

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 7001 PCB PIE 22-01 Implementation of the Constitutional Prohibition Against Lobbying by a Public Officer

SPONSOR(S): Rules Committee and State Affairs Committee and Public Integrity & Elections Committee, Koster

TIED BILLS: **IDEN./SIM. BILLS:**

FINAL HOUSE FLOOR ACTION: 117 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/HB 7001 passed the House on February 10, 2022, and subsequently passed the Senate on February 23, 2022.

In 2018, the people of Florida amended the state constitution to prohibit lobbying by certain public officers both during public service and for a six-year period following vacation of public office. The prohibitions address lobbying on issues of policy, appropriations, or procurement before the federal government, the legislature, any state government body or agency, or any political subdivision. The amendment takes effect on December 31, 2022. It expressly authorizes the Legislature to enact implementing legislation to include definitions and penalties. Such legislation may deal with no other subject.

Current law provides a number of lobbying restrictions based on public service. The state constitution provides that legislators may not represent another for compensation before any state agency while serving in legislative office and that legislators and statewide elected officers may not represent another for compensation before the government body where they were an officer or member for two years following vacation of office. The Code of Ethics for Public Officers and Employees prohibits a broad class of public officers and employees from representing another for compensation before their former department or employer for two years after leaving public service. Finally, state legislators may not lobby the executive branch, as defined by the lobby registration laws, for a period of two years after vacation of office.

Rules of the House of Representatives currently restrict former legislators from lobbying the House of Representatives for a period of six years following legislative service, and current members from lobbying local governments.

Current law and related rules define lobbying and related terms for the purpose of registration to lobby both in the Legislature and in the executive branch.

CS/CS/HB 7001 implements the new constitutional public officer lobbying prohibitions. The bill provides definitions of terms that have no clear constitutional definition. It provides that the prohibitions apply to persons in public office on or after December 31, 2022. It authorizes the Commission on Ethics (Commission) to investigate and determine violations of the new prohibitions. The bill provides a range of penalties for violations and directs the Commission to report post-service lobbying violations and recommended punishment to the Governor for imposition of penalties. Finally, it authorizes the Chief Financial Officer and Attorney General independently to collect monetary penalties imposed.

The bill has an uncertain but likely insignificant fiscal impact on the state.

The bill was approved by the Governor on May 26, 2022, ch. 2022-140, L.O.F., and will become effective on December 31, 2022.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present situation

In 2018, the people of Florida amended the state constitution to prohibit lobbying by certain public officers both during public service and for a six-year period following vacation of public office.¹ The prohibitions address lobbying on issues of policy, appropriations, or procurement before the federal government, the legislature, any state government body or agency, or any political subdivision. The amendment takes effect on December 31, 2022.² The amendment expressly authorizes the Legislature to enact implementing legislation to include definitions and penalties.³

The prohibitions affect the following officers:

- Statewide elected officers;
- Members of the Legislature;
- County commissioners;
- Constitutional county officers and county charter officers;
- School board members;
- School superintendents;
- Elected municipal officers,
- Elected special district officers in special districts with ad valorem taxing authority; and
- Secretaries, executive directors, and other administrative heads of executive branch departments.

Officers Defined in Statute

“Secretaries” and “executive directors”, are not constitutional offices.⁴ A “secretary” is appointed by the Governor to head a department and is not otherwise named in the Constitution. An “executive director” is the chief administrative employee or officer of a department headed by a board or by the Governor or Cabinet. Other departments authorized by the Constitution⁵ may have administrative heads not identified as secretaries or executive directors. Moreover, statutory terminology is subject to change over time.

Florida has a variety of special districts with ad valorem taxing authority. Some such districts may not exercise ad valorem taxing authority without converting their governing board from landowner elected to a board elected by all qualified electors residing in the district.⁶

Commission on Ethics

The Commission on Ethics (Commission) was created by the Legislature in 1974 “to serve as guardian of the standards of conduct” for state and local public officials and employees.⁷ State law designates the Commission as the independent commission provided for in s. 8(f), Art. II of the state constitution.⁸ Constitutional duties of the Commission consist of conducting investigations and making public reports

¹ S. 8(f), Art. II, Fla. Const. (effective 12/31/2022).

² S. 38, Art. XII, Fla. Const.

³ S. 8(f), Art. II, Fla. Const. (effective Dec. 31, 2022).

⁴ S. 20.03(5) and (6), F.S.

⁵ S. 6, Art. IV, Fl. Const.

⁶ S. 190.006(3), F.S.

⁷ Florida Commission on Ethics, *Guide to the Sunshine Amendment and Code of Ethics for Public Officers and Employees*, available at <http://www.ethics.state.fl.us/Documents/Publications/GuideBookletInternet.pdf> (last visited January 10, 2022); See also S. 112.320, F.S.

⁸ S. 112.320, F.S.

on all breach of trust complaints towards public officers or employees not governed by the judicial qualifications commission.⁹ In addition to its constitutional duties, the Commission, in part:

- Renders advisory opinions to public officials;¹⁰
- Makes recommendations to disciplinary officials when appropriate for violations of ethics and disclosure laws;¹¹
- Administers the Executive Branch Lobbying Registration and Reporting Law;¹²
- Maintains financial disclosure filings of constitutional officers and state officers and employees;¹³ and
- Administers automatic fines for public officers and employees who fail to timely file required annual financial disclosure.¹⁴

Restrictions on lobbying and related representation

The state constitution prohibits members of the Legislature from personally representing another person or entity for compensation during a term of office before any state agency other than a judicial tribunal. Similarly, it also prohibits statewide elected officers and members of the Legislature from personally representing another person or entity for compensation before the government body or agency where the individual was an officer or member for two years following vacation of office.¹⁵ The phrase “represent for compensation” appears to involve more activities than “lobbying” as defined by current laws. Legal representation in administrative proceedings and representation of a person under discipline by the House of Representatives or Senate are examples of representation barred by the previous constitutional restrictions but currently excluded from statutory definitions of lobbying.

Certain former local officials are also prohibited from personally representing another person or entity for compensation before the government body or agency where the individual was an officer for two years after vacating that office. This applies to elected county, municipal, special district, or school district officers and appointed school district superintendents.¹⁶

The Code of Ethics for Public Officer and Employees¹⁷ prohibits a broad class of public officers and employees from representing another for compensation before their former employing agency for a period of two years following vacation of office.¹⁸ In 2013, the statute was amended to prohibit former members of the Legislature from lobbying for compensation before the executive branch for a period of two years following vacation of office.¹⁹ That provision incorporates the definitions in the executive branch lobbyist registration law.²⁰

Under a rule first adopted in 2016, the House of Representatives prohibits a member from accepting any compensation to lobby any local government or governmental agency, except for the provision of licensed professional services when registration as a lobbyist is required.²¹ Finally, under another House of Representatives rule, no one serving in the Legislature after November 8, 2016, is permitted

⁹ S. 8(f), Art. II, Fla. Const.

¹⁰ S. 112.322(3)(a), F.S.

¹¹ S. 112.322(2)(b), F.S.

¹² Ss. 112.3215, 112.32155, F.S.

¹³ S. 112.3144, F.S.

¹⁴ S. 112.31455, F.S.; see also Florida Commission on Ethics, *Guide to the Sunshine Amendment and Code of Ethics for Public Officers and Employees*, available at <http://www.ethics.state.fl.us/Documents/Publications/GuideBookletInternet.pdf> (last visited January 10, 2022).

¹⁵ S. 8(e), Art. II, Fla. Const.

¹⁶ S. 112.313(14), F.S.

¹⁷ Pt. III, Ch. 112, F.S.

¹⁸ S. 112.313(9), F.S.

¹⁹ Ch. 2013-36, Laws of Fla.

²⁰ S. 112.3215, F.S.

²¹ Rule 15.4(e), House Rules (Edition 1, 12/5/20).

to lobby the House of Representatives for a period of six years following vacation of office as a member of the Legislature.²²

Lobbyist registration laws

Current law requires registration before lobbying either the Legislature or the executive branch.²³ Those laws and their implementing rules provide definitions of terms applicable in those two divergent contexts. Registration is required of everyone who contracts for compensation or is employed for the purpose of lobbying or for whom government affairs constitutes a principal responsibility of their employment. Lobbying in the legislative context includes seeking the goodwill of a legislator or staff member. It also includes any attempt to influence legislative action.²⁴ Current law requires every state agency, state university, or community college employee who seeks to influence legislative action by appearing before or attending a legislative meeting to register as a lobbyist regardless of whether lobbying is merely incidental to their employment.²⁵ That requirement does not affect communications outside of the employer's normal business hours.²⁶ The House of Representatives and Senate enforce legislative lobbyist registration requirements.

In the context of the executive branch, lobbying means seeking to influence an agency decision and includes attempts to obtain the goodwill of agency officials or employees.²⁷ The executive branch registration law is limited to lobbying on decisions in the area of policy or procurement.²⁸ The Commission enforces executive branch lobbyist registration.²⁹ The Commission has defined "policy" and "procurement" in rules implementing executive branch lobbying registration.³⁰

In each context, there are explicit clarifying exceptions. Under legislative lobbying, exceptions include:

- Responding to a request for information from a legislator, committee, or staff member;
- Appearing in response to a legislative subpoena;
- Providing advice or services to the Legislature under a contract that uses public funds;
- Representing a client in a disciplinary matter in the House of Representatives or Senate;
- A judicial or other state officer acting in his or her official capacity; and
- Appearing as a witness to provide information at the written request of the chair of a legislative meeting.³¹

Under executive branch lobbying, exceptions include:

- A person representing a client in a judicial proceeding or a formal administrative proceeding under the Administrative Procedure Act³² (APA);
- An employee of an executive branch agency or legislative or judicial branch entity acting in the normal course of his or her duties;
- A confidential informant providing confidential information for law enforcement purposes; and
- A person lobbying on a procurement in the lowest cost category under state procurement laws.³³

²² Rule 17.1(g), House Rules.

²³ Ss. 112.3215(3), 11.045(2), F.S.

²⁴ S. 11.045(1), F.S., Joint Rule 1.1(2) (published with the House Rules).

²⁵ S. 11.061(1), F.S.

²⁶ *Id.*

²⁷ S. 112.3215(1)(f), F.S.

²⁸ *Id.*

²⁹ Ss. 112.322, 112.324, F.S.

³⁰ R. 34-12.020(9) and (11), F.A.C. Chapter 34-12, F.A.C. also supplies additional definitions and clarifies statutory exceptions.

³¹ Joint Rule 1.1(3) and (4).

³² Ch. 120, F.S.

³³ S. 112.3215(1)(h), F.S.

The state ethics laws also regulate gifts of lobbyists or their principals to reporting individuals and procurement employees.³⁴ There is currently no state law definition of “lobbying” in the context of political subdivisions or the federal government.

Current law specifies officers with appropriate administrative or constitutional jurisdiction and authorizes them to impose penalties for ethics violations committed by particular public officers or employees.³⁵

Effect of proposed changes

The bill implements the constitutional lobbying prohibition for public officers, which is scheduled to go into effect on December 31, 2022. The bill defines a number of terms used in the constitutional provision and other terms needed for clarity. The bill provides that the prohibition applies to those holding public office on or after December 31, 2022. It provides for administrative enforcement of the constitutional prohibition and establishes penalties for violating the prohibition.

Definitions

The bill defines terms whose meaning may not be clear from the constitutional context in which they are used. The amendment applies to a specific set of public officers, three of which are not constitutionally identified offices. The bill defines “secretary” and “executive director” consistent with the executive branch organization statutes³⁶ and defines “other agency head” in a corresponding manner.

The bill defines “elected special district officer in a special district with ad valorem taxing authority” in a manner excluding community development district board members elected by landowners under a law that does not allow the board to levy ad valorem taxes until members have been elected by qualified electors.³⁷

The bill defines “lobby”, “compensation”, and “legislative action” in a manner consistent with current lobbying registration laws covering the legislative³⁸ and executive³⁹ branches. It defines “lobby for compensation” in a manner consistent with the definition of “lobbyist” in both registration laws.⁴⁰ The bill also defines “issue of policy” and “issue of procurement” consistent with current rules of the Commission.⁴¹

The bill defines “issue of appropriation” in a manner consistent with the appropriation power.

The bill also contextually defines lobbying before the federal government and lobbying before political subdivisions. Specifically, lobbying the federal government is limited to influencing a decision of the United States’ legislative or executive branch where lobbyist registration is required. Lobbying a political subdivision is limited to legislative action or other discretionary decisions; it does not include administrative actions.

The bill defines “state government body or agency” in a manner consistent with the breadth of the constitutional provision to include any “department, agency, commission, council, board, or instrumentality” created by the state constitution or general law and “any official or officer thereof”. Further, the bill provides that the term includes each state attorney, public defender, criminal conflict and civil regional counsel, and capital collateral regional counsel.

³⁴ S. 112.3148, F.S.

³⁵ S. 112.324(4)-(8), F.S.

³⁶ S. 20.03, F.S.

³⁷ S. 190.006(3), F.S.

³⁸ S. 11.045(1), F.S.

³⁹ S. 112.3215(1), F.S.

⁴⁰ Ss. 11.045(1)(g), 112.3215(1)(h), F.S.

⁴¹ R. 34-12.020(9) and (11), F.A.C.

The bill defines “political subdivision” in a manner consistent with other laws but limited to categories addressed by the constitutional provision, excluding special districts that do not have ad valorem taxing authority. “Federal government” is defined as Congress and any federal executive branch department, office, agency, or instrumentality, corporate or otherwise, or any federal independent agency, including any unit thereof.

The bill defines “administrative action” as a category of decisions exempt from those covered by the definition of “lobby”. The definition excludes procurement decisions, which are expressly included within the constitutional lobbying prohibitions. “Administrative action” includes APA proceedings in state agencies. However, the APA applies to neither federal agencies nor political subdivisions. For this reason, the bill provides a specific definition of administrative action outside APA proceedings. The definition incorporates the following specific examples of administrative matters:

- Any action or decision on a license, permit, waiver of regulation, development order or permit, or development agreement;
- Any quasi-judicial proceedings under s. 286.0155(2), F.S.;
- Any decision subject to judicial review; or
- Any other administrative procedure, except on an issue of procurement.

The explicit definition of administrative action works in conjunction with “a decision or determination of any rights, duties, or obligations made on a case-by-case basis,” which is an exclusion provided in the definition of “issue of policy”. Also related, the definition of “lobby for compensation” expressly excludes representation on a legal claim cognizable in court or other tribunal to include pre-litigation offers, demands, and negotiations. Together, these provide broader exemptions than those provided in the current lobbying registration laws with respect to administrative representations and settlement negotiations.

The definitions of “lobby” and “lobby for compensation” include exceptions consistent with the present registration laws. The bill broadens current exemptions for settlement negotiations regarding pending lawsuits expressly allowing pre-litigation demands, offers, and negotiations, but expressly excluding any claim bill pending in the Legislature. The bill also exempts expert witness testimony and related communications.

The definition of “lobby for compensation” departs from current legislative branch lobbying laws in treating state employees the same as private sector employees when not employed principally for government relations.

Finally, the bill defines “governmental entity” to include the federal government, the Legislature, any state government body or agency, or any political subdivision.

Administration

The bill applies the constitutional prohibitions only to persons serving in the affected public offices on or after December 31, 2022.

The bill deems a violation of the new constitutional prohibitions to be a violation of the Code of Ethics for purposes of administration. This authorizes the Commission to investigate and determine violations raised in a written sworn complaint or written authorized referral. The process invoked includes preliminary investigations by Commission staff, probable cause determinations by the Commission, adjudicatory hearings before the Division of Administrative Hearings, and final orders by the Commission.⁴²

The bill provides penalties consistent with current penalties for prohibited lobbying and other prohibited representation.⁴³ The penalties are:

- Public censure and reprimand;
- A civil penalty up to \$10,000; and
- Forfeiture of pecuniary benefits received from the violation, which must be paid to the General Revenue Fund.

The bill requires the Commission to report violations of the post-service lobbying prohibition and recommended penalties to the Governor for imposition of penalties. Existing referral requirements would apply to violations by current public officers.⁴⁴ The Chief Financial Officer and Attorney General are each authorized to collect any penalty imposed.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may result in collection of penalty and forfeiture amounts.

2. Expenditures:

The bill may result in some expenditures for investigations of and hearings on violations.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have a fiscal impact on local government.

2. Expenditures:

The bill does not appear to have a fiscal impact on local government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill has no apparent economic impact on the private sector.

D. FISCAL COMMENTS:

None.

⁴² S. 112.324, F.S.

⁴³ S. 112.317(1)(d), F.S.

⁴⁴ S. 112.324(4)-(8), F.S.