

FILE 2811 — January 17, 2024

FINANCIAL DISCLOSURE

DISCLOSURE OF TRUSTS IN THE ABSENCE OF KNOWLEDGE OF THE TRUST'S HOLDINGS

To: Mark Herron, Attorney (Tallahassee)

SUMMARY:

The disclosure of indirectly-owned real property and interests in specified businesses exceeding applicable disclosure thresholds is required on a CE Form 1, "Statement of Financial Interests," when information of the trust's holdings can be obtained with a reasonable inquiry. Referenced are CEO 83-3, CEO 11-5, and CEO 23-8.

QUESTION:

Is a filer's beneficial interest in a trust required to be disclosed when the trust has a spendthrift clause that prevents him from borrowing against trust assets or otherwise alienating his interest in the trust?

This question is answered as follows.

You make this inquiry on behalf of your client, who is an Assistant State Attorney for the Eleventh Judicial Circuit ("the Filer"). Due to this public employment, he is a specified state employee under Section 112.3145, Florida Statutes, and is, therefore, required to file CE Form 1, "Statement of Financial Interests."

In 2023, the Filer became aware that he is one of the beneficiaries of an irrevocable trust. He is not the grantor or the trustee of this trust. The trust has a spendthrift clause, which operates to prevent the Filer and the other beneficiaries from alienating or encumbering their beneficial interests in the trust.¹ Of particular note, the Filer does not know and has not been told what assets the trust contains, and you have informed Commission staff that it apparently is the strong preference of the grantor of the trust that the Filer and the other beneficiaries remain uninformed in that regard. The Filer has not received any income or distributions from the trust, and does not expect to receive any until the after the grantor's demise.

With this background, you ask whether and how the Filer should disclose the trust in the various sections of CE Form 1.

The Filer will not have to disclose the trust a primary source of income. He has not realized any gross income from the trust and, although the trust itself may have realized gross income during the reporting period, that is not attributable to him. In CEO 23-8, Question 2, we confirmed that trust income need not be disclosed as a primary source of income where a filer is not able to access that trust income and where a filer has no ability to direct the use of the trust's income. Given that he has received no gross income from the trust, he also cannot have any secondary sources of income related to the trust.

The Filer also will not have to disclose his beneficial interest in the trust as intangible personal property, even if the value² of that beneficial interest exceeds the applicable disclosure threshold. The trust has a spendthrift clause that operates to prevent him from alienating or encumbering his beneficial interest. As we recently confirmed in CEO 23-8, Question 1, an asset

¹ The spendthrift clause states, "The interest of a beneficiary in principal or income shall not be subject to the claims of any creditor, any spouse for alimony or support, or others, to legal process, and may not be voluntarily or involuntarily alienated or encumbered."

² We advised in CEO 83-3 that the Department of the Treasury has guidelines for valuing such interests.

in the context of CE Form 6 is "anything that can be sold, alienated, or otherwise made available to settle debts." Consistent with that, in the context of CE Form 1, we find that an interest that cannot be alienated or encumbered and is otherwise not marketable cannot have a value in excess of the applicable disclosure threshold—which here is \$10,000. The Filer also will not have to disclose any securities or investments in the trust's corpus as intangible personal property. The intangible personal property section only requires the disclosure of those intangible interests that are owned directly by the filer, not indirectly.³

The Filer also will not have to disclose any of the trust's liabilities, if it has any, as his own liabilities on CE Form 1, so long as he and the trust are not jointly and severally liable for a debt. Only those debt obligations for which a filer is personally liable to another must be reported. See § 112.312(14) (defining "liability"). Under the facts you present, you do not allude to any circumstance that has rendered the Filer personally liable for the trust's debts. If he and the trust are jointly and severally liable for a debt, then the portion individually attributable to the Filer after settlement among the joint debtors should be disclosed as a liability, and the balance will be disclosed as a joint and several liability not otherwise reported as a liability, assuming the debts exceed the applicable disclosure thresholds.

This leaves only the "Real Property" and "Interests in Specified Businesses" sections of CE Form 1. These sections are distinct from the rest of the form because they require disclosure of interests owned directly and indirectly. While the Filer does not directly own any interests in either real property or businesses that are contained within the trust (the trust would have direct ownership), he could potentially have indirect interests. You state that the Filer has no

³ "Indirect" is defined in Section 112.312(13), Florida Statutes, as "an interest in which legal title is held by another as trustee or other representative capacity, but the equitable or beneficial interest is held by the person required to file under [the Code of Ethics for Public Officers and Employees]." The instructions for the 2023 CE Form 1 further explain, "Indirect ownership includes situations where you are a beneficiary of a trust that owns the property, as well as situations where you own more than 5% of a partnership or corporation that owns the property."

knowledge of the trust's assets and, therefore, he has no knowledge of whether he has any indirect interests requiring disclosure.

He does, however, have the right to acquire the information necessary to make an accurate disclosure on CE Form 1. The Florida Trust Code, found in Chapter 736, Florida Statutes, affords qualified beneficiaries⁴ the right to certain information. Relevant to this inquiry, the Florida Trust Code states, "[u]pon reasonable request, the trustee shall provide a qualified beneficiary with relevant information about the assets and liabilities of the trust and the particulars relating to administration." § 736.0813(1)(e), Fla. Stat.; see also Palmisano & Foertsch, *The Trust Beneficiary's Right of Access to Information*, Fla. B.J., Mar. 2021, at 46 (viewed on Jan. 15, 2024, at <https://www.floridabar.org/the-florida-bar-journal/the-trust-beneficiarys-right-of-access-to-information/>). The Florida Trust Code protects the right of the qualified beneficiary to request this information even if the grantor of an irrevocable trust has taken efforts in the trust instrument to keep it private. To that end, Section 736.0105(2)(t), Florida Statutes, provides,

The terms of a trust prevail over any provision of this code except . . . The duty under s. 736.0813(1)(e) to respond to the request of a qualified beneficiary of an irrevocable trust for relevant information about the assets and liabilities of the trust and the particulars relating to trust administration.

⁴ Section 736.0103(19), Florida Statutes, defines a qualified beneficiary as:

. . . a living beneficiary who, on the date the beneficiary's qualification is determined:

- (a) Is a distributee or permissible distributee of trust income or principal;
- (b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or
- (c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date.

In general, we find that the financial disclosure laws in the Code of Ethics for Public Officers and Employees only achieve the goals of financial disclosure⁵ if there is an implied obligation on the part of the filer to make a reasonable inquiry regarding his or her own interests. In the absence of such an obligation, we could expect absurd results, such as, hypothetically, the nondisclosure of an intangible asset on CE Form 1 because a filer deliberately chose not to investigate the asset's value. A filer could then shirk their disclosure responsibilities, set out by statute, by remaining willfully uninformed of his or her financial holdings. Here, the filer is but a reasonable inquiry away from having actual knowledge of the contents of the trust.

In your inquiry, you provide some arguments for applying here our reasoning in CEO 11-5 and other opinions interpreting the conflicts of interest provisions in the context of blind trusts, where a filer, by design, has no knowledge of a trust's contents. We decline to apply the reasoning of those opinions here because the Section 112.31425, Florida Statutes, which codified exceptions to the Code of Ethics for Public Officers and Employees, including exceptions to its financial disclosure requirements, pertaining to qualified blind trusts, was repealed effective January 1, 2020. Ch. 2019-60, Laws of Fla. (repealing § 112.31425, Fla. Stat., which was derived from Ch. 2013-36, Laws of Fla.).

Where lawmakers have expressed a policy choice not to excuse filers from disclosing certain financial holdings for lack of the knowledge, and where such knowledge is available by law to the beneficiary-filer if he makes a reasonable inquiry, we find, regarding assets in the trust

⁵ The goals of financial disclosure include, "the public's 'right to know' an official's interests, deterrence of corruption and conflicting interests, creation of public confidence in Florida's officials, and assistance in detecting and prosecuting officials who have violated the law. The importance of these goals cannot be denied." Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978).

at issue, that the disclosure of indirectly owned real property and interests in specified businesses exceeding disclosure thresholds is required on CE Form 1.⁶

Your question is answered accordingly.

AL/sjz/ks

cc: Mark Herron

⁶ We recognize this opinion advises that, on CE Form 1, beneficial interests in a trust need not be disclosed as intangible personal property when they are not alienable, yet goes on to advise filers to disclose their indirect interests in real property and specified businesses held by the trust, assuming those interests exceed the reporting thresholds. This reasoning is not contradictory, but is based on the disclosure requirements. As explained above, the disclosure requirements for intangible personal property are based on dollar values (i.e., disclosing any interest exceeding \$10,000). An inalienable interest in a trust has no value, and, therefore, need not be disclosed. However, the portion of CE Form 1 addressing real property and interests in specified businesses have reporting obligations regardless of how much that ownership interest is worth. Therefore, even if an interest in a trust is not alienable, so long as the trust beneficiary has indirect ownership of items within the trust, these other portions of the form must still be considered.