Florida Commission on Ethics

Statement of Estimated Regulatory Costs (SERC)

Agency: Florida Commission on Ethics
Rule Number: Rule 34-18.001, Florida Administrative Code
Rule Purpose: To address the recent amendment found in Article II, Section 8(h)(2) of the Florida Constitution. The amendment requires the Florida Commission on Ethics, through the statutory procedures governing rule-making, to define the term "disproportionate benefit," as it is used in that particular subsection, and to prescribe the requisite intent for finding a violation of the prohibition contained in that particular subsection.
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Please note: The following analyzes the impact of the language in Rule 34-18.001, NOT the language of the Constitutional amendment

Section 120.541, Florida Statutes, sets forth the requirements that agencies must follow in preparing Statements of Estimated Regulatory Costs (SERC). Specifically, paragraphs 120.541(2)(a) through (g), Florida Statutes, provide that certain information must be addressed in any SERC. The informational requirements as they appear in the statute are cited below, along with the Commission's response to each as related to Rule 34-18.001.

(a)1. Is the rule likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of $1 million in the aggregate within 5 years after the implementation of the rule?

No. The purpose of the rule is to clarify and define elements of a recent constitutional amendment found in Article II, Section 8(h)(2) of the Florida Constitution. The constitutional amendment solely addresses the conduct of public officers and employees and does not relate to private businesses. Therefore, the rule, which simply clarifies elements of the amendment, is not likely to adversely impact economic growth, private sector job creation or employment, or private sector investment. In particular, the rule is not likely to reduce personal income, visitors to Florida, private wages or salaries, or property income.

The portion of the constitutional amendment addressed by the rule prohibits, in part, a public officer or public employee from abusing his or her public positions to obtain a disproportionate benefit for a business with which he or she contracts, serves as an officer, partner, director, or proprietor, or owns an interest. A contract in violation of the prohibition arguably would be voidable under Section 112.3175, Florida Statutes. However, it is not anticipated that the amount of contracts voidable under the prohibition found in the constitutional amendment would affect Florida's economic growth, private sector job creation or employment, or private sector investment to any significant degree. And, regardless, any such effect will result from the prohibition in the constitutional amendment, not from the rule under analysis here.

(a)2. Is the rule likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in

other states or domestic markets, productivity, or innovation in excess of $1 million in the aggregate within 5 years after the implementation of the rule?

No. As previously described, the rule only applies to public officers and employees, not to businesses in the private sector. More particularly, the rule does not affect the price of goods or services produced by Florida businesses, does not regulate professions, and does not affect the quantity of goods or services that Florida businesses produce. Moreover, because it does not apply to the private sector, it will not cause Florida businesses to reduce their workforce, will not affect the ability of Florida businesses to invest in product development or innovation, and will not render the production of any good or service illegal within Florida.

(a)3. Is the rule likely to increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within 5 years after the implementation of the rule?

No. The rule, in and of itself, does not impose any monetary penalty or costs upon the public officers and public employees to whom it applies. It simply defines and clarifies certain terms used in the constitutional amendment found in Article II, Section 8(h)(2), Florida Constitution, which in itself imposes no penalty. While it has been argued by interested parties during the rule-making process that the rule will increase filing fees[1] and attorney fees, inasmuch as it may lead to an increase in ethics complaints, these arguments do not address the rule but rather the prohibition created by the underlying constitutional amendment.

Nor can it be said that the rule likely will increase regulatory or transactional costs for the Commission on Ethics or any state or local agency in terms of new operational expenses or expenses needed to initiate procedures to facilitate compliance. The Commission does not foresee the addition of any new staff or expenses pursuant to the language of the rule. The Commission intends to respond within the parameters of its current budget. And regarding state or local agencies, the rule is triggered—by its very language—only when a public officer acts or refrains from acting "with a wrongful intent and for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties." Accordingly, it does not appear the rule—or the underlying constitutional amendment—will impose any regulatory or transactional expenses upon a state or local agency beyond advising (if an agency chooses to do so) its officers and employees to continue acting in conformity with the proper performance of their duties.

Future legislation may impose a penalty upon public officers and public employees who violate the constitutional prohibition. These potential penalties are still forthcoming, will be determined by the Legislature, and are not addressed in the rule.

(b) A good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule.

[1] It should be noted that there is no fee imposed for filing an ethics complaint, and neither the constitutional amendment nor the rule in question impose any such fees.

Pursuant to the language of the constitutional amendment found in Article II, Section 8(h)(2), Florida Constitution, the rule applies to public officers and public employees of the State of Florida and its political subdivisions. These are the types of individuals likely to be affected by the rule. The rule and the constitutional prohibition do not apply to state or local government entities or to private entities. Thus, a good faith estimate of the number of entities likely to be required to comply with the rule is none.

According to information obtained from the Florida Office of Economic and Demographic Research, there are approximately 108,862 public officer and public employee positions in State Government, 92,709 public officer and public employee positions in the State University System, 58,255 public officer and public employee positions in the Florida Colleges System, 201,972 public officer and public employee positions in Local Government (counties, cities, and special districts), and 351,009 public officer and public employee positions in School Districts. This is a total of approximately 812,807 public officer and public employee positions in Florida, and is a good faith estimate of the number of individuals likely to be required to comply with the rule.

(c) A good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues.

Regarding the Commission on Ethics, there will be no additional cost for implementing and enforcing the rule. Assuming the Legislature enacts penalties for a violation of the constitutional prohibition, the Commission intends to implement and enforce the prohibition—and the accompanying rule—with its existing staff and within its current budgetary allocation. The Commission does not anticipate the rule will increase its operating expenses.

Regarding state and local government entities, there is no anticipated cost for implementing and enforcing the rule. In terms of implementation, as previously mentioned, the rule applies only if a public officer or public employee, with a wrongful intent, abuses his or her position by acting or refraining from acting in a manner inconsistent with the proper performance of his or her duties and does so to obtain a disproportionate benefit. In other words, so long as public officers or public employees do not abuse their public positions, the rule will not apply. Therefore, a state or local entity should not experience any extra cost once the rule becomes effective. Also, while it is recommended that state and local entities mention the underlying constitutional prohibition—and, therefore, the rule—if they decide to conduct training for their public officers and public employees, it is not anticipated that adding these comments to an ethics training will carry any expense. The new prohibition and rule simply can be folded into existing training. And in terms of enforcement, the Commission on Ethics is tasked with the rule, not any other state or local agency.

Regarding the rule's anticipated effect on state or local revenues, the rule, in itself, does not impose any type of monetary penalty. Nor does it call for the collection of any funds from those to whom it applies. It simply defines and clarifies terms used in the constitutional amendment found in Article II, Section 8(h)(2), Florida Constitution. It is anticipated that the Legislature will pass legislation prescribing fines or monetary penalties for violating the underlying constitutional prohibition. Such penalties likely will enhance the general revenue of the State. However, because

that legislation is still forthcoming, there is no available information on what the penalties will be. Moreover, the amount of enhancement will depend on the number of times that violations of the constitutional prohibition are found to have occurred, which is not possible to estimate.

> (d) A good faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule. As used in this section, "transactional costs" are direct costs that are readily ascertainable based upon standard business practices and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, the cost of monitoring and reporting, and any other costs necessary to comply with the rule.

It is not estimated that the rule will impose any transactional costs on individuals or entities. The rule, in and of itself, does not impose any monetary penalty, cost, or expense upon the public officers and public employees to whom it applies. It simply defines and clarifies certain terms used in the constitutional amendment found in Article II, Section 8(h)(2), Florida Constitution.

Even considering the underlying constitutional amendment, it cannot be said the prohibition found in Article II, Section 8(h)(2) imposes any transactional cost. The amendment does not prescribe a penalty for violating its prohibition but instead leaves the issue of penalties for the Legislature to determine in future legislation. Nor does the amendment impose a filing fee. Anyone filing an ethics complaint with the Commission alleging a violation of the amendment can do so without paying a filing fee. And while public officers and public employees will be required to comply with the constitutional prohibition, the language in Article II, Section 8(h)(2) does not create any monitoring or reporting obligation on the part of the Commission or any state or local officer, employee, or agency.

Finally, it is unlikely that the constitutional prohibition will increase operational expenses for state and local agencies. As previously discussed, the rule indicates the prohibition will be triggered only when a public officer acts or refrains from acting "with a wrongful intent and for the purpose of obtaining any benefit, privilege, exemption, or result from the conduct which is inconsistent with the proper performance of his or her public duties." Considering this intent standard, the constitutional prohibition will not impose additional expenses upon a state or local agency beyond telling its officers not to violate the prohibition. At most, state and local agencies will simply need to mention the constitutional prohibition if they choose to hold ethics trainings for their officers and employees.

It has been argued that the constitutional prohibition may draw more state and local officers and employees into ethics proceedings, thereby creating attorney fees for the officers/employees and raising insurance rates for their agencies if they defend their officers/employees. However, this argument really addresses the costs of complying with the prohibition in the constitutional amendment rather than the rule in question. And while individuals and agencies may incur costs in defending against ethics complaints prosecuted under the constitutional amendment, it is impossible to estimate what those costs will be.

(e) An analysis of the impact on small businesses as defined by s. 288.703, and an analysis of the impact on small counties and small cities as defined in s. 120.52. The impact analysis for small businesses must include the basis for the agency's decision not to implement alternatives that would reduce adverse impacts on small businesses.

Regarding small businesses, the fiscal impact of the rule will be minimal, if any. As previously described, the purpose of the rule is to clarify and define elements of the recent constitutional amendment found in Article II, Section 8(h)(2) of the Florida Constitution. The amendment solely addresses the conduct of public officers and employees in their public capacities.

As previously mentioned, any contract transgressing the prohibition arguably will be voidable, including contracts to which a small business is a party. See Section 112.3175, Florida Statutes. This effect is more relevant to the constitutional prohibition than to the rule, but it is mentioned here for the sake of thoroughness. Although it is difficult to predict, it is anticipated that the amount of contracts voidable under the constitutional amendment will be few in number. Such voidable contracts would be only those which provide the public officer or public employee—or their spouse, children, employer, or any business with which they are an officer, partner, director, or proprietor, or own an interest—with a disproportionate benefit, and which the public office or public employee has secured by wrongfully and intentionally acting, or refraining from acting, in a manner inconsistent with the proper performance of their public duties.

It is difficult to see how any alternative to the rule would reduce this potential effect. The constitutional amendment in Article II, Section 8(h)(2), Florida Constitution, creates the prohibition. The rule simply clarifies certain elements in the amendment. The rule cannot be re-written in a way to reduce or remove this potential effect on small businesses because to do so would undercut the purpose of the amendment.

Regarding small counties and small cities, the impact of the rule will have minimal fiscal impact, if any. The rule may affect the officers and employees of small counties and small cities inasmuch as the constitutional amendment on which it is based applies to all public officers and public employees, including those working or serving in small cities and small counties. However, the rule and the amendment address only abuses of position by individual public officers and employees, not the activities of the agencies (e.g., counties and cities) where they serve.

In addition, the rule will have no practical effect on the day-to-day operation of small counties or small cities. It does not create any new regulatory costs, does not impose a reporting or monitoring requirement, and will be administered by the Commission on Ethics. And while small cities and small counties may want to mention the rule and the accompanying amendment should they elect to provide ethics trainings to their officers and employees, this would not seem to create a fiscal burden.

Perhaps the only fiscal impact, as previously discussed, will be if small counties or small cities decide to defend a public officer or public employee who is the subject of an ethics complaint concerning the constitutional prohibition. The cost of such a defense, and any corresponding increase on the insurance premiums for small counties or small cities, is difficult to estimate and,

in any event, concerns the effect of the underlying constitutional prohibition rather than the rule, which again simply clarifies and defines elements of the prohibition.

(f) Any additional information that the agency determines may be useful.

The analysis in this SERC constitutes the Commission on Ethics' good faith appraisal of the scope and impact of the rule.

(g) In the statement or revised statement, whichever applies, a description of any regulatory alternatives submitted under paragraph (1)(a) and a statement adopting the alternative or a statement of the reasons for rejecting the alternative in favor of the proposed rule.

Section 120.541(1)(a), Florida Statutes, states a person who will be "substantially affected" by the rule may submit lower cost regulatory alternatives within 21 days after the publication of the notice of proposed rulemaking. Section 120.541(2)(g), Florida Statutes, requires alternatives submitted by "substantially affected" persons to be considered in a SERC. A "substantially affected" person is an individual for whom (1) the rule will result in a real or immediate injury; and (2) possesses an alleged interest within the "zone of interest" that the rule is designed to regulate. See Office of Insurance Regulation and Financial Services Commission v. Secure Enterprises, LLC, 124 So. 3d 332, 336 (Fla. 1st DCA 2013).

Within the pertinent time-period, the Commission on Ethics received language and/or proposals which may be considered lower cost regulatory alternatives from the following groups: (1) Association of Florida Community Developers; (2) Florida Association of Counties; (3) Florida League of Cities, Inc.; (4) Florida Association of Special Districts; (5) Florida Sheriffs' Association; (6) Citrus Research and Development Foundation; and (7) Villages of Lake-Sumter, Inc.. Subsequently, five of these six entities wrote the Commission a joint letter, which also was signed by the Florida Association of District School Superintendents, containing additional regulatory alternative language.

These groups each proposed similar language modifying the rule. Their alternatives are summarized below along with a description as to why the Commission did or did not accept each proposed change.

First, alternative language was proposed either defining or asking that the rule define the terms "public officer," "public employee," and "agency." The rule does not define these terms. This is because there was no express grant of authority given to the Commission in Article II, Section 8(h)(2), Florida Constitution, to define these terms. Section 120.52(8), Florida Statutes, states "[a]n agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute." Moreover, the concept of "rulemaking authority," as explained in Section 120.52(17), Florida Statutes, requires "statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term 'rule.'"

Here, the constitutional prohibition found in Article II, Section 8(h)(2), Florida Constitution, gave the Commission the authority to engage in rulemaking on two specific tasks: (1) define the term "disproportionate benefit" as used in that subsection; and (2) prescribe the requisite intent for finding a violation of the prohibition contained in that particular subsection. Because the Commission was not charged with defining "public officer," "public employee," or "agency," it would be an invalid exercise of the Commission's rule-making authority to define those terms in the rule.

Second, alternative language was proposed confining the definition of "disproportionate benefit" only to those instances where an abuse of public position results in an economic benefit. The rule does not accept this alternative. The constitutional prohibition in Article II, Section 8(h)(2), Florida Constitution, does not contain language limiting its scope to only economic effects or benefits. To use the rule to limit the application of the constitutional prohibition to instances where there is an economic benefit does not appear to reflect the intention of the Constitution Revision Commission in proposing or the voters in supporting the underlying amendment. In addition, the Commission has accepted complaints in the past, under an ethics prohibition with language very similar to that of the amendment, regarding public officers and public employees who have misused their position without experiencing any financial or economic benefit (e.g., complaints involving the sexual harassment of subordinates). Were the rule to confine the constitutional prohibition to only instances of economic benefit, the prohibition would be inapplicable in such situations.

Third, alternative language was proposed eliminating language stating that a public officer or public employee can violate the constitutional prohibition not only by acting, but also by refraining from acting. The rule does not accept this alternative. The Commission can conceive of instances where a public officer or public employee refuses to perform his or her duties in order to secure a disproportionate benefit for himself, herself, or another. To confine the rule's language in the manner proposed would place such situations beyond the reach of the constitutional prohibition. It should be noted that the language of the rule accepted by the Commission will be applied if a public officer or employee refrained from acting with a wrongful intent to obtain a benefit, privilege, exemption, or result inconsistent with the proper performance of his or her public duties. In other words, simply making a mistake or failing to act, without the requisite intent, will not be enough, under the rule, to violate the constitutional prohibition.

Fourth, alternative language was proposed asking that the rule include language stating that the constitutional prohibition will not be triggered if the public officer or public employee acts in compliance with the existing statutes in the Code of Ethics. The rule does not adopt such a "safe harbor" clause because, given comments at the rule workshop and hearing held by the Commission on July 26, 2019, it does not appear the Constitution Revision Commission intended for the rule to contain such language; and the amendment does not provide for the inclusion of "safe harbor" language. However, the language of the rule does state it applies only when a public officer or public employee acts or refrains from acting "with a wrongful intent for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties."

Fifth, alternative language was proposed to eliminate any reference to "similarly situated persons," which appears in the rule as a factor that must be considered when determining if a benefit, privilege, exemption, or result constitutes a "disproportionate benefit." In particular, the consideration is whether the particular benefit, privilege, exemption, or result is available to "similarly situated persons." The rule does not accept this alternative. The use of the phrase "disproportionate benefit" in the constitutional prohibition implies a sense of balancing one's interest against those of another. The use of the phrase "similarly situated persons" in the rule means that, in applying the constitutional prohibition, such a balancing must occur. This reflects the intent of the constitutional amendment, which was overwhelmingly supported by Florida voters.

Sixth, alternative language was proposed to rewrite the intent standard in the rule. This language was accepted in material part. A prior version of the rule stated the requisite intent for violating the prohibition in Article II, Section 8(h)(2), Florida Constitution, was whether the public officer or public employee "acted, or refrained from acting, with knowledge that his or her action or failure to act would result in a disproportionate benefit." The version of the rule accepted by the Commission states the requisite intent is whether the public officer or public employee acted, or refrained from acting, with a "wrongful intent for the purpose of obtaining any benefit, privilege exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties."