

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Rules Committee

BILL: CS/CS/SB 2088

INTRODUCER: Rules Committee; Rules Subcommittee on Ethics and Elections; and others

SUBJECT: Ethics

DATE: April 26, 2011 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carlton	Roberts	EE	Fav/CS
2.	Carlton	Phelps	RC	Fav/CS
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

CS/CS/SB 2088 amends the voting conflicts law by prohibiting a member of the Legislature from voting on certain legislation. The bill establishes standards for determining whether legislation would inure to the special private gain or loss of a prohibited beneficiary. The bill also provides exemptions for certain independent contractor or “of counsel” attorneys and those who are employed or otherwise serve an agency of government. It also requires a member to publicly state to the body or the committee to which the member belongs, prior to consideration of the legislation, all of the interests which give rise to the voting conflict. The bill would also require disclosure of the specific nature of those interests in a memorandum filed with either the Secretary of the Senate or Clerk of the House of Representatives within 15 days after the vote. The memorandum would be published in the journal of the house of which the legislator is a member. The bill also provides a mechanism by which a member can obtain guidance from the general counsel of his or her respective house of the Legislature.

The bill amends the financial disclosure laws applicable to elected constitutional officers by requiring the Florida Commission on Ethics (“Commission”) to review timely-filed financial disclosures of elected constitutional officers, along with any supporting documents provided, to determine if the filing is sufficient. The bill requires the Commission to notify filers whether

their disclosures are sufficient by July 31, and provides 30 days for the official to correct the filing without penalty. Also, if information is omitted from the form which is required to be disclosed, and that information was contained in the supporting documentation filed with the Commission but was not caught by the Commission, the officer shall not be liable for fines or penalties.

The bill incorporates recommendations made by the Nineteenth Statewide Grand Jury on Public Corruption (“Grand Jury”). Specifically, the bill amends the definition of the term “gift” so that campaign contributions made pursuant to federal elections laws are not a gift. Also, the bill requires two additional types of public servant to file an annual statement of financial interests pursuant to s. 112.3145, F.S. In addition, the bill implements the Grand Jury recommendations concerning use of the term “corruptly” in the criminal bribery and misuse of public position provisions.

The final recommendation of the Grand Jury incorporated into the bill authorizes public officers to place their assets in a blind trust. The blind trust must meet certain minimum requirements concerning the contents of the trust agreement and who can serve as trustee. If a public officer places assets in a blind trust, those assets would not give rise to certain conflicts of interest and voting conflicts. The public officer would be required to make certain disclosures concerning the blind trust on his or her annual financial disclosure. The bill also limits the communications between the public officer and the trustee. Finally, the public officer is required to file a notice of the blind trust with the Commission.

Finally, the bill amends the crime of official misconduct in s. 838.022, F.S., by creating new prohibitions. The bill also amends the crime of failing to perform a duty required of an officer in s. 839.24, F.S. Finally, the bill also amends the provision concerning criminal actions under color of law or through use of simulated legal process in s. 843.0855, F.S., by creating new substantive prohibitions on certain conduct by public officers or employees.

This bill substantially amends the following sections of the Florida Statutes: s. 112.312, F.S., s. 112.3143, F.S., s. 112.3144, F.S., s. 112.3145, F.S., s. 838.015, F.S., s. 838.016, F.S., and s. 838.022, F.S. The bill creates s. 112.31435, F.S., and s. 112.3142, F.S. Finally, the bill repeals s. 838.014(4), F.S.

II. Present Situation:

Voting Conflicts:

Under Section 112.3143(2), Florida Statutes, no state public officer is prohibited from voting in an official capacity on any matter. However, any state public officer voting in an official capacity upon any measure which would inure to the officer's special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer shall, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting.

Conversely, county, municipal, and other local officers are prohibited from voting on any measure which would inure to his/her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained, other than an agency; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the officer. In the event of a conflict, the county, municipal, and other local officers are required to publicly state to the assembly the nature of the officer's interests in the matter from which he or she is abstaining prior to the vote being taken. Additionally, the county, municipal, and other local officers are required to disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting.

Financial Disclosure:

Currently, all elected constitutional officers and candidates for such offices are required by Art. II, s. 8 of the State Constitution, to file a full and public disclosure of their financial interests annually. The annual full and public disclosure is also required of all statewide elected officers and any other officers, candidates, and employees as determined by law. Currently, the financial disclosure requirements are contained in s. 112.3144, F.S., and s. 112.3145, F.S. Section 112.3144, F.S., is the implementing language for the full and public disclosure of financial interests required of the constitutionally specified officers and candidates.

