

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB PIE 17-05 Ethics Reform
SPONSOR(S): Public Integrity & Ethics Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Public Integrity & Ethics Committee		Rubottom	Rubottom

SUMMARY ANALYSIS

PCB PIE 17-05 addresses public officer and employment conduct respecting solicitation and negotiation of conflicting and potentially conflicting income producing relationships, addresses post-service lobbying restrictions for certain elected and appointed officials, and revises executive branch lobbyist registration requirements. Specifically, the bill:

- Prohibits public officers and employees from soliciting an employment or contractual relationship from entities with whom they may not enter into conflicting employment and contractual relationships;
- Requires officers and employees to report any offer of an employment or contractual relationship from such entities;
- Requires certain disclosures of prohibited solicitations;
- Imposes a 6 year post service ban on personal representation before the Legislature and any executive branch agency applicable to statewide elected officers and members of the Legislature, the substance of CS/HB 7003;
- Imposes a 2 year post service ban on personal representation before any state executive branch agency for heads of departments under the Governor, chief administrative officers of agencies headed by the Governor and Cabinet and by certain constitutional bodies unless the former official is employed by another state agency;
- Restricts potentially conflicting employment of statewide elected officers and state legislators:
 - Prohibits solicitation of employment or investment advice arising out of official duties;
 - Prohibits solicitation and acceptance of investment advice or profitmaking arrangements (other than employment) from lobbyists or lobbyists' employers or principals;
 - Requires disclosure by lobbyists and principals of any prohibited solicitations;
 - Requires immediate disclosure of either new employment or an increase in compensation from certain employers;
- Restricts certain unelected state officers and employees regarding soliciting and negotiating an employment or contractual relationship with certain employers;
- Authorizes the Commission on Ethics to investigate disclosures of certain prohibited solicitations in the same manner as a complaint;
- Updates executive branch lobbying registration requirements to mandate electronic registration, clarify provisions and reduce mandatory investigation of audit-identified mistakes in compensation reporting;
- Repeals a statute strictly regulating legislative lobbying by state agency, university and college personnel.

The bill has indeterminate fiscal impacts both positive and negative.

The bill has an effective date of July 1, 2017, but provides for delayed application of certain provisions affecting current employees and certain unelected officers.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Laws governing conflicting employment and solicitation of gifts

Present situation

Current law prohibits any public officer or employee from entering into an employment or contractual relationship with any entity, including public agencies, over which the officer or employee's agency exercises regulatory power or with whom the agency does business.¹ There are a number of exceptions relating to certain objectively fair or *de minimis* procurements, certain disclosed relationships and comparable exceptions.² "Regulatory power" under this law does not include power exercised by a delegation to another agency or legislative authority exercised by legislation or passage of ordinances.³

The Florida Constitution prohibits legislators and statewide elected officers from personally representing another person or entity for compensation before their former body for a period of two years following vacation of office.⁴ State law also imposes on many public officers and state employees a 2 year ban on lobbying their own agency after vacation of public office or employment. Affected employees are generally those with policy making or significant purchasing authority. Affected legislative employees, including committee staff directors, deputy staff directors, certain attorneys, analysts and others, are barred by this statute from lobbying either house or any office of the Legislature. Affected state agency personnel are only barred from lobbying their own former agency. Thus, a recent Secretary of Health may lobby the Executive Office of the Governor or any agency under the Governor except the Department of Health. For both legislative and executive employees, however, there is an exception to the ban for those subsequently employed by other state agencies. Thus, a former agency Secretary or legislative Staff Director may lobby their former employer on behalf of another state agency by whom they are employed in the first two years after leaving the position to which the ban relates.

The only "exception" to the current two-year ban for statewide elected officers and members of the Legislature is one recognized by the Commission on Ethics (the Commission) regarding those serving in subsequent elective office.⁵ Thus, a former legislator elected to higher state office or local office may lobby the legislature in their newly elected official capacity.

The Code of Ethics imposes additional post-service restrictions on certain state officers and employees.⁶ There is a concurrent employment prohibition⁷ and a post employment restriction⁸ on employment by agency contractors over which the officer or employee has exercised certain procurement influence or authority during public service. After vacation of office or position, the former state officer or employee may not be employed "in connection with any contract" over which the employee had influence with respect to the procurement. The restriction lasts the life of such contract. There is an exception when the employee's job is contracted out to the contractor, the influence was merely advisory and the agency head determines the best interests of the state will be served.⁹

¹ Section 112.313(7), F.S.

² Section 112.313(12), F.S.

³ Section 112.313(7)(a)2., F.S.

⁴ Art. II, s. 8, Fla. Const.

⁵ Commission on Ethics Advisory Opinion (CEO) 81-57, affirmatively quoted in CEO 09-4 (footnote 1).

⁶ Section 112.3185, F.S.

⁷ Section 112.3185(2), F.S.

⁸ Section 112.3185(3), F.S.

⁹ Section 112.3185(3), F.S.

A related restriction lasts 2 years respecting contracts that were “within [the] responsibility” of a former state officer or employee. An exception is provided when the agency head determines the former employee’s employment with the contractor is in the best interests of the state.¹⁰

In addition, there is a post-service compensation limitation applicable to an agency employee who becomes a contractor providing services to their former agency. This provision also has an exception when the agency grants a waiver on the grounds of cost savings to the state.¹¹

State law prohibits a public officer or employee or candidate from soliciting or accepting anything of value based upon an understanding that the officer, employee or candidate would be influenced thereby.¹² This includes gifts, employment and valuable investment advice. In addition, without such quid pro quo understanding, the law prohibits certain public officers and employees from soliciting any gift or honorarium from certain entities – primarily vendors, political committees, lobbyists and principals.¹³ Nonetheless, a public officer or employee may solicit employment from entities from whom they may not seek a gift and may solicit future employment from entities from whom they may not accept present employment, so long as there is no understanding that influence is offered in the exchange.

“Solicit” appears in over 240 state statutes in a variety of forms. It is only defined in a few special uses such as the regulation of soliciting charitable contributions¹⁴. The word is used 5 times in the Code of Ethics with no statutory definition.¹⁵

There are no current laws restricting solicitation by public servants of employment or investment opportunities based merely on the status of the person or business solicited.

House Rules adopted for the 2016-2018 term prohibit solicitation or acceptance of employment or investment advice arising out of official or campaign activities.¹⁶ The Rules also restrict House members’ acceptance of compensation to lobby local government¹⁷ and establish a 6 year ban on legislators lobbying the House after vacation of office.¹⁸

Effect of proposed changes:

The bill expands the present 2 year post-service ban on personal representation for compensation by statewide elected officers and members of the Legislature to a 6 year ban on such representation before any state executive or legislative body, consistent with CS/HB 7003 passed by the House on March 10, 2017.¹⁹ In addition the bill would create a new 2 year ban on lobbying any agency in the

¹⁰ Section 112.3185(4), F.S.

¹¹ Section 112.3185(5), F.S.

¹² Section 112.313(2), F.S.

¹³ Sections 112.3148(3) and 112.3149(2), F.S. (Only unsolicited gifts, \$100 and under, may be accepted; and only *expenses* such as travel and lodging related to an honorarium event may be accepted.)

¹⁴ Section 496.404(24), F.S. (defining “solicitation”).

¹⁵ Black’s Law Dictionary, Sixth Edition defines “solicit” as follows (citations omitted):

To appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain....The term implies personal petition and importunity addressed to a particular individual to do some particular thing....

¹⁶ House Rule 15.5.

¹⁷ House Rule 15.4(e).

¹⁸ House Rule 17.1(g) (applicable to all legislators serving on or after November 8, 2016). Note, the House has no authority regulate lobbying in the Senate except by joint action. For an example of joint lobbyist regulation, see Joint Rule One, Joint Rules, the Eighty-eighth Florida Legislature.

¹⁹ For detailed analysis of the provisions of CS/HB 7003, see the House Staff Analysis at:

<http://myfloridahouse.gov/Sections/Documents/loadaddoc.aspx?FileName=h7003a.RPC.DOCX&DocumentType=Analysis&BillNumber=7003&Session=2017>.

executive branch for “agency directors”, defined as a department Secretary²⁰ or the chief administrative employee or officer of a department headed by the Governor and Cabinet, or headed by a body established or granted legislative or executive power by the State Constitution.²¹ This provision would affect the highest ranking state employee in less than 40 executive branch departments and independent commissions or boards.

The bill would also prohibit solicitation of a conflicting employment or contractual relationship and potentially conflicting employment. Specifically, no public officer or agency employee at any level of government would be allowed to solicit an employment or contractual relationship from an entity regulated by their agency or doing business with their agency. To enforce this prohibition, such entities would be required to disclose to the employing agency any solicitation prohibited by the law. This would allow the agency to act appropriately to discipline the individual. If the solicitor is the agency head or a member of a body that is the agency head, the disclosure must be made to the Commission.

Certain unelected state officers and state agency employees, those required to file financial disclosures under the Code of Ethics are further prohibited from soliciting prospective employers from whom they may not solicit gifts, including lobbyists and principals, in addition to the entities regulated by or doing business with the officer’s or employee’s agency. Further, this category of state officers and state employees may not negotiate future employment with such restricted employers without the permission of their agency head or an authorized designee. Permission may only be withheld if the negotiation conflicts with the interests of the state. However, these officers and employees may solicit or negotiate such employment 90 days prior to termination of employment if the individual has given notice of termination or is ending a fixed term of office and not to be reappointed. If the agency has notified the individual that they will be discharged from employment or office, solicitation and negotiation is permitted in the last 180 days prior to such discharge.

Any prohibited solicitation must be reported by the restricted employers to the agency head or the Commission if the solicitor is the agency head. Officers and employees must disclose to their agency head, inspector general, general counsel or a designee of the agency head any offer of employment or contractual relationship from entities whom they may not solicit such relationships.

Solicitation of investment advice/ business deals with lobbyist and principals

Present situation:

In addition to the prohibition on soliciting or accepting anything of value intended to influence public action²², state law restricts the use of non-public information gained by reason of public position.²³ This clearly includes use of such information for investment purposes. The relevant information appears to include stock tips received by reason of office if the information is not available to the public.

House Rules adopted for the 2016-2018 term prohibit solicitation or acceptance of investment advice arising out of official or campaign activities. The Rules also prohibit business deals with lobbyists and principals.²⁴

Effect of proposed changes:

²⁰ As that term is defined in s. 20.03, F.S. (“...an individual who is appointed by the Governor to head a department and who is not otherwise named in the State Constitution.”)

²¹ These entities include the Board of Governors, Florida Fish and Wildlife Commission, Department of Education, State Board of Administration and similar agencies.

²² Section 112.313(2), F.S.

²³ Section 112.313(8), F.S., use information not available to members of the general public and gained by reason of his or her official position

²⁴ House Rule 15.5.

The bill would prohibit statewide elected officers and members of the Legislature from soliciting or accepting investment advice from lobbyists and principals. It also prohibits soliciting investment advice arising out of official or campaign activities.

The bill also would prohibit these officers and legislators from entering into investment deals with lobbyists and principals, excepting employment or businesses engaging the personal services²⁵ of the elected official such as a professional partnership.

Disclosure of employment by elected officers

Present situation:

The financial disclosure laws require elected constitutional officers to file full and complete disclosure of assets, liabilities and income annually, and candidates for such office to file when qualifying for office.²⁶ These disclosures are due on July 1 each year covering the previous calendar year. Thus, employer and income information is not reportable for 6 to 18 months after it is earned. There are no requirements for immediate disclosure of changes in income or employment.

A 2013 statute restricts dual public employment by public officers if the officer has reason to know that the employment is offered to influence the officer or gain other advantage to the employer. There is a safe harbor for public and competitive hiring processes. Promotion, advancement and increases in competition are also restricted by the law.²⁷

The House Rules adopted for the 2016-2018 term require House members to disclose to the Public Integrity & Ethics Committee any new employment or increase in compensation from employers that receive revenue by direct appropriations and employers that are public entities.

The bill would require new disclosures by statewide elected officials and members of the Legislature. New employment and every compensation increase will have to be disclosed within 30 days of acceptance, or by the effective date of the change if the employer is:

- An entity receive state funds directly by appropriation;
- A public employer; or
- A lobbying firm, a lobbyist or a lobbyist's principal.

In addition new employment must be disclosed if the offer of employment arose out of official or political activities of the statewide elected officer or legislator. The disclosures will be made to the Commission on Ethics and be published online with the official's latest financial disclosure.

Lobbyist Registration and Compensation Reporting

Present Situation

Lobbyists must register to lobby the executive branch and the legislative branch in Florida. Executive branch lobbying is regulated by the Code of Ethics and administered by the Commission.²⁸ Legislative branch lobbying is regulated primarily by Joint Rule, administered by the Office of Legislative Services. Both registration systems require lobbyists to register annually for each principal represented indicating the entities to be lobbied as well as quarterly compensation reporting by lobbying firm. The Commission and the Legislature have instituted electronic registration and compensation reporting. Executive branch lobbyists, however, must supply a written oath to complete each registration. Registration fees

²⁵ The IRS describes personal service activity as follows: "A personal service activity is an activity that involves performing personal services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting, or any other trade or business in which capital is not a material income-producing factor." "2016 Instructions for Schedule C" (Form 1040), p.C-4.

²⁶ Section 8, Art. II, Fl. Const., s. 112.3144, F.S.

²⁷ Section 112.3125, F.S.

²⁸ Section 112.3215, F.S.

are set administratively and paid into a trust fund for administration of each system. Most executive lobbyists register to lobby all agencies covered by the system, leaving the entities to be lobbied unclear.

In addition to the Joint Rules, state law regulates aspects of legislative lobbying by state employees. Employees of non-public entities only must register if they are principally employed for governmental affairs. However, any state employee who appears before any member or appears before or attends any legislative committee to advocate for or against legislation must register as a lobbyist on behalf of their agency. In addition, "state, state university and community college" employees are required to record their attendance before any committee during established business hours of the employee's agency, record with OLS any attendance in legislative chambers, committee rooms, legislative offices, and other areas, unless the agency designates the individual's position as being used for lobbying. The law provides for deduction from the paycheck for all business hours spent lobbying in violation of these requirements.²⁹ Other than the registration requirement, these regulations do not appear to have been enforced in recent years.

All state agency and legislative officers and employees are exempt from executive branch lobbying registration. However, local officials and employees must register to lobby the state executive branch.³⁰

Compensation reporting is subject to random audits and findings of non-compliance are reported to the Commission (in case of executive branch lobbying firms) for investigation. Some such cases involve mere mistakes in reporting or calculation.

Effect of Proposed Changes

The bill updates the executive branch registration law, requiring e-mail addresses of lobbyists, principals and lobbying firms. It makes electronic registration mandatory and removes the requirement of an oath in registration. The bill revises some provisions to bring some definitions into closer conformity with the legislative branch lobbying registration rule. The bill also allows the Commission to dismiss some compensation audit related investigations based on the insignificance of the violation.

The bill authorizes an additional fee not to exceed \$5.00 for each entity for which a lobbyist registers to lobby for each principal. It lowers the maximum fee for registering a principal for one entity from \$40 to \$20.

The bill exempts officers and employees of Florida political subdivisions from the requirement to register as executive branch lobbyists.

The bill also repeals the law requiring a broad category of state employees to register to lobby the Legislature and requiring state employees to record their presence in legislative premises during business hours and requiring deductions from pay for failing to comply. Registration will still be required under the Joint Rules.

Code of Ethics, Enforcement

Present situation:

The Commission is the independent body responsible for investigating and reporting on complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the Judicial Qualifications Commission.³¹ This jurisdiction extends to alleged violations of the state Code of

²⁹ Section 11.061, F.S.

³⁰ Section 112.3215(1)(h)2., F.S.

³¹ Art. II, s. 8(f) and (i)(3), Fla. Const.

Ethics.³² For most violations, the Commission may not investigate except upon receipt of a complaint or referral from particular state officers responsible for enforcing the laws or from a United States Attorney.³³

Power to impose civil penalties for violations is vested in the Governor and other public officers, depending on the status of the violator. Only the House or Senate may impose penalties on Members of the House or Senators, respectively. If the Commission finds grounds for impeachment of an impeachable officer, findings are submitted to the Speaker of the House. The Governor is authorized to otherwise impose penalties on other officers subject to impeachment and the Attorney General has such power to impose penalties on the Governor. The presiding officers of the Legislature are empowered to impose penalties on certain legislative employees.³⁴

The Commission investigates complaints, determines probable cause and, after any public administrative hearing, makes findings of violations and recommendations on punishment. If there is no probable cause, the complaint is dismissed. A hearing must be requested within 14 days following mailing of the probable cause notification. In addition, the Commission may require a public hearing on its own motion. The Commission may not enter into stipulation or settlement imposing penalties but all penalties must be imposed by the appropriate disciplinary authority.³⁵

The Commission may dismiss any complaint or referral at any stage of disposition if it determines that the violation that is alleged or has occurred is a de minimis violation.

Executive branch lobbyist registration enforcement is governed by distinct enforcement provisions. The Commission reports probable cause findings to the Governor and Cabinet for appropriate action which can include a fine up to \$5,000 and prohibition from lobbying for up to 2 years. Someone accused of violating the lobbyist registration law can also request a hearing within 14 days of mailing the probable cause notification. Such complaints, however, are not subject to dismissal based on the de minimis nature of a violation.³⁶

Effect of Proposed Changes

The bill allows the Commission to investigate certain mandatory disclosures of prohibited solicitations by certain public officers and employees in the same manner as the Commission investigates complaints.

The bill also allows the commission to dismiss executive branch lobbyist registration complaints and referrals based on lobbying firm compensation audits if the Commission determines that the public interests is not served by proceeding further. This will allow dismissal of cases involving de minimis violations or unintentional mistakes in compensation reports.

B. SECTION DIRECTORY:

Section 1. repeals s. 11.061 – State, state university, and community college employee lobbyists; registration; recording attendance; penalty; exemptions.³⁷

Section 2. amends s. 112.313(7), (9) and (15), to prohibit public officer and employee solicitation of an employment or contractual relationship from entities regulated by or doing business with the officer or employee's agency, expand the lobbying ban on statewide elected officers and legislators to a 6 year

³² Part III, Ch. 112. See ss. 112.322(1) and 112.324, F.S.

³³ Section 112.324(1), F.S.

³⁴ Section 112.324(4)-(8), F.S.

³⁵ Section 112.324(3), F.S.

³⁶ Section 112.3215(8)-(9), F.S.

³⁷ Joint Rule One will still require all such state officers and employees to register, consistent with the current requirements of s. 11.061(1).

prohibition covering both the executive and legislative branches of state government, create a ban on lobbying the entire executive branch for particular state appointees serving on or after January 8, 2019, and remove a number of outdated exemptions from certain provisions of law.

Section 3. creates s. 112.3181 – Additional standards for statewide elected officers and legislators, to regulate solicitation and acceptance of employment and investment advice or business deals and to require certain employment and compensation disclosures.

Section 4. amends s. 112.3185(1) and (7)-(9), to prohibit certain state appointed officers and employees from soliciting an employment or contractual relationship from certain employers posing potential conflicts and allowing agency heads to refuse to allow certain negotiations for future employment when not in the state's interests.

Section 5. amends s. 112.3215, F.S., to update the executive branch lobbyist registration law.

Section 6. provides that the 6 year ban on personal representation for compensation before the executive branch and legislature applies to all elected statewide officers and members of the Legislature serving on or after November 8, 2016.

Section 7. provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The change in fees authorization may have an indeterminate impact on revenues to the Executive Branch Lobbyist Registration Trust Fund.

2. Expenditures:

The changes in s. 112.3215 relating to executive branch lobbyist registration are expected to yield an indeterminate reduction in the Commission's cost of administering that law.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill has no impact on local revenues.

2. Expenditures:

The bill may have a slight reduction in costs to local governments by exempting local officers and employees from executive branch lobbying registration.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

No impact.

D. FISCAL COMMENTS:

N/A

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to implicate the mandate provision.

2. Other:

Lobbying consists in activity protected by the First Amendment of the United States Constitution's guarantee of the right to petition government. Regulation of those who lobby for compensation is permitted but fees may only be used to administer the regulations in order to avoid taxing the exercise of a constitutional right. Thus, fees established for lobbyist registration should be no higher than necessary to administer the registration law.

B. RULE-MAKING AUTHORITY:

The revisions to the executive branch lobbying registration law and other changes to the Code of Ethics are proper subjects of the rulemaking powers of the Commission.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES