HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 7003 PCB PIE 17-02 State Officer Post-service Lobbying Prohibitions
SPONSOR(S): Public Integrity & Ethics Committee, Metz
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Public Integrity & Ethics Committee	18 Y, 0 N	Kiner	Rubottom
1) Rules & Policy Committee	18 Y, 0 N, As CS	Kiner	Birtman

SUMMARY ANALYSIS

The Florida constitution places post-service restrictions on legislators and statewide elected officers. These restrictions are typically characterized as post-service lobbying bans and prohibit legislators and statewide elected officers from personally representing another person or entity for compensation before their former government body or agency for two years following vacation of office. These constitutional prohibitions applicable to legislators and statewide elected officers have also been codified in the Florida Code of Ethics for Public Officers and Employees (Code). However, the Code also prohibits appointed state officers from personally representing another person or entity for compensation before their former government body or agency for two years following vacation of office. Additionally, the Code places additional restrictions on legislators as the Code prohibits legislators from personally representing another person or entity for compensation during their term of office before any state agency other than judicial tribunals or in settlement negotiations after the filing of a lawsuit, and prohibits legislators from acting as lobbyists before the executive branch for two years following vacation of office.

The bill replaces the current general law provision that prohibits legislators and statewide elected officers from personally representing another person or entity for compensation before their former government body or agency for two years following vacation of office with a new prohibition. The new prohibition prohibits legislators and statewide elected officers from personally representing another person or entity for compensation before any state government body or state agency other than judicial tribunals or in settlement negotiations after the filing of a lawsuit for six years following vacation of office.

The bill's provisions apply only to those individuals who were members of the Legislature or who were statewide elected officers at any time after November 8, 2016.

The bill does not have a fiscal impact on the state or local governments.

The bill has an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Florida Post-service Lobbying Prohibitions

The Florida Constitution[1] prohibits legislators and statewide elected officers from personally representing another person or entity for compensation before their former government body or agency for a period of two years following vacation of office.[2] This constitutional provision also prohibits legislators from personally representing another person or entity for compensation during term of office before any state agency, other than judicial tribunals.[3]

In addition to these constitutional prohibitions, general law[4] prohibits legislators, statewide elected officers, and appointed state officers[5] from personally representing[6] another person or entity for compensation before their former government body or agency[7] for a period of two years following vacation of office. General law[8] also prohibits legislators from personally representing another person or entity for compensation during their term of office before any state agency other than judicial tribunals or in settlement negotiations after the filing of a lawsuit.

General law[9] also prohibits legislators from acting as lobbyists for compensation before an executive branch agency, agency official, or employee, for two years following vacation of office. For purposes of this post-service statutory prohibition on former legislators lobbying the executive branch, the term

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[1] Article II, s. 8, Fla. Const.

[2] While the constitution does not contain an express exemption applicable to former legislators and statewide elected officers who are elected to another public office, the Commission on Ethics has stated in a published advisory opinion that Article II, s. 8 of the Florida Constitution would not preclude a former legislator who *has been elected* to another public office from appearing before the Legislature:

> "Given the intent, it is not difficult to understand that the prohibition of Article II, Section 8(e) would not preclude a former legislator who has been elected to another public office from lobbying the Legislature as part of his official responsibilities. In that situation, the people have selected the former legislator through an electoral process and there simply is not the opportunity for use of prior public office to acquire lucrative employment as a lobbyist. Nor would the former lobbyist [*sic* apparently referring to the former legislator] be peddling the influence he has gained through public service within the marketplace for lobbyists. We do not believe that an elected official is representing "another person or entity" when approaching the Legislature in the fulfillment of his public duties."

Commission on Ethics Advisory Opinion (CEO) 81-57, affirmatively quoted CEO 09-4 (footnote 1). Other opinions make clear that former elected officers who may be *appointed* public officers or otherwise *employed* in public service are not exempted from the prohibitions on personal representation but may appear at the request of a legislative committee as a witness for informational purposes. *See* CEO 09-4. *Accord CEO 90-4.*

[3] When the voters approved Article II, s. 8(e), the term 'judicial tribunals' included all courts of the state created under Article V of the state constitution, judges of industrial claims, and the Industrial Relations Commission. *See* Myers v. Hawkins, 363 So. 2d 926 (Fla. Supreme Court 1978). In light of this decision, the Commission on Ethics has stated in a published advisory opinion that a DOAH proceeding is not a judicial tribunal. *See* Commission on Ethics Advisory Opinion 11-7 (footnote 5) and 91-54.

[4] S. 112.313(9), F.S.

[5] Pursuant to s. 112.313(9), F.S., the term 'appointed state officer' means "any member of an appointive board, commission, committee, council, or authority of the executive or legislative branch of state government whose powers, jurisdiction, and authority are not solely advisory and include the final determination or adjudication of any personal or property rights, duties, or obligations, other than those relative to its internal operations."

[6] Pursuant to s. 112.312(22), the term 'represent' or 'representation' means "actual physical attendance on behalf of a client in an agency proceeding, the writing of letters or filing of documents on behalf of a client, and personal communications made with the officers or employees of any agency on behalf of a client."

[7] Pursuant to s. 112.313(9), F.S., the term 'state agency' means "an entity of the legislative, executive, or judicial branch of state government over which the Legislature exercises plenary budgetary and statutory control."

[8] S. 112.313(9), F.S.

[9] S. 112.313(9), F.S.

'lobbyist' has the same meaning as provided in s. 112.3215(1)(h), F.S. Pursuant to s. 112.3215(1)(h), the term 'lobbyist' means "a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity." However, section 112.3215(1)(h), F.S., provides for several exceptions as the term 'lobbyist' does not include a person who is:

- An attorney, or any person, who represents a client in a judicial proceeding or in a formal administrative proceeding conducted pursuant to chapter 120 or any other formal hearing before an agency, board, commission, or authority of this state.
- An employee of an agency or of a legislative or judicial branch entity acting in the normal course of his or her duties.
- A confidential informant who is providing, or wishes to provide, confidential information to be used for law enforcement purposes.
- A person who lobbies to procure a contract pursuant to chapter 287 which contract is less than $20,000.

The Florida Commission on Ethics (Commission) is the independent body charged with receiving and investigating sworn complaints involving Florida's constitutional ethics provisions, as well as any other violation of Florida's Code of Ethics for Public Officers and Employees.[10] While the Commission receives and investigates sworn complaints, the Commission does not have the authority to impose punishment for an ethics violation.[11] Instead, whenever the Commission finds probable cause exists that an ethics violation has occurred, the Commission is required to submit its findings, along with a recommended penalty, to the statutorily designated official who may impose punishment.[12]

The Commission must make such submission to the Senate President or Speaker of the House, whichever is applicable, in any case concerning a former legislator who is alleged to have violated a provision applicable to former legislators or whose alleged conduct occurred while a member of the Legislature.[13] In the case of a former statewide elected officer, the Commission is required to make such submission to the Governor.[14]

A former legislator or statewide elected officer who violates one of Florida's constitutional ethics provisions or a provision of the Code may be subject to one or more of the following civil penalties[15]:

- Public censure and reprimand
- Civil penalty up to $10,000
- Restitution[16] of any pecuniary benefits received because of the violation committed

Pursuant to statute, in any case in which a civil penalty or restitution is imposed, the Attorney General is required to bring a civil action to recover such penalty.[17]

Rules of the Florida House of Representatives (2016 – 2018)

During the 2016 Organization Session, the Florida House of Representatives adopted its rules for the 2016 – 2018 term. Rule 17.1(g) prohibits a lobbyist[18] who was a member of the Legislature at any time

[10] Art. II, s. 8(f) and (i)(3), Fla. Const., and s. 112.322(1), F.S.
[11] S. 112.324(3), F.S.
[12] S. 112.324(4)-(9), F.S.
[13] S. 112.324(8)(e), F.S.
[14] S. 112.324(8)(d), F.S.
[15] S 112.317, F.S.
[16] Pursuant to s. 112.317(1)(d), F.S., the Commission may recommend that the restitution penalty be paid to the agency of the public officer or employee or to the General Revenue Fund.
[17] S. 112.317(2), F.S.
[18] Pursuant to the Joint Rules of the Florida Legislature for the 2016 – 2018 term, 'lobbyist' means "a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity. An employee of the principal is not a lobbyist unless the employee is principally employed for governmental affairs…. Any person

after November 8, 2016, from lobbying the House of Representatives for period of six years following vacation of office as a member of the Legislature.

Other Post-service Lobbying Prohibitions (Federal & State)

Federal Post-service Lobbying Prohibitions

Federal law places certain post-service lobbying prohibitions on former members of the United States Senate and United States House of Representatives.[19] Specifically, former United States Senators are prohibited from lobbying either House of Congress on behalf of any other person (except the United States) for two years after vacating office.[20] Former United States Representatives are prohibited from lobbying either House of Congress on behalf of any other person (except the United States) for one year after vacating office.[21]

Federal law also subjects certain executive branch[22] employees[23] (including appointed employees) to the following post-employment restrictions:[24]

- Lifetime ban – a former employee may not represent a private party against the United States government in relation to a particular matter involving specific parties if the former employee was personally and substantially involved in the matter during his or her employment.
- Two-year ban – a former employee may not represent a private party against the United States government in relation to a matter that was pending under the former employee's official responsibility during his or her last year of government service.
- One-year cooling-off period – a former senior employee may not represent another person or entity by making a communication to or appearing before the former employee's former agency to seek official action on any matter.
- Two-year cooling-off period – a former very senior employee may not represent another person or entity by making a communication to or appearing before the former employee's former agency to seek official action on any matter.

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employed by the Governor, the Executive Office of the Governor, or any executive or judicial department of the state or any community college of the state who seeks to encourage the passage, defeat, or modification of any legislation by personal appearance or attendance before the House of Representatives or the Senate, or any member or committee thereof, is a lobbyist." Joint Rule 1.1(2)(e).

[19] *See* 18 U.S.C., sec. 207(e).

[20] *See* 18 U.S.C., sec. 207(e)(1)(A). The statute reads, "Senators. Any person who is a Senator and who, within 2 years after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any Member, officer, or employee of either House of Congress or any employee of any other legislative office of the Congress, on behalf of any other person (except the United States) in connection with any matter on which such former Senator seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title [18 USCS § 216]."

[21] *See* 18 U.S.C., sec. 207 (e)(1)(B)(i). Any person who is a Member of the House of Representatives or an elected officer of the House of Representatives and who, within 1 year after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in clause (ii) or (iii), on behalf of any other person (except the United States) in connection with any matter on which such former Member of Congress or elected officer seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title [18 USCS § 216].

[22] Per 5 C.F.R. part 2641, the term 'executive branch' for purposes of 18 U.S.C. sec. 207 includes "an executive department as defined in 5 U.S.C. 101, a Government corporation, an independent establishment (other than the Government Accountability Office), the Postal Service, the Postal Regulatory Commission, and also includes any other entity or administrative unit in the executive branch."

[23] Per 5 C.F.R. part 2641, the term 'employee' for purposes of 18 U.S.C. sec. 207 means "any officer or employee of the executive branch or any independent agency that is not a part of the legislative or judicial branches. The term does not include the President or the Vice President, an enlisted member of the Armed Forces, or an officer or employee of the District of Columbia. The term includes an individual appointed as an employee or detailed to the Federal Government under the Intergovernmental Personnel Act (5 U.S.C. 3371-3376) or specifically subject to section 207 under the terms of another statute. It encompasses senior employees, very senior employees, special Government employees, and employees serving without compensation."

[24] *See* 18 U.S.C., sec. 207

On January 28, 2017, President Trump issued an executive order prohibiting executive branch appointees from lobbying the agency which they were appointed to serve for five years after termination of employment.[25]

The executive order also prohibits executive branch appointees from the following:

- participating in any matter involving specific parties that is directly and substantially related to their former employer or former clients, including regulations and contracts, for two years after their appointment date;
- participating in any particular matter which they lobbied within the two years before their appointment date, and from participating in the specific issue area in which that particular matter falls, for two years after their appointment date;
- engaging in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2017, would require registration under the Foreign Agents Registration Act of 1938, as amended; and
- accepting gifts from registered lobbyists or lobbying organizations for the duration of their service as an appointee.[26]

In early 2017, several congressional members have introduced legislation in the United States House of Representatives to extend post-service employment restrictions currently applicable to former members of the United States Senate and United States House of Representatives.

Florida Congressman Bill Posey has introduced H.R. 383, the 'Stop the Revolving Door in Washington Act,' which proposes to extend the current lobbying bans applicable to former members of the United States Senate and United States Representatives to five years after vacation of office. Congressman Posey also has also introduced H.R. 384, the 'End the Congressional Revolving Door Act,' which proposes to terminate retirement and other federal benefits for former members of Congress who become lobbyists.

Florida Congressman Ron DeSantis has introduced H.R. 796, the 'Drain the Swamp Act of 2017'. Among other things, the house resolution proposes to extend the current lobbying bans applicable to former members of the United States Senate and United States House of Representatives to five years after leaving office.

Michigan Congressman David Trott has introduced H.R. 346, the 'Congressional Integrity Act,' which proposes to establish a uniform five-year lobbying ban on former members of the United States Senate and United States House of Representatives.

Other State Post-service Lobbying Prohibitions

According to a 50-state survey conducted by the National Conference of State Legislatures, at least 34 states have enacted post-service lobbying prohibitions on former state legislators.[27] Of these 34 states, 20 states[28] impose a one-year prohibition, while eight states[29], including Florida, impose a two-year prohibition. Out of the remaining six states, three states[30] impose a ban that expires at the end of the next regular session after the legislator has vacated office, one state[31] has a prohibition that expires at the end of the legislator's current term of office (in case of resignation), one state[32] has a prohibition

[25] *See* "Executive Order: Ethics Commitments by Executive Branch Appointees" on the White House website at https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees (last viewed 1/30/2017).
[26] Id.
[27] *See* "Rules Against Legislators Lobbying State Government After They Leave Office," on NCSL's website at http://www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx (last viewed 1/13/2017).
[28] AK, AZ, AR, CA, CT, DE, GA, IN, ME, MA, MN, NJ, PA, RI, SC, SD, TN, UT, VA, WV.
[29] AL, CO, FL, IA, KY, LA, MT, NY.
[30] MD, NV, OR.
[31] MI.
[32] MO.

lasting six months after expiration of any term of office for which the person was elected, and one state's[33] prohibition lasts until the later of the close of the session which the legislator served or six months after leaving office.

While no state currently has a post-service lobbying ban longer than two years, at least one state other than Florida is considering extending beyond two years. House Bill 213 is currently pending in the Missouri House of Representatives and proposes to extend Missouri's lobbying ban applicable to former legislators and appointed state officers (who require confirmation by the state senate) to five years following vacation of office from six months.

In 2010, an Ohio state statute that imposed a one-year lobbying ban on former state assembly members was permanently enjoined by a federal district court on grounds it violated the First Amendment to the United States Constitution.[34] The statute at issue prohibited former assembly members and legislative employees from lobbying the general assembly on a *compensated* and *uncompensated* basis for one-year after leaving office or employment.[35] There, a former state assembly member, who was a supporter and member of an advocacy organization, wished to represent the organization's interest before the Ohio General Assembly on an *uncompensated* basis. The court found the statute infringed on First Amendment protections relating to the right to peaceably assemble and to petition the government for redress of grievances, and as such, subjected the statute to strict scrutiny. While the court found the state had a compelling interest in preventing corruption or the appearance of corruption, the court found this compelling interest to be limited to *compensated* lobbying; as such, the court did not find the state had a compelling interest in prohibiting *uncompensated* lobbying.

Like many other states[36], Florida's ban is limited to personal representation for compensation.

Despite the injunction, however, an Ohio state statute providing a one-year prohibition on all public officials and employees from representing any person or entity in regards to a [non-legislative] matter in which they personally participated as a public official or employee remains intact.[37]

A handful of states also have post-service lobbying bans applicable to former executive branch officials.

Effect of Proposed Changes

The bill replaces the current general law provision that prohibits legislators and statewide elected officers from personally representing another person or entity for compensation before <u>their</u> former government body or agency for two years following vacation of office with a new prohibition. The new prohibition prohibits legislators and statewide elected officers from personally representing another person or entity for compensation before <u>any</u> state government body or state agency other than judicial tribunals for six years following vacation of office. In doing so, the bill removes the current law exceptions related to lobbying the executive branch that allow legislators to personally appear before state agencies in limited capacities. Among these exceptions are those related to personally representing a client in a formal administrative proceeding conducted pursuant to chapter 120 or any other formal hearing before a state agency, board, commission, or authority and procuring a contract less than $20,000 from a state agency in accordance with Chapter 287, Florida Statutes.

The bill's provisions apply only to those individuals who were members of the Legislature or who were statewide elected officers after November 8, 2016.

B. SECTION DIRECTORY:

Section 1 amends s. 112.313, F.S., relating to postemployment restrictions and standards of conduct for legislators and legislative employees.

[33] NC.
[34] <u>Brinkman v. Budish</u>, 692 F. Supp. 2d 855, 862 (S.D. Ohio 2010).
[35] *See* Ohio Rev. Code 102.03(A)(4) (2010).
[36] At least, AL, AK, AZ, CA, CO, DE, IA, LA, ME, MD, MI, NV, NY, OR, PA, VA.
[37] *See* Ohio Rev. Code 102.03(A)(1).

Section 2 provides applicability for the act's provisions.

Section 3 provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

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.

2. Other:

   First Amendment, United States Constitution

   The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble, and to petition the government for redress of grievances." The Fourteenth Amendment extends these prohibitions to the states.

   Provisions of Florida law that regulate lobbyist activity have been challenged on grounds they violate these First Amendment protections. In Florida League of Professional Lobbyists v. Meggs, the United States Court of Appeals for the Eleventh Circuit (11th Circuit) upheld a Florida statute that required a lobbyist hired by a principal to disclose all lobbying expenditures, whether made by the lobbyist or by the principal, and the source of funds for all such expenditures.[38] In Florida Association

[38] Florida League of Professional Lobbyists v. Meggs, 87 F.3d 457 (11th Cir. 1996).

of Professional Lobbyists, Inc. v. Division of Legislative Information Services, the 11th Circuit upheld a Florida statute prohibiting certain 'expenditures' and requiring quarterly compensation reports.[39]

At least 34 states have instituted post-service lobbying bans on state legislators. In 2010, an Ohio statute prohibiting former members of the general assembly from lobbying the general assembly for one year following vacation of office was permanently enjoined.[40] There, the federal district court recognized the state's compelling interest in avoiding corruption or the appearance of corruption, but held the prohibition was not narrowly tailored to achieve that objective because it prohibited compensated and uncompensated lobbying. Florida's lobbying ban prohibits personal representation for compensation.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On Tuesday, January 24, 2017, the Public Integrity & Ethics Committee adopted an amendment to specify that the bill's provisions apply only to those individuals who were members of the Legislature after November 8, 2016, were statewide elected officers after November 8, 2016, or who were appointed state officers after July 1, 2017.

On Tuesday, February 21, 2017, the Rules & Policy Committee adopted a strike-all amendment to do the following:

- Restrict the bill's proposed changes to legislators and statewide elected officers; and
- Broaden the prohibition applicable to legislators and statewide elected officers to prohibit them from personally representing another person or entity for compensation before any state government body or state agency other than judicial tribunals or in settlement negotiations after the filing of a lawsuit.

The bill analysis is drawn to the bill as amended by the Rules & Policy Committee.

[39] Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, 525 F. 3d 1073 (11th Cir. 2008).
[40] Brinkman v. Budish, 692 F. Supp. 2d 855, 862 (S.D. Ohio 2010).