defining "special private gain or loss."

Finally, it would allow State and local officials who are attorneys to avoid disclosing confidential or privileged information when disclosing a voting conflict of interest.

Unfortunately, there are some problems with the way this section of the bill is drafted. As written, it will weaken the existing law:

1) The word "principal" is poorly defined – it leaves out one's employer and clients, for instance, so that their gain or loss no longer create a conflict of interest for the official.

2) "Special private gain or loss" is defined in such a way as to eliminate conflicts (that are covered now) when there are only a few people who will benefit from the measure being voted on, and if they all benefit the same. For instance, if each will get $1M.

3) The amendment would require additional proof in order to find a violation – that the official knew the matter would inure to his or her special private gain or loss.

[Gifts from PC's and CCE's]

This section creates an entirely new prohibition against some gifts being given to public officials and their families by Political Committees and Committees of Continuous Existence. But not all gifts – just the ones that are "not primarily related to contributions, expenditures, or other political activities" under Ch. 106.

Without seeing any examples of what is intended or without having a specific definition, it is difficult to determine what would be "primarily related to" contributions, expenditures, or other political activities, and what would not. It may be that a definition would make this clearer.