

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7003 PCB PIE 22-02 Implementation of the Constitutional Prohibition Against Lobbying by a Former Justice or Judge

**SPONSOR(S):** Public Integrity & Elections Committee, Koster

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Public Integrity & Elections Committee	16 Y, 0 N	Dillon	Rubottom
1) State Affairs Committee	22 Y, 0 N	Skinner	Williamson
2) Judiciary Committee	18 Y, 0 N	Brascomb	Kramer

### SUMMARY ANALYSIS

In 2018, the people of Florida amended the state constitution to prohibit lobbying by former justices and judges for a six-year period following vacation of judicial office. The prohibition addresses lobbying on issues of policy, appropriations, or procurement, and addresses lobbying before the legislative and executive branches of state government. 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 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.

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.

There is no current law that prohibits lobbying by former justices and judges.

HB 7003 implements the constitutional prohibition on lobbying by former justices and judges for six years following vacation of judicial office. It provides definitions of terms that have no clear constitutional definition and provides that the prohibition applies to justices and judges who vacate office on or after December 31, 2022. It authorizes the Commission on Ethics (Commission) to investigate and determine violations of the new prohibition. The bill provides a range of penalties for violations and directs the Commission to report a violation 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.

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

The bill provides an effective date of December 31, 2022.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

In 2018, the people of Florida amended the state constitution to prohibit a former justice or former judge from lobbying for compensation before the legislative or executive branches of state government for six years following vacation of his or her judicial position.<sup>1</sup> The prohibition addresses lobbying on issues of policy, appropriations, or procurement. The amendment takes effect on December 31, 2022.<sup>2</sup> The amendment expressly authorizes the Legislature to enact implementing legislation to include definitions and penalties.<sup>3</sup>

#### Restrictions on Lobbying

The Code of Judicial Conduct (Code) establishes standards for the ethical conduct of judges. However, the Code does not expressly address lobbying by current or former justices or judges. The Code does prohibit a judge from engaging in any political activity except on behalf of measures to improve the law, the legal system, or the administration of justice, or as expressly authorized by the Code or by law.<sup>4</sup> The Code does place certain restrictions on compensation for quasi-judicial and extrajudicial activities.<sup>5</sup> A judge may accept compensation, reimbursement, payment of expenses, and waiver of fees or charges if the source of such does not give the appearance of influencing the judge in the performance of his or her judicial duties or give the appearance of impropriety, subject to the specified restrictions.<sup>6</sup> The Code also states that a judge should not lend the prestige of judicial office to advance the private interests of the judge or others.<sup>7</sup> The Code is enforced through the Judicial Qualifications Commission (JQC), established by the constitution to investigate misconduct of justices or judges and recommend discipline up to and including removal from office. The Supreme Court is authorized to impose punishment for such conduct.<sup>8</sup>

There is currently no prohibition against former justices or former judges lobbying after vacation of office. However, senior judges eligible to preside in trial courts on temporary assignments are bound by the Code, except for specified provisions.<sup>9</sup> The restrictions might discourage such individuals accepting lobbying contracts. The Code currently requires disclosure of financial interests by judges vacating office.<sup>10</sup> There are no other rules, nor jurisdiction of the JQC, respecting conduct of justices or judges after they vacate judicial office.

#### Lobbyist Registration Laws

Current law requires registration before lobbying either the Legislature or the executive branch.<sup>11</sup> 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

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<sup>1</sup> S. 13(b), Art. V, Fla. Const. (effective Dec. 31, 2022).

<sup>2</sup> S. 38, Art. XII, Fla. Const.

<sup>3</sup> S. 13(b), Art. V, Fla. Const. (effective Dec. 31, 2022).

<sup>4</sup> Canon 7 D, Florida Code of Judicial Conduct

<sup>5</sup> Canon 6, Florida Code of Judicial Conduct

<sup>6</sup> *Id.*

<sup>7</sup> Canon 2 B., Florida Code of Judicial Conduct

<sup>8</sup> S. 12(a)(1) and s. 12(c), Art. V, Fla. Const. The Court's discipline powers are alternative and cumulative to the power of impeachment and removal of justices and judges vested in the Legislature. S. 12(d), Art. V, Fla. Const., s. 17, Art. III, Fla. Const.

<sup>9</sup> Florida Code of Judicial Conduct, *available at*

[https://www.floridasupremecourt.org/content/download/402388/file/Code\\_Judicial\\_Conduct.pdf](https://www.floridasupremecourt.org/content/download/402388/file/Code_Judicial_Conduct.pdf) (last visited Jan. 16, 2022)

<sup>10</sup> Canon 6 B., Florida Code of Judicial Conduct

<sup>11</sup> Ss. 112.3215(3), 11.045(2), F.S.

member. It also includes any attempt to influence legislative action.<sup>12</sup> 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.<sup>13</sup> That requirement does not affect communications outside of the employer's normal business hours.<sup>14</sup> 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.<sup>15</sup> The executive branch registration law is limited to lobbying on decisions in the area of policy or procurement.<sup>16</sup> The Commission on Ethics (Commission) enforces executive branch lobbyist registration.<sup>17</sup> The Commission has defined "policy" and "procurement" in rules implementing executive branch lobbying registration.<sup>18</sup>

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.<sup>19</sup>

Under executive branch lobbying, exceptions include:

- A person representing a client in a judicial proceeding or a formal administrative proceeding under the Administrative Procedure Act<sup>20</sup> (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.<sup>21</sup>

The state ethics laws also regulate gifts of lobbyists or their principals to reporting individuals and procurement employees.<sup>22</sup> 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.<sup>23</sup>

### Commission on Ethics

The 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.<sup>24</sup> State law designates the Commission as

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<sup>12</sup> S. 11.045(1), F.S., Joint Rule 1.1(2) (published with the House Rules).

<sup>13</sup> S. 11.061(1), F.S.

<sup>14</sup> *Id.*

<sup>15</sup> S. 112.3215(1)(f), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> Ss. 112.322, 112.324, F.S.

<sup>18</sup> R. 34-12.020(9) and (11), F.A.C. Chapter 34-12, F.A.C. also supplies additional definitions and clarifies statutory exceptions.

<sup>19</sup> Joint Rule 1.1(3) and (4).

<sup>20</sup> Ch. 120, F.S.

<sup>21</sup> S. 112.3215(1)(h), F.S.

<sup>22</sup> S. 112.3148, F.S.

<sup>23</sup> S. 112.324(4)-(8), F.S.

<sup>24</sup> 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 Jan. 16, 2022); see also s. 112.320, F.S.

the independent commission provided for in s. 8(f), Art. II of the state constitution.<sup>25</sup> Constitutional duties of the Commission consist of conducting investigations and making public reports on all breach of trust complaints towards public officers or employees not governed by the JQC.<sup>26</sup> In addition to its constitutional duties, the Commission, in part:

- Renders advisory opinions to public officials;<sup>27</sup>
- Makes recommendations to disciplinary officials when appropriate for violations of ethics and disclosure laws;<sup>28</sup>
- Administers the Executive Branch Lobbying Registration and Reporting Law;<sup>29</sup>
- Maintains financial disclosure filings of constitutional officers and state officers and employees;<sup>30</sup> and
- Administers automatic fines for public officers and employees who fail to timely file required annual financial disclosure.<sup>31</sup>

## Effect of Proposed Changes

### Definitions

HB 7003 implements the constitutional lobbying prohibition for justices and judges vacating office, 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 justices and judges vacating judicial office on or after December 31, 2022. It provides for administrative enforcement of the constitutional prohibition and establishes penalties for violating the prohibition.

The bill defines “lobby,” “compensation,” and “legislative action” in a manner consistent with current lobbying registration laws covering the legislative<sup>32</sup> and executive<sup>33</sup> branches. It defines “lobby for compensation” in a manner consistent with the definition of “lobbyist” in both registration laws.<sup>34</sup> The bill also defines “issue of policy” and “issue of procurement” consistent with current rules of the Commission.<sup>35</sup>

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

The bill defines “administrative action” as a category of decisions exempt from those covered by the definition of “lobby.” This definition excludes procurement decisions, which are already expressly prohibited by the constitutional provision. “Administrative action” includes Administrative Procedure Act (“APA”) proceedings in state agencies. For any agency not governed by the APA, the definition incorporates the following specific examples of administrative matters:

- Any action or decision on a license, permit, or waiver of regulation; and
- 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 prelitigation offers, demands, and negotiations. Together, these provide broader exemptions than those provided in the

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<sup>25</sup> S. 112.320, F.S.

<sup>26</sup> S. 8(f), Art. II, Fla. Const.

<sup>27</sup> S. 112.322(3)(a), F.S.

<sup>28</sup> S. 112.322(2)(b), F.S.

<sup>29</sup> Ss. 112.3215, 112.32155, F.S.

<sup>30</sup> S. 112.3144, F.S.

<sup>31</sup> 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 Jan. 16, 2022).

<sup>32</sup> S. 11.045(1), F.S.

<sup>33</sup> S. 112.3215(1), F.S.

<sup>34</sup> Ss. 11.045(1)(g), 112.3215(1)(h), F.S.

<sup>35</sup> R. 34-12.020(9) and (11), F.A.C.

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 prelitigation 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” as an officer or agency of the executive or legislative branches of state government.

### Administration

The bill applies the constitutional prohibition to a justice or judge who vacates his or her judicial position on or after December 31, 2022.

This bill deems a violation of the new constitutional prohibition to be a violation of the Code of Ethics<sup>36</sup> for purposes of administration. This authorizes the Commission to investigate and determine violations raised in a written sworn complaint or a 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.<sup>37</sup>

The bill provides penalties consistent with current penalties for prohibited lobbying and other prohibited post-service representation.<sup>38</sup> 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. The Chief Financial Officer and Attorney General are each authorized to collect any penalty imposed.

The bill provides an effective date of December 31, 2022.

## B. SECTION DIRECTORY:

**Section 1:** Creates s. 112.3123, F.S., relating to definitions.

**Section 2:** Creates s. 112.3124, F.S., relating to applicability, administration, penalties, and collection thereof.

**Section 3:** Provides an effective date of December 31, 2022.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

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<sup>36</sup> Pt. III, Ch. 112, F.S.

<sup>37</sup> S. 112.324, F.S.

<sup>38</sup> S. 112.317(1)(d), F.S.

A small amount of funds may be generated for the general revenue fund from penalties collected for violations of the lobbying ban.

2. Expenditures:

This bill may result in some expenditures for investigations of and hearings on violations by the Commission on Ethics.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

The constitutional amendment provides that implementing legislation “shall not contain provisions on any other subject.”<sup>39</sup> The bill neither amends nor incorporates other laws, thus assuring compliance with this requirement.

The bill defines terms used in the constitutional amendment which have no clear constitutional definition. The following terms used in the amendment, but not defined in the bill, appear to have clear constitutional meaning:

- Justice;
- Judge;
- Legislative branch; and
- Executive branch.

#### Jurisdiction of the JQC and Impeachment

The JQC investigates allegations of judicial misconduct of current justices or judges. The constitutional prohibition is applicable to former justices and judges. Thus, the JQC lacks constitutional jurisdiction to enforce the post-service lobbying prohibition. Similarly, the Legislature’s power to impeach and remove justices and judges would not reach post-service lobbying violations.

B. RULE-MAKING AUTHORITY:

No new rulemaking authority is created in the bill.

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<sup>39</sup> S. 8(f)(5), Art. II, Fla. Const. (effective December 31, 2022).

### C. DRAFTING ISSUES OR OTHER COMMENTS:

The definitions in HB 7003 generally conform to definitions of identical terms in HB 7001, which implements a distinct constitutional lobbying prohibition on certain public officers also included in the 2018 constitutional amendment addressed in this analysis. A few definitional differences arise from distinctions in the amendments. The public officers provision reaches lobbying of a state governmental body or agency, the federal government, and political subdivisions, in addition to the Legislature.<sup>40</sup> In HB 7001, the term “governmental entity” includes all those entities. However, the prohibition on former justices and judges implemented by HB 7003 extends to lobbying the “legislative or executive branches of state government.”<sup>41</sup> For this reason, the term “governmental entity” in HB 7003 only includes agencies and officers of the legislative and executive branches. Because of that narrower meaning, HB 7003 uses the term “public entity” in place of “governmental entity” used in HB 7001 to describe a category of lobbyist clients that would include government offices outside the legislative and executive branches. Also, because the scope of HB 7003 is narrower, the definition of “administrative action” omits particular decisions of local governments.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On November 30, 2021, the Public Integrity & Elections Committee adopted an amendment to change the proposed statute number for two new sections of law because the original bill unintentionally used a section number already occupied in the Florida Statutes. This analysis is drawn to the bill as amended.

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<sup>40</sup> S. 8(f), Art. II, Fla. Const. (effective Dec. 31, 2022).

<sup>41</sup> S. 13(b), Art. V, Fla. Const. (effective Dec. 31, 2022).