The Commission serves as the depository for the financial disclosure filings of state officers or employees. Those who serve at a local level file their financial disclosure with the local supervisor of elections. The Commission and supervisors of elections are statutorily required to assist each other in identifying those subject to the financial disclosure requirement, providing notice to those individuals, and tracking receipt of financial disclosures. In the event that an individual fails to timely file his or her financial disclosure, the Commission imposes an automatic fine of \$25 per day for failure to timely file financial disclosure. The automatic fine is capped at \$1,500. Neither the Commission nor the supervisor of elections is required to examine the financial disclosure filings.

If a filer is uncertain about whether he or she is required to disclose information, the filer may contact the Commission for guidance. Usually, the Commission's staff can answer simple questions by telephone or letter. In some circumstances, staff may not be able to provide such informal guidance. The Commission's staff will usually provide the filer the "safe harbor" advice to disclose the information or will advise the filer to seek a formal opinion from the Commission at its next available meeting. Upon receipt of the guidance, the onus is on the filer to include the information on their original form or, if necessary, file an amendment form. A member of the public can file a complaint with the Commission alleging that the person failed to disclose information which they were legally obligated to disclose. That complaint follows the same procedure as any complaint alleging a violation of one of the standards of conduct in the Code of Ethics. In the event that the Commission finds the filer in violation, he or she is subject to the penalties in s. 112.317, F.S.

Nineteenth Statewide Grand Jury Recommendations:

On November 30, 2009, Governor Crist convened the Grand Jury to review the ethics laws for possible improvement and to investigate any potential criminal activity within the Grand Jury's jurisdiction. On December 17, 2010, the Grand Jury issued a 124-page report interim report. The report contains various findings of fact, explanation of current ethics laws, and suggestions for improvement of those laws.

One recommendation was to clarify what constitutes a "gift." Currently, the definition of gifts for purposes of the Code of Ethics is located in s. 112.312(12), F.S. That section also identifies certain things which are specifically excluded from the definition of "gift." Currently, campaign contributions regulated by state law are specifically excluded from the definition of "gift." The exemption, which must be narrowly construed, does not include campaign contributions given which are reported pursuant to federal law. The Grand Jury recommended fixing this omission.

Another recommendation concerned who is required to file an annual statement of financial interests pursuant to s. 112.3145, F.S. Generally, only those specifically enumerated in that statute are required to file an annual statement of financial interests.¹ This filing requirement is less onerous than that required in Article II, s. 8 of the Florida Constitution. Currently, neither members of a community redevelopment agency board nor finance directors of county, municipal, or other political subdivisions are required to file annual financial disclosure. The Grand Jury recommended requiring annual financial disclosure of those individuals.

The bill also addresses the Grand Jury recommendation concerning crimes such as bribery and criminal misuse of public position. Currently, s. 838.014(4), F.S., defines the term "corruptly."² "Corruptly" is then incorporated as the requisite mental state for the public corruption offenses in Chapter 838 of the Florida Statutes. The Grand Jury heard testimony that the use of that mental state prevents State Attorneys from being able to try or convict public officers for those offenses. Thus, the Grand Jury concluded that "corruptly" should be stricken from the criminal provisions.

Other Criminal Provisions:

The bill also modifies the crime of official misconduct in s. 838.022, F.S. Under that section, it is a third degree felony for a public servant to, with corrupt intent, obtain a benefit for any person or to cause harm to another, to falsify or cause another person to falsify any official record or official document; to conceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act; or to obstruct delay or prevent the communication of information relating to the commission of a felony that directly involves or affects the public agency or public entity served by the public servant.

The bill amends s. 839.24, F.S., which provides that a sheriff, county court judge, prosecuting officer, court reporter, stenographer, interpreter, or other officer is guilty of a second degree

¹ Section 112.3145(1)(a)2.g., permits a unit of local government to require financial disclosure of individuals if permitted to do so by the enabling legislation or via ordinance or resolution.

² It is important to note that the definition of "corruptly" in s. 838.014(4), F.S., is different in s. 112.312(9), F.S., which applies to the Code of Ethics.

misdemeanor if he or she willfully fails to perform any duty he or she is required to perform under criminal law.

The bill also amends s. 843.0855, F.S., which provides that it is a third degree felony for a person to impersonate or falsely act as certain public officers and employees in connection with or relating to any legal process affecting people or property, or otherwise take any action under color of law against persons or property. That section also makes it a third degree felony to falsely under the color of law in anyway attempt to influence, intimidate, or hinder a public officer or law enforcement officer in the discharge of his or her official duties by threats of or actual physical abuse or harassment or through simulated legal process.

Blind Trusts:

Currently, there is no provision of the Florida Statutes addressing the use of blind trusts by public officers.

III. Effect of Proposed Changes:

Voting Conflicts:

As previously mentioned, current law provides that no statewide elected officer is prohibited from voting in an official capacity on any matter. The bill creates an exception to the general rule in Section 112.3143(2), F. S., that state public officers may vote in an official capacity on any matter. The bill creates s. 112.31435, F.S., which prohibits a member of the Legislature from voting upon any legislation that would inure to his or her special private gain or loss. The bill also prohibits a member of the Legislature from voting on a matter which he or she knows would inure to the special private gain or loss of his or her relative, business associate, employer, board upon which the member sits, or a principal by whom the member is retained or the parent corporation or subsidiary of a corporate principal by whom the member is retained.

The bill provides guidance on determining whether legislation would inure to the special private gain or loss of a member or other prohibited beneficiary. Specifically, a vote on legislation that is preliminary or procedural in nature does not inure to a member's special private gain or loss. Also, if the chance that legislation would inure to the benefit of one of the prohibited beneficiaries is remote, or the gain from the legislation is speculative in nature, a vote on the legislation would not inure to the member's special private gain or loss. If the legislation would impact a large class of people, and the member or other prohibited beneficiary is not affected any differently than the rest of the class, then a vote on the legislation would not inure to the special private gain or loss of the prohibited beneficiary. The bill also creates an exception for attorneys who are independent contractors or are "of counsel" and the following criteria are met: the lawyer-member is not involved in representing the client; the lawyer-member is not involved in management of the law firm; and the lawyer-member does not receive income from the client. The bill specifically provides that a member of the Legislature is not prohibited from voting on a General Appropriations Act or implementing legislation on the floor of the Senate or the House of Representatives. The bill also specifically provides that a member is not prohibited from

voting on matters that would benefit his or her employer or a board upon which the member sits when the member's employer or board is a public agency.³

The bill also requires a member to disclose, prior to a vote being taken, all of the interests in the legislation that give rise to the voting conflict. Additionally, the member must disclose the specific nature of those interests as a public record in a memorandum filed with the Secretary of the Senate or the Clerk of the House of Representatives within 15 days after the date on which a vote on the legislation occurs. The memorandum shall be spread upon the pages of the journal of the house of which the legislator is a member.

The bill also permits a member to seek an advisory opinion from the general counsel of his or her respective house of the Legislature. The general counsel must render an opinion within 10 days and the member is entitled to reasonably rely upon the opinion.

Financial Disclosure:

The bill amends s. 112.3144, F.S., concerning the filing of annual full and public disclosure of the interests by elected constitutional officers. Specifically, the bill requires the Commission to review any full and public disclosure of financial interests filed by an elected constitutional officer no later than 5:00 p.m. on July 1.⁴ The Commission is required to compare the form and any other supplemental or supporting documentation provided by the filer to determine whether the filing is sufficient. The Commission must then notify the filer whether his or her disclosure is sufficient. If the filing is sufficient, the Commission accepts the filing and shall consider the disclosure to be filed as of the date received.

If the Commission determines, based upon the full and public disclosure form and supporting or supplemental documents, that the filer omitted information required to be filed, the Commission must notify the filer by certified mail. The notice must be sent within thirty days of July 1 and must state with particularity the reason(s) for the deficiency. The officer must then file a new full and public disclosure of financial interests no later than September 1 of that year. A complaint cannot be filed alleging a violation of s. 112.3144, F.S., based on errors identified by the Commission, unless the filer fails to make the corrections necessary to comply with the disclosure requirement by September 1. If the officer fails to file the corrected form by September 1, he or she remains subject to the automatic fines for failure to timely file his or her disclosure. However, the officer would retain the right to appeal any automatic fine based on the existence of unusual circumstances.

When the filing is determined to be sufficient, the officer is not liable for any fines or penalties related to the filing. However, the exemption from liability for fines or penalties is not intended to apply where the filer omits information necessary for the Commission to make its sufficiency determination. This encourages the officer to disclose any information which would facilitate the

³ "Agency" is defined in s. 112.312(2), F.S., as "any state, regional, county, local, or municipal governmental entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; or any public school, community college, or state university."

⁴ If a filing is not received before 5:00 p.m. on July 1, the bill does not require the Commission to conduct a review of the officer's full and public disclosure of financial interests.

Commission's review and prevents withholding information in an effort to receive the exemption.

Nineteenth Statewide Grand Jury Recommendations:

Consistent with the recommendations of the Grand Jury, the bill amends the definition of "gift" in s. 112.312(12), F.S. The bill exempts campaign contributions reported pursuant to federal elections law from the definition of a "gift."

The bill also incorporates two other recommendations of the Grand Jury by amending s. 112.3145, F.S. The first change requires members of a community redevelopment agency board to file annual financial disclosure. The second change requires a finance director of a county, municipality, or other political subdivision to file annual financial disclosure.

Consistent with the Grand Jury's recommendation concerning the criminal bribery and misuse of public position statutes, the bill removes "corruptly" from Chapter 838 of the Florida Statutes. Specifically, the definition of "corruptly" in s. 838.014(4), F.S., is repealed. Then, the phrase "corruptly" is replaced with "knowingly" in s. 838.015, s. 838.016, and s. 838.022 of the Florida Statutes. Thus, the mental state required for those offenses would become "knowingly."

Other Criminal Provisions:

The bill amends the official misconduct provision in s. 838.022, F.S. by adding a provision that makes it a third degree felony for a public servant to knowingly "render any ruling, order or opinion, action or inaction adversely or contrary to the doctrine of stare decisis, binding precedent, the Supremacy Clause of the U.S. Constitution, or oath of office when clearly informed of such evidence or information, unless having the authority to overrule or recede from such rule of law, or distinguish such rule of law or set forth some other intervening or superseding evidence or information, and does so by such ruling, order, or opinion, or action or inaction." The bill also prohibits a public servant from committing or causing "any act in violation of s. 18 U.S.C. 241⁵ or 18 U.S.C. 242 under federal law."⁶ The bill provides that s. 838.022, F.S. "must be strictly enforced by law enforcement and state attorneys without discretion."

⁵ Section 18 U.S.C. 241 makes it a federal crime for two or more persons to conspire to injure, threaten, oppress, or intimidate any person in the free exercise or enjoyment of, or because of exercising, his rights and privileges under the U.S. Constitution or federal statutes. That section also prohibits two or more people from going in disguise on the highway, or on the premises of another, with the intent to prevent or hinder his free exercise or enjoyment of any rights or privilege secured under the U.S. Constitution or federal laws. The punishment provided for in that section is dependent upon the circumstances surrounding the deprivation. However, the punishment can range from fine to imprisonment and, in certain circumstances, the federal government can impose the death penalty.

⁶ Section 18 U.S.C. 242 makes it a federal crime for a person to act under color of law, statute, ordinance, regulation, or custom to willfully subject any person to the deprivation of rights, privileges, or immunities secured or protected by the U.S. Constitution or laws of the U.S., or to different punishments, pains, or penalties on account of the person being an alien or because of his color or race, than are prescribed for citizens. The punishment provided for in that section is dependent upon the circumstances surrounding the deprivation. However, the punishment can range from fine to imprisonment and, in certain circumstances, the federal government can impose the death penalty.

The bill also amends the provision specifying the penalty for failure to perform a duty required of an officer in s. 839.24, F.S. As amended, the provision would make it a first degree misdemeanor for a “sheriff, judicial officer, quasi-judicial officer, prosecuting officer, court reporter, stenographer, interpreter, or other officer required to perform any duty under provision of the Rules of Court or chapter 120 who willfully or negligently⁷ fails or knowingly refuses to perform his or her duty.” The bill also provides that s. 839.24, F.S. must be “strictly enforced by law enforcement and state attorneys without discretion.”

The bill also amends the prohibition on criminal actions under color of law or through use of simulated legal process in s. 843.0855, F.S. Specifically, the bill creates a new third degree felony for “any public servant or employee who, under color of law, in any manner intentionally obstructs or attempts to obstruct the due execution of the law, or with the intent to intimidate, hinder, deprive, or interrupt any officer, beverage enforcement agent, or other person or party in the legal performance of his or her duty or the exercise of his or her rights under the constitution or laws of this state or the United States, in connection with or relating to any legal process, whether such intent is effected or not.” The bill also makes it a second degree felony for any “public servant or employee who, under color of law, in any manner intentionally renders any ruling, order or opinion, or action or inaction adverse or contrary to the doctrines of stare decisis, binding precedent, the Supremacy Clause of the U.S. Constitution, or oath of office, in connection with or relating to any legal process affecting persons or property, when clearly informed of such evidence or information, unless having the authority to overrule or recede from such rule of law, or distinguish such rule of law or set forth some other intervening or superseding evidence or action or inaction.” The bill also makes it a second degree felony for any “public servant or employee or person who commits or causes any act in violation of s. 18 U.S.C. 241 or 18 U.S.C. 242 under federal law, in connection with or relating to any legal process affecting a person or property.” The bill specifies that s. 839.24, F.S., “must be strictly enforced by law enforcement and state attorneys without discretion.”

Blind Trusts:

The bill permits public officers to create a blind trust and place their assets into the blind trust. When a public officer places assets into a blind trust, the public officer gives the trustee the authority to dispose of the assets and the public officer must not attempt to influence or exert control over decisions regarding the management of the trust. However, the public officer may make requests for distributions, communicate with the trustee concerning his or her financial needs, and provide instructions to sell certain assets originally placed in the trust if the public officer is subsequently prohibited by law from holding the assets. The public officer would also be entitled to enough information from the trustee to prepare their personal income tax statements. The public officer would be required to disclose the blind trust as an asset on his or her financial disclosure form. The public officer would also be required to disclose as primary income any income exceeding the thresholds for reporting.

⁷ Aside from general concerns about the vagueness of the provisions amending ss. 838.022, 839.24, and s. 843.0855, F.S., the use of the negligence standard in the context of this criminal provision is constitutionally suspect. See, *State v. Winters*, 346 So. 2d 991 (Fla. 1977).

The bill also specifies that certain relatives and other individuals may not serve as a trustee. The bill also specifies that the trust agreement must contain a statement of purpose namely, to remove control and knowledge of the investments so that conflicts between the grantor's responsibilities as a public officer and his or her private interests will be eliminated. The trust agreement must also give the trustee complete control over the assets including the power to dispose of and acquire property. The agreement must also specify that communications concerning the trust holdings or sources of income are prohibited. The agreement must also specify that the trust tax return is to be prepared by the trustee and information relating to the trust is not to be disclosed to the public officer.

The public officer must notify the Florida Commission on Ethics that the trust was created within 5 business days. The notice to the Commission must set forth the date the agreement was executed; the name and address of the trustee; and acknowledgement that he or she has agreed to serve as the trustee. Under the provisions of the bill, public officers would not have to have their blind trusts "qualified" by the Commission on Ethics.

The benefit of creating a blind trust is that the assets placed in the trust would not give rise to certain conflicts of interests. Specifically, assets in the trust would not create a violation of the prohibition on doing business with one's own agency in s. 112.313(3), F.S.; would not give rise to a conflicting employment or contractual relationship which would be prohibited in s. 112.313(7), F.S.; and the assets in the blind trust would not give rise to a voting conflict of interests under s. 112.3143, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Florida Commission on Ethics may incur additional costs related to sufficiency reviews for certain financial disclosure filings, but such amount is indeterminate at this time. Any potential increase in work caused by the sufficiency review could be offset by using seasonal OPS staff for the thirty day period in which the Commission conducts the review.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Rules Committee on April 26, 2011:

The Committee Substitute differs from CS/SB 2088 in that it: provides factors to be determined in deciding whether there is special private gain; creates an exemption to the voting conflicts provision for attorneys who are independent contractors or “of counsel” attorneys; authorizes advisory opinions; and, allows public officers to create a blind trust which, if it complies with certain requirements, would shield the public officers from certain conflicts of interest; amends the crimes of official misconduct, failure to perform duty required of an officer, and criminal actions under color of law or through simulated legal process.

CS by Rules Subcommittee on Ethics and Elections on April 4, 2011:

The Committee Substitute differs from the original bill in that it: clarifies that a member must disclose when the member knows that the legislation would inure to the special private gain of a business associate, employer, or board upon which the member sits, to conform; clarifies that a member may vote on legislation that inures to a member’s *public* employer, principal, or board without any disclosure.

B. Amendments:

None